

Humanitarian action from an armed group's perspective

Introduction

There should be 'a humanitarian law that will ensure that governments will not infringe humanitarian access'. With these words, reproduced in the study conducted by Geneva Call on the perceptions of armed non state-actors on humanitarian action, a representative of the Sudan's People Liberation Movement – North (SPLM-N) expressed his frustration over a state-centric system of norms that requires obtaining the consent from host States to gain access to areas under the control of armed groups.¹ This comment is motivated by the context of the conflict in Sudan where humanitarian access is prevented to Southern Kordofan and Blue Nile states, which remain cut off, and access to most of the Jebel Marra area in Darfur is heavily restricted, as reminded by the 13 May 2016 Report of the UNSG on the protection of civilians.²

While there is a lack of data on the extent to which armed groups are hampering humanitarian action, armed groups are reported to have denied access to aid organizations in Yemen, for example, or to impose stringent accreditation procedures in eastern Ukraine among others.³ In addition, the latest statistics gathered in the Aid Worker Security Report 2017 tell us that 'between 2011 and 2016, the armed groups responsible for most major attacks on aid workers were the Taliban (51 attacks), Al Shabaab (21), IS (12), and Al Qaeda in the Islamic Maghreb (AQIM) (5). Other significant perpetrator groups included the Anti-Balaka groups in the Central African Republic (four incidents) and Syria's Jabhat Al Nusra, the Democratic Front for the

¹ Ashley Jackson, 'In their Words : Perceptions of Armed Non-State Actors on Humanitarian Action', Geneva Call, 2016, at : https://genevacall.org/wp-content/uploads/dlm_uploads/2016//09/WHS_Report_2016_web.pdf,

² Report of the Secretary General on the protection of civilians in armed conflict, 13 May 2016, S/2016/447, para. 30, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2016/447

³ Ibid., para. 31-32.

Liberation of Rwanda and Movement for Oneness and Jihad in West Africa (MUJAO) (three incidents each)'.⁴

Given these realities, it makes sense to include armed groups in discussions of the challenges faced by relief operations in contemporary armed conflicts.

Armed groups' perception of humanitarian aid

The Geneva Call study mentioned above highlights that the 19 armed groups they consulted generally expressed support for international humanitarian law and certain principles underlying humanitarian action, namely neutrality, impartiality and independence. The Aid Worker Security study shows a slightly more critical perception of humanitarian aid and workers, perhaps because of the types of the groups interviewed for the study: Al Shabaab in Somalia and the Taliban and Haqqani Network, in Afghanistan. In addition, the Aid Worker Security research sought to include the Islamic State and Al Qaeda viewpoints through a review of their public statements and English-language publication. The general conclusion the report draws with regard to the perception of humanitarian aid is that: 'armed groups view aid organisations as potential threats to their authority as well as useful proxy targets. When attempting to govern territory and provide some measure of public services, armed groups have incentives to grant aid organisations secure access, but this often requires the aid groups to accept conditions that compromise humanitarian principles'.⁵

That said some armed groups have issued positive declarations in favour of humanitarian assistance, such as the *Declaration of Commitment on Compliance with IHL and the Facilitation of Humanitarian Assistance* by the National Coalition of Syrian Revolution and Oppositions Forces.⁶ Others have adopted formal policies regulating humanitarian aid, as, for instance, the

⁴ Humanitarian Outcomes, 'Aid Worker Security Report 2017. Behind the attacks: A look at the perpetrators of violence against aid workers', 2017, p. 7, available at: <https://aidworkersecurity.org/sites/default/files/AWSR2017.pdf>.

⁵ Aid Worker Security Report 2017, 'Summary'.

⁶ The document is available at: http://www.etilaf.us/ihl_declaration

Karen National Union (KNU) in Burma, which has established a *Policy for Humanitarian Assistance* on 11 June 2014.⁷

While these texts and declarations usually comply with IHL, the interpretations that some armed groups have concerning humanitarian principles are problematic. This is the case with regard to the type of entity that can provide humanitarian assistance. Common article 3 states that ‘(a)n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’ While the ICRC is especially mentioned, the words ‘such as’ suggest that other entities may do so.⁸ Offers to conduct humanitarian relief operations may thus be made by states, international organizations or NGOs. Some of these actors are perceived by armed groups as not meeting the criteria of neutrality, impartiality and independence. Unsurprisingly, ‘national aid organizations’ fall into that category. The SPLM-N even asserted that ‘no actors fulfil all three principles’.⁹

Apart from the fact that national aid organizations are said to be in some instances, ‘infiltrated by the government’,¹⁰ perhaps more worryingly, humanitarian assistance, even when provided by independent and neutral NGOs, can be perceived as partial, because, according to a specific mandate, they might target aid towards a certain population. For example, the Democratic Forces for the Liberation of Rwanda (FDLR), active in the North East of the DRC, criticized the partiality of organizations that distributed aid only to the Congolese population and excluded the Rwandan refugees.¹¹ The perception of the absence of neutrality is particularly problematic for humanitarian access, as it can justify, in the eye of an armed non-state actor, refusal of consent to access the zones under its control.

⁷ The document is available at:

http://theirwords.org/media/transfer/doc/knu_s_policy_for_humanitarian_assistance_2014-be64212cf1a6b6dff134dee3e7e6a25.pdf

⁸ See the *2016 Commentary to Common Article 3*, in ICRC (2016) *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949, paras 803-806, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169934.

⁹ Geneva Call, *In their words...*, p. 12.

