Humanitarian Assistance and State Sovereignty in International Law Towards a Comprehensive Framework

Emilie Ellen Kuijt

Intersentia Ltd Sheraton House | Castle Park Cambridge | CB3 0AX | United Kingdom

Tel.: +44 1223 370 170 | Fax: +44 1223 370 169

Email: mail@intersentia.co.uk

www.intersentia.com | www.intersentia.co.uk

Emilie Ellen Kuijt Humanitarian Assistance and State Sovereignty in International Law: Towards a Comprehensive Framework

ISBN 978-1-78068-366-9 D/2015/7849/156 NUR 828

Cover image © Denise Rosenboom – 'Source'

A thesis edition of this book has also been published by Intersentia.

No part of this publication may be reproduced, stored in an automated data system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise, without the prior written permission from the author/publisher.



ACKNOWLEDGEMENTS

It has been a privilege to complete my Ph.D. research with the support of so many wonderful people.

My gratitude first and foremost goes out to Prof. Nico Schrijver, my 'promotor'. You have expressed faith in me and supported me in every step of this process, as well as in my personal voyage. Nico, I thank you: both for this support, and for always managing to challenge me on the content of the thesis. This appreciation similarly goes out to Dr. Robert Heinsch. Your critical comments and willingness to always discuss my questions and thoughts have improved my work and kept me going through various stages of the research: thank you.

Next to Leiden University, this thesis was written at various stages while visiting Tel Aviv University. I am grateful for the support of Prof. Eyal Benvenisti in giving me an academic home away from home, and for his insightful comments on my manuscript as a member of the Ph.D. committee.

Many thanks of course also go to the other members of the committee: Prof. Willem van Genugten, Prof. Cedric van Ryngaert, Dr. Heike Spieker, Prof. Horst Fischer and Prof. Carsten Stahn for their perceptive comments. You have given me the opportunity to improve myself.

My sincere recognition also goes to the people behind the Gieskes-Strijbis Fund, for their continuous interest in the protection of those in need, resulting in their generous support of this Ph.D. research.

At a personal level, my deep, deep thanks go out to my parents, both of whom have spent many an hour supporting the positive outcome of this project. Parental love is immeasurable. Similarly Steffi, I want to thank you for your steadfast faith in me, and always reminding me of that of opa. Robert Jan: thank you for your brotherly advice and technical support, often supplemented of course by Niene. Our discussions have always helped shape my thoughts.

Words cannot express how honoured I am to have so many wonderful friends, my 'adoptive family', who have always cheered me on and believed in the outcome of this project. I am a better friend, researcher and person because of you. I thank you from the bottom of my heart for being there for the hope, the despair and all the chapters in between. In particular my appreciation goes out to Lotte, as well as to Marianne, Jessica, Lisa, Pauline, Rogier, Tali, Ranish, Olga, Denise, Jorrit, Tess and Esther. Many thanks also of course to all those I do not name as space is running out – you know who you are!

Acknowledgements

I would furthermore especially like to thank my dear colleagues at Leiden University. My two roommates Daniëlla and Hanna made me look forward to coming to work every day in the otherwise often lonely process of writing a Ph.D. thesis. The rest of the group has also always made my days in Leiden joyful and only upon leaving did I truly realise what I had: thanks to all and in particular Vid, Ruben, Cecily, Erik, Helen, Niels, Andrea, Luca, Mette and of course the ladies across the hall from my office, Esther, and Wendy for her editorial work! Stefanie: I am glad you jumped on board when I brainstormed the idea of organising a conference together. It was one of the most fulfilling experiences I have had whilst working on my Ph.D., and I am happy we had the opportunity to share it. Thanks also of course to those who have shared my lunches and coffees at TAU, especially Keren, Mirjam, Masua and Myriam – it has been a pleasure sharing my days working on the thesis with you.

And so, it comes to an end. The thesis has been completed. I am grateful to have been surrounded by so many wonderful people during this process. I thank you all.

