

Israel – Hamas 2023 Symposium – Applicability of Article 23 of the Fourth Geneva Convention to Gaza

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This post examines the scope of Israel’s obligation to permit free passage of relief consignments for the benefit of the civilian population located in Gaza. It is generally acknowledged that siege warfare, including starvation of enemy combatants, constitutes a legally permissible method of warfare (see e.g., DoD, *Law of War Manual*, § 5.19.1). On the other hand, intentional starvation of civilians is a war crime. This post contends that Israel’s obligation to allow free passage of relief supplies is governed by Article 23 of the Fourth Geneva Convention. The express terms of this article exclude any obligation to permit free passage of fuel supplies. Moreover, Article 23 affords broad discretion to commanders to refuse passage of any relief supplies when there is a serious concern that such supplies could be used by or for the benefit of Hamas combatants.

The Fourth Geneva Convention

Several law of war rules provide for the establishment of humanitarian corridors through which parties may provide essential supplies to the civilian population in areas impacted by siege warfare. In a prior post, I [explained](#) that [Article 18](#) of Additional Protocol II requires that

humanitarian assistance be provided to all civilians on a non-discriminatory basis, including to persons kidnapped from Israel. However, Article 18 does not place any specific limitations on a party's right to refuse to consent to the passage of relief consignments. Therefore, it is necessary to examine other authorities to determine the circumstances in which a party may properly refuse to consent to the passage of relief supplies.

Article 55 of the Fourth Geneva Convention requires an Occupying Power to provide adequate food and other essential supplies to the civilian population of the territories which it occupies. Article 42 of the Regulations annexed to 1907 Hague Convention IV states that a territory is considered occupied "when it is actually placed under the authority of the hostile army." As noted by the U.S. DoD *Law of War Manual*, the duties applicable to occupying powers are not triggered until such time as occupation is "actual and effective; that is, the organized resistance must have been overcome . . ." (§ 11.2.2.1). Gaza cannot be considered an occupied territory at this time, as Hamas is providing organized resistance above ground, and also because Hamas remains in control of the subterranean battle space.

On the other hand, the requirement to permit passage of humanitarian consignments contained in Article 23 of the Fourth Geneva Convention, and its more widely applicable customary international law counterpart, is much broader in scope. As noted by Article 13 of the Convention, Article 23 applies to the "whole of the populations of the countries in conflict." As such, Article 23 imposes obligations on an invading force during the invasion phase of a conflict, even when that force has not yet established its authority over the territory invaded.

However, Article 23 is severely limited in its application, both as to who may receive humanitarian assistance and as to the types of humanitarian assistance which may be provided. Assuming the conditions for free passage have been satisfied, Article 23 requires passage of "essential foodstuffs, clothing and tonics" only when the intended beneficiaries are "children under fifteen, expectant mothers and maternity cases." This rather harsh limitation was designed to ensure that humanitarian aid does not augment the capabilities of the enemy (see Jean Pictet et al., 1958 GC IV Commentary, art. 23, p. 180). The only other categories of humanitarian assistance for which free passage may be required are medical supplies and objects necessary for religious worship. The latter is the only category of humanitarian assistance for which the entire civilian population is the intended beneficiary.

Of considerable importance, Article 23 provides commanders with the discretion to refuse passage of humanitarian supplies if there is serious reason to believe that: (a) the aid may be misappropriated; (b) the aid provides a definite military or economic advantage to the adverse party by substituting for the assistance that would otherwise be provided by that adverse party; or (c) the neutral intermediary designated to distribute relief supplies, such as the International Committee of the Red Cross (ICRC), is unable to effectively supervise its

distribution. As noted by the Pictet *Commentary*, “constant surveillance is necessary to ensure that the articles are in actual fact received by those for whom they are intended” (p. 183).

The Pictet *Commentary* to Article 23 further observes that these conditions leave considerable discretion to the besieging party to refuse passage of relief consignments (p. 182-83). The treaty drafters justified the limited scope of Article 23 on the grounds that the Convention “had to bow to the harsh necessities of war” (p. 183). Article 23 has been aptly criticized on the grounds that it “virtually allows the blockage of any relief action” (ICRC, *Commentary to Additional Protocol I*, para. 2850).

Additional Protocol I

The 1977 Additional Protocol I (AP I) to the 1949 Geneva Conventions, to which neither the United States nor Israel is a State party, further addresses the issue of providing humanitarian supplies to civilian populations in besieged areas. Article 69 of AP I, in a manner analogous to Article 55 of the Fourth Geneva Convention, requires an occupying power to provide humanitarian supplies to the population of occupied territories. For the same reasons noted above with respect to Article 55 of the Fourth Convention, Article 69 is not currently applicable to the conflict in Gaza because Israel is not an occupying power.