¹⁰ *Ibid.*

¹¹ *Ibid.*

The issue of consent to humanitarian access in non-international armed conflicts

The issue of consent, or rather the refusal to give consent to the provision of humanitarian aid, is at the heart of many humanitarian crises in contemporary armed conflicts. Different initiatives have sought to address, clarify and/or reiterate international law applicable to these situations. I will mention here the *Oxford Guidance on the Law relating to Humanitarian Relief Operations in Situations of Armed Conflicts*¹² and the ‘Humanitarian access initiative’ developed by OCHA, the ICRC, the Swiss DFA and Conflict Dynamics which produced a *Practitioners’ Manual* as well as a *Legal Handbook on Humanitarian access in Armed Conflicts*.¹³

With regard to consent, as underlined by the 2016 ICRC Commentary, Common Article 3 does not give information out by whom, nor how, an offer of humanitarian assistance is to be responded to.¹⁴ In contrast, Article 18, para. 2 of the Additional Protocol II, explicitly addresses the requirement to obtain the consent ‘of the High Contracting Party concerned’.

The 2016 ICRC Commentary of Common article 3 notes that : ‘Despite the silence of common Article 3, it is clear from the logic underpinning international law in general, and humanitarian law in particular, that, in principle, an impartial humanitarian organization will only be able to carry out the proposed humanitarian activities if it has consent to do so.’¹⁵ Interestingly, the commentary adds : ‘Consent may be manifested through a written reply to the organization which has made the offer but can also be conveyed orally. In the absence of a clearly communicated approval, an impartial humanitarian organization can make sure that the ‘Party to the conflict’ concerned consents at least implicitly, by acquiescence, to the proposed humanitarian activities duly notified to that Party in advance.’¹⁶ The ICRC commentary of Common article 3 thus only speaks about the modalities of obtaining the consent of the ‘party to the conflict’ and not the ‘High Contracting Party’ such as in AP II.

¹² Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance on the Law relating to Humanitarian Relief Operations in Situations of Armed Conflicts*, University of Oxford and UN OCHA, 2016, available at: <http://www.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf>

¹³ available at: <http://www.cdint.org/our-work/humanitarian-action/humanitarian-access/>

¹⁴ 2016 Commentary to Common Article 3, para. 827

¹⁵ *Ibid.*, para. 828.

¹⁶ *Ibid.*, para. 829.

What is at stake here ? This issue of who can give consent can indeed prove to be particularly problematic in situations where humanitarian relief needs to be provided to a territory under the control of an armed group. What if the armed group in control of territory accepts humanitarian access, but the State in which the armed group operates refuses ?

The Oxford Guidance on the Law relating to Humanitarian Relief Operations in Situations of Armed Conflicts stated in this regard that: ‘In situations of non-international armed conflict, where a humanitarian relief operation is intended for civilians in territory under the effective control of an organised armed group, and this territory can be reached without transiting through territory under the effective control of the state party to the conflict, the consent of the state is nonetheless required, but it has a narrower range of grounds for withholding consent.’¹⁷ The Oxford document also underlines that: ‘Whatever the legal position, as a matter of operational practice, the agreement or acquiescence of all parties to an armed conflict to humanitarian relief operations intended for civilians in territory under their effective control or transiting through such territory will be required to conduct the operations in a safe and unimpeded manner’.¹⁸

There are different interpretations with regard to the issue of consent and access to the territory held by an armed group. Marco Sassòli, for instance, has argued that under Common article 3, a humanitarian body may proceed with humanitarian assistance if an armed group has accepted it, even if the host state withheld its consent.¹⁹ Nishat Nishat has held a similar position.²⁰ Some authors even maintained that there might be a legal obligation requiring an armed group’s consent for humanitarian relief operations in area under their control.²¹

Be that as it may, all the armed groups interviewed in the Geneva Call study were adamant in saying they have a right to consent and regulate humanitarian access, because ‘they see

¹⁷ Oxford Guidance, Rule D(ii)

¹⁸ Ibid., para. 31.

¹⁹ Marco Sassòli, When are states and armed groups obliged to accept humanitarian assistance? 6 November 2013, at: https://phap.org/system/files/article_pdf/Sassoli-AcceptingHumanitarianAssistance_0.pdf

²⁰ Nishat Nishat, ‘The Right of Initiative of the ICRC and Other Impartial Bodies’, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions, A Commentary*, OUP, 2015, p. 502, para. 25.

²¹ See Françoise Bouchet-Saulnier, ‘Consent to humanitarian access: An obligation triggered by territorial control, not States’ rights’, *International Review of the Red Cross*, 2014, vol. 96, (893), pp. 207-217; see also Tom Gal, ‘Territorial control by armed groups and the regulation of access to humanitarian assistance’, *Israel Law Review*, pp. 25-47.

themselves as governments in waiting, or as de facto governments of the area they control'.²² In an armed group's view, failure to obtain consent can be a justified reason for expelling a humanitarian organization.²³

More generally, experts tend to agree that it is important to consider armed non-state actors not only as perpetrators of IHL violations, but also as actors that can play a positive role in protection issues, if only because they are often very close to their constituencies.²⁴ Many armed groups also view themselves as being responsible for the fate of the civilian population under their control. Despite national counter-terrorism legislation, it is crucial to encourage states and humanitarian organizations to consider certain armed groups also as partners, and not only as duty bearers in the implementation of relief operations and to take seriously statements such as the one expressed by a KNU representative who said: 'Although I don't know all the rules, I do think we should take part and fulfil our responsibilities'.²⁵

²² Geneva Call, *In their words...*, p. 16.

²³ *Ibid.*, p. 21.

²⁴ see for instance, Ron Dudai and Karen McEvoy, 'Thinking Critically About Armed Groups and Human Rights Praxis', *Journal of Human Rights Practice*, 2012, 4(1), p. 15.

²⁵ Geneva Call, *In their words...*, p. 22.