October 2015

CONTENTS

	cknowledgements	Vii
Lı	st of Abbreviations	XVII
P	ART I. SETTING THE FRAMEWORK	
Chapter 1 Introduction		
1.	Introduction	3
	1.1 Introduction	3
	1.2 Aim of the Research and Research Questions	8
	1.2.1 Aim of the Research	8
	1.2.2 General Research Questions and Boundaries	10
	1.3 Research Structure	12
	1.4 Methodology	14
	1.4.1 Primary Sources	16
	1.4.2. Secondary Sources	18
	1.4.3 Character of the Research	20
C	hapter 2	
D	efining Humanitarian Assistance, the Principles for Its Provision	
ar	nd Determining the Relevant Actors	23
	2.1 Introduction	23
	2.2 The Concept of Humanitarian Assistance	24
	2.1.1 Historical Development	24
	2.2.1.1 The Role of the UN in the Development of Humanitarian	
	Assistance	28
	2.2.1.2 The Role of the ICRC and IFRC in the Development of	
	Humanitarian Assistance	30
	2.2.2 Defining Humanitarian Assistance	32
	2.2.3 The Principles for the Delivery of Assistance	38
	2.2.3.1 The Principle of Humanity	40
	2.2.3.2 The Principle of Impartiality	42 45
	2.2.3.3 The Principle of Neutrality	45
	2.2.3.4 An Alternative: The UN Principles Regarding Humanitarian Assistance	47
	2.2.3.5 Other Perspectives on the Principles for	4/
	Providing Humanitarian Assistance	51
	2.3 Actors Involved in Humanitarian Assistance	54
	2.3.1 Recipients of Humanitarian Assistance	54
		٠.

\sim				
C_i	nr	116	'n	tς

2.3.2.1 The Affected State 2.3.2.2 International Organisations 3.3.2.3 Third States 66 2.4 Conclusion 68 Chapter 3 Humanitarian Assistance: Its Scope of Application and the Applicable Law 71 3.1 Introduction 71 3.2 The Circumstances that may Require Humanitarian Assistance 72
2.3.2.3 Third States 2.4 Conclusion 66 Chapter 3 Humanitarian Assistance: Its Scope of Application and the Applicable Law 71 3.1 Introduction 71
2.3.2.3 Third States 66 2.4 Conclusion 68 Chapter 3 Humanitarian Assistance: Its Scope of Application and the Applicable Law 71 3.1 Introduction 71
Chapter 3 Humanitarian Assistance: Its Scope of Application and the Applicable Law 71 3.1 Introduction 71
Humanitarian Assistance: Its Scope of Application and the Applicable Law 71 3.1 Introduction 71
Humanitarian Assistance: Its Scope of Application and the Applicable Law 71 3.1 Introduction 71
3.2 The Circumstances that may Require Humanitarian Assistance 72
5 1
3.2.1 Defining an Armed Conflict 72
3.2.2 Armed Conflicts and the Provision of Humanitarian Assistance 78
3.2.3 Defining Occupation 79
3.2.4 Occupation and the Provision of Humanitarian Assistance 82
3.2.5 Defining a (Natural) Disaster 84
3.2.6 Disasters and the Provision of Humanitarian Assistance 87
3.3 Providing Assistance: Establishing the Existence of a Humanitarian
Crisis 89
3.3.1 An Over-Arching Approach to the Provision of Humanitarian Assistance 90
3.3.2 The Material Scope of Application 91
3.3.3 Defining a Humanitarian Crisis 97
3.4 Scope of Application: The Relationship between Human Rights Law
and International Humanitarian Law 99
3.4.1 Development of the Interaction between both Fields of Law 100
3.4.2 Applicability of Human Rights in Armed Conflict and Occupation 106
3.4.2.1 Relevance of Continued Applicability and Acceptance
Thereof 106
3.4.2.2 The Potential Extraterritorial Scope of Application
of Human Rights Treaties 108
3.4.3 Hierarchy or Convergence of International Legal Norms?
3.5 Conclusion 120
Chapter 4
State Sovereignty as a Contextual Concept regarding
Humanitarian Assistance 123
4.1 Introduction 123
4.2 Sovereignty as a Concept in International Law 124
4.2.1 Historical Context and Relevant Principles in Relation to
Humanitarian Assistance 125
4.2.1.1 The Principle of Non-Intervention 126
4.2.1.2 The Principle of Consent

40.10 TH D 11.1 CD 11.11.11	2.1
1	31
1 0 0 3	33
	35
	37
4.2.3 The Responsibility to Protect, the UN and Humanitarian	
	42
· · · · · · · · · · · · · · · · · · ·	44
4.2.3.2 Humanitarian Assistance and the Development of RtoP	
	47
	53
4.3 Conclusion	55
PART II. PRIMARY RIGHTS AND DUTIES IN HUMANITARIAN CRISES	
Chapter 5	
	61
5.1 Introduction	61
5.2 The Development of Human Rights Relevant to Humanitarian	
Assistance 10	63
5.2.1 'Generations' of Human Rights in Relation to Humanitarian	
Assistance 10	66
5.2.2 Derogability, Human Rights and the Provision of Humanitarian	
Assistance 10	68
5.2.3 Progressive Realisation in the ICESCR	70
5.3 A Human Right to Receive Humanitarian Assistance in	
	72
5.3.1 Humanitarian Assistance as a Potential Human Right in	
	74
5.3.2 Humanitarian Assistance as a Potential Human Right	
	77
5.3.3 Humanitarian Assistance and Collective Human Rights: Rights-	
	81
	84
5.4 Humanitarian Assistance Within the Context of Existing Human Rights 18	
	86
<u> </u>	90
	91
• •	98
<u> </u>	200
	206
E	.00 207
	213
8	114

Contents

5.5.1 Humanitarian Assistance as an Independent Human Right 5.5.2 Humanitarian Assistance as a Vehicle in the Fulfilment of	214
Existing Human Rights	217
Chapter 6	
The Duty of the Affected State to Provide, and the Right of Persons	
to Receive Humanitarian Assistance	221
6.1 Introduction	221
6.2 Duties and Rights under General International Law	222
6.2.1 State Sovereignty and the Duty to Provide	
Humanitarian Assistance	222
6.2.2 State Sovereignty and the Right to Receive	
Humanitarian Assistance	226
6.3 Duties and Rights under Human Rights Law	227
6.3.1 Duties of the Affected State and Non-State Actor	
under Human Rights Law	228
6.3.2 Rights of Persons to Receive Assistance	
under Human Rights Law	233
6.4 Duties and Rights under the UN Framework: the Security Council	22
and General Assembly	236
6.4.1 Duties of the Affected State and Non-State Actor	225
under Security Council Resolutions	237
6.4.2 Rights of Persons to Receive Assistance under Security Council	245
Resolutions 6.4.3 Duties of the Affected State under Concret Assembly Resolutions	245
6.4.3 Duties of the Affected State under General Assembly Resolutions 6.4.4 Rights of Persons to Receive Assistance under General Assembly	240
Resolutions	250
6.5 Duties and Rights in Specific Circumstances under International Law	251
6.5.1 Duties of the Affected State and Non-State Actor	231
in Times of Conflict	252
6.5.1.1 Duties of the Affected State in Times of an International	232
Armed Conflict	252
6.5.1.2 Duties of the Affected State and Non-State Actor	
in Times of a Non-International Armed Conflict	255
6.5.2 Rights of Persons to Receive Assistance in Times of Conflict	258
6.5.2.1 Rights of Persons to Receive Assistance in Times of an	
International Armed Conflict	259
6.5.2.2 Rights of Persons to Receive Assistance in Times of	
a Non-International Armed Conflict	260
6.5.3 Duties of the Affected State (Occupying Power) in Times of	
Occupation	261
6.5.4 Rights of Persons to Receive Assistance in Times of Occupation	265
6.5.5 Duties of the Affected State in Times of (Natural) Disaster	266

6.5.5.1 The Potential Application of the ILC Study:	
	268
6.5.5.2 The Potential Application of the IDRL Guidelines	
	270
6.5.6 Rights of Persons to Receive Assistance in Times of	
	272
6.5.6.1 The Potential Application of the ILC Study:	
**	273
6.5.6.2 The Potential Application of the	
	273
	274
ϵ	276
	277
6.5.10 Rights of Persons to Receive Assistance under the (Potential)	_,,
	282
	284
6.6.1 The Applicable Lex Specialis in Armed Conflict	284
	286
	287
6.6.4 Determining the Problems and Gaps in the Provision of	
	287
6.7 Conclusion	289
PART III. THIRD PARTY ACTION WHEN PROVISION IS LACKING	
Chapter 7	
Third Parties and the Provision of Assistance: The Right to Offer	
	307
· · · · · ·	
7.1 Introduction	307
7.2 The Provision of Humanitarian Assistance by Third Parties under	
General International Law	309
7.2.1 State Sovereignty and the Right to Offer Assistance	309
7.2.2 State Sovereignty and the Right to Access	311
7.3 The Provision of Humanitarian Assistance by Third Parties	
Under Human Rights Law	312
7.3.1 Human Rights Law and the Right to Offer Assistance	313
7.3.2 Human Rights Law and the Right to Access	317
7.4 The Provision of Humanitarian Assistance by Third Parties Under	
the UN Framework: the Security Council and General Assembly	320
7.4.1 Security Council Resolutions and the Right to Offer Assistance	321
	326
7.4.3 General Assembly Resolutions and the Right to Offer Assistance	335
7.4.4 General Assembly Resolutions and the Right to Access	339

Contents

7.5 The Provision of Humanitarian Assistance by Third Parties Under	
Specific Circumstances in International Law	343
7.5.1 The Right to Provide Assistance in Times of Conflict	344
7.5.1.1 The Right to Provide Assistance in Times of	
International Armed Conflict	344
7.5.1.2 The Right to Provide Assistance in Times of Non-	
International Armed Conflict	346
7.5.2 The Potential Right to Access in Times of Conflict	350
7.5.2.1 The Potential Right to Access in Times	
of International Armed Conflict	350
7.5.2.2 The Potential Right to Access in Times	
of Non-International Armed Conflict	354
7.5.3 The Right to Provide Assistance and the Law of Occupation	357
7.5.4 The Potential Right to Access and the Law of Occupation	359
7.5.5 The Right to Provide Assistance in Times of (Natural) Disaster	361
7.5.5.1 The Potential Application of the ILC Study:	
Protection of persons in the event of disaster	364
7.5.5.2 The Potential Application of the IDRL Guidelines	
and Model Act	366
7.5.6 The Potential Right to Access in Times of (Natural) Disaster	367
7.5.6.1 The Potential Application of the ILC Study:	
Protection of persons in the event of disaster	368
7.5.6.2 The Potential Application of the IDRL Guidelines	
and Model Act	370
7.5.7 The Right to Provide Assistance under Refugee Law	372
7.5.8 The Potential Right to Access under Refugee Law	372
7.5.9 The Right to Provide Assistance under the (Potential) IDP	
Framework	373
7.5.10 The Potential Right to Access under the (Potential) IDP	
Framework	375
7.6 Ascertaining the Legal Framework in a Humanitarian Crisis	379
7.6.1 The Applicable Lex Specialis in Armed Conflict	380
7.6.2 The Applicable Lex Specialis in Occupation	383
7.6.3 The Applicable Lex Specialis in Times of (Natural) Disaster	385
7.6.4 Determining the Problems and Gaps in the Provision of	
Humanitarian Assistance	386
7.7 Conclusion	390

Chapter 8	
Legal Consequences of the Denial of Humanitarian Assistance: Methods of Enforcement	411
victious of Emoleciment	411
8.1 Introduction	411
8.2 The Law of State Responsibility and Enforcement of Humanitarian	410
Assistance	413
8.2.1 State Responsibility, the ARSIWA and Humanitarian Assistance 8.2.2 The ARSIWA, Peremptory Norms and the Denial of	414
Humanitarian Assistance	419
8.2.3 State Responsibility and the Potential Duty to Cooperate in the	100
Event of a Breach	426
8.2.4 State Responsibility, Humanitarian Assistance and Legal	422
Developments	432 434
8.3 Acts Constituting Denial or Obstruction of Humanitarian Assistance 8.3.1 Circumstances of Denial or Obstruction: Determining a	434
Humanitarian Crisis	435
8.3.2 The Refusal of Consent: Arbitrariness and Enforcement	436
8.3.3 The Denial or Obstruction of Assistance: a Violation of	150
International Law	441
8.4 Enforcement through the Use of Force	443
8.4.1 Security Council Action: Enforcement through the	
UN system and the Responsibility to Protect	446
8.4.2 The Beginning of Security Council Action	450
8.4.3 Security Council Action since the UN embracement of the	
Responsibility to Protect	461
8.5 Enforcement through Human Rights Law	473
8.5.1 Enforcement through Human Rights Treaty Mechanisms	474
8.5.2 Human Rights Enforcement through the UN	
Charter-Based System	480
8.6 Methods of Enforcement through Individual (Criminal) Responsibility	483
8.6.1 Enforcement through Targeted Sanctions	484
8.6.2 Enforcement through International Criminal Law 8.6.2.1 War Crimes and Humanitarian Assistance	486 490
8.6.2.2 Crimes Against Humanity and Humanitarian Assistance	490
8.7 The Enforcement of Humanitarian Assistance and the Absence	770

