

Purpose-Based Regulation of Consent to Non-Forcible Operations

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Determining the operation, modalities, and effects of consent is the key challenge for international law on intervention by invitation. This is the case regardless of whether an intervention which is invited to be carried out on the host State's territory would involve the use of force or would be a non-forcible operation. This contribution focuses on a particularly relevant form of non-forcible interventions or operations, namely relief offered by States or international organisations