Passage of relief supplies in non-occupied areas is governed by Article 70 of AP I. This article imposes considerably greater obligations on commanders to allow free passage of relief consignments. Unlike Article 23 of the Fourth Geneva Convention, Article 70 stipulates only one circumstance in which a party may deny passage of relief supplies, i.e., the unavailability of a neutral party to distribute such assistance (AP I, art. 70(3)(b)). Article 70 is also broader than Article 23 of the Fourth Convention in that relief consignments must be allowed for the benefit of the entire civilian population, as opposed to the limited subset of civilian beneficiaries designated by Article 23. Moreover, Article 70 requires free passage of all essential items required by the civilian population, in contrast to the limited categories of supplies for which free passage is required by Article 23.

Article 70 is also dissimilar to Article 23 in that the former requires a party’s consent to the passage of any relief consignments. The issue of whether there are limitations on a party’s discretion to refuse consent under Article 70 has been the subject of scholarly debate. A thorough discussion of this issue is contained in Sean Watts’s “Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Action.”

The issue of whether Article 70 represents customary international law pivots on the interpretation of the consent requirement. Article 70 is devoid of any language which allows a party to consider military necessity in deciding whether to permit free passage of relief consignments. This is obviously inconsistent with Article 23 of the Fourth Convention, in which considerations of military necessity underly a commander’s discretion to refuse entry

of relief consignments. Indeed, the ICRC's *Commentary* states that Article 70 rendered "obsolete" the provisions of Article 23 which provide discretion to commanders to deny passage of relief supplies (para. 2851). This weighs against according the status of customary international law to Article 70, as the stated purpose of AP I was to supplement the Fourth Convention, as opposed to replacing it (AP I, art. 1(3)).

Common sense dictates that military necessity must be a factor in deciding whether to allow passage of relief consignments, especially in locales in which active combat conditions prevail. This is essentially the guidance contained in the DoD *Law of War Manual*, which largely mirrors the provisions of Article 23 in establishing the responsibilities of commanders in connection with the passage of relief supplies (§ 5.19.3). It is highly doubtful that customary international law deprives a party of the discretion to refuse passage of humanitarian consignments when those supplies are or will be used to facilitate military operations against that party. Article 70 is unlikely to reflect customary international law, unless a party can take military necessity into account in deciding whether to consent to the passage of relief consignments.

Article 70 is applicable to only a limited set of circumstances, even if it does reflect customary international law. Unlike Article 23, which applies to the whole of the population of the countries in conflict, Article 70 is limited in its applicability to "the civilian population of any territory under the control of a Party to the conflict." This raises the critical question of the meaning of the term "control." The ICRC's *Commentary* to Article 70 states the term "control" means "the capacity of the Party concerned to ensure the execution of its decisions in the whole territory" (para. 2793). The ICRC *Commentary* then contradictorily states that Article 70 applies even when a party does not have control over a territory (para. 2793). However, this interpretation cannot be reconciled with the plain language of Article 70, which limits its applicability to only those territories under the "control" of a party.

It is clear that Israel lacks *control* over Gaza for purposes of Article 70, especially if one uses the definition contained in the ICRC *Commentary*, i.e., the ability to ensure the execution of its decisions throughout the *whole territory*. This is especially true if one includes the subterranean parts of the enclave within the term "whole territory."

The term "control" as used in Article 70 could reasonably be interpreted to require the existence of at least a sufficient level of control required to ensure that relief supplies are being distributed only to the intended civilian recipients. This interpretation makes sense because the civilian population is the intended beneficiary of Article 70. There is likely no neutral party who can effectively ensure the distribution of relief consignments only to civilian beneficiaries, especially given the fact that Hamas still retains a significant degree of control over large parts of the enclave. Moreover, the fact that Hamas embeds itself into the civilian infrastructure makes it virtually impossible for any neutral party to distinguish ordinary civilians from combatants. As such, the level of "control" required to trigger Article 70 does not exist.

Conclusion

In conclusion, Article 23 of the Fourth Geneva Convention and its more widely applicable customary international law counterpart is the only provision that governs Israel's obligation to allow free passage of humanitarian supplies in areas which it does not control. Article 23 provides commanders with considerable discretion to refuse passage of relief consignments when there are serious reasons for fearing that humanitarian assistance is being diverted for military purposes.

Jeffrey Lovitky is a former member of the U.S. Army JACC. He recently served in Israel as a volunteer attorney. The views expressed herein are the author's alone, and do not represent the views of any government or other entity.

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