of a Sovereign

8.8 Conclusion

502

508

Contents

Chapter 9 Conclusions and Recommendations	517
9.1 Conclusions Pertaining to the Existing Legal Framework 9.2 Recommendations for Improvement of the Legal Framework	517
Concerning Humanitarian Assistance	539
9.2.1 The Basic Existing Legal Framework and Problems with	
Fragmentation	539
9.2.2 Fixing the Problems and Gaps in the Law	542
Dutch Summary	551
Bibliography	
Index	
Curriculum Vitae	
School of Human Rights Research Series	

LIST OF ABBREVIATIONS

ACHR American Convention for Human Rights
ACHPR / African Charter African Charter on Human and Peoples Rights
AP I / II to the Geneva

Conventions

Bruges Resolution the Institute of International Law Resolution

2003. Bruges

CEDAW Convention on the Elimination of Discrimination

Against Women

CESCR Committee on Economic, Social and Cultural

Rights

CRED Centre for Research on the Epidemiology of

Disasters

CRB The Commission for Relief in Belgium CRC Convention on the Rights of the Child

EC European Community

ECHO European Community Humanitarian Office
ECHR European Convention for Human Rights
ECHR European Court of Human Rights
ECOSOC UN Economic and Social Council

EU European Union

FAO Food and Agriculture Organization

Fourth Geneva Convention Convention (IV) relative to the Protection of

Civilian Persons in Time of War

Friendly Relations Declaration Declaration on Principles of International Law

Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of

the United Nations

GC I / II / III / IV Geneva Convention I / II / III / IV

Guiding Principles on IDPs UN Guiding Principles on Internal Displacement

1998

High-Level Panel Report Report of the Secretary General's High Level

Panel on Threats, Challenges and Change

HRC Human Rights Committee

IACtHR Inter-American Court on Human Rights
IASC Inter-Agency Standing Committee
ICC International Criminal Court

ICC Statute Rome Statute of the International Criminal Court ICCPR International Covenant on Civil and Political

Rights

List of Abbreviations

ICERD International Convention on the Elimination of

All Forms of Racial Discrimination

ICESCR International Covenant on Economic, Social and

Cultural Rights

ICJ International Court of Justice

ICRC International Committee of the Red Cross

ICTY International Criminal Tribunal for the former

Yugoslavia

ICTR International Criminal Tribunal for Rwanda

IDPs Internally Displaced Persons

IDRL Guidelines IFRC Guidelines for the domestic facilitation and

regulation of international disaster relief and

initial recovery assistance'

IDRL Programme International Disaster Relief Laws, Rules and

Principles Programme

IFRC International Federation of the Red Cross

ILAInternational Law AssociationILCInternational Law CommissionIROInternational Refugee Organization

IRU International Relief Union

Kampala Convention African Union Convention for the Protection and

Assistance of Internally Displaced Persons in

Africa

Maastricht Principles Maastricht Principles on Extra-Territorial

Obligations (ETOs) of States in the area of

Economic, Social and Cultural Rights

Mohonk Criteria Mohonk Criteria for Humanitarian Assistance in

Complex Emergencies

NATO North Atlantic Treaty Organization NGO non-governmental organisation

OCHA Office for the Coordination of Humanitarian

Affairs

Refugee Convention Convention Relating to the Status of Refugees

RtoP Responsibility to Protect

San Remo Institute The International Institute of Humanitarian Law

in San Remo

San Remo Principles Guiding Principles on the Right to Humanitarian

Assistance

UDHR Universal Declaration of Human Rights

UN United Nations

UNDHA United Nations Department of Humanitarian

Affairs

UNDRO United Nations Disaster Relief Organisation
UNHCR United Nations High Commissioner for Refugees

UN HRC United Nations Human Rights Council

UNRRA United Nations Relief and Rehabilitation

Administration

Vienna Declaration 1993 Vienna Declaration and Programme of

Action

1907 Hague Convention 1907 Hague 'Convention respecting the Laws

and Customs of War on Land'

1907 Hague Regulations Convention (IV) respecting the Laws and

Customs of War on Land', 'Regulations concerning the Laws and Customs of War on

Land'

1984 Draft Convention UN Draft Convention on Expediting the Delivery

of Emergency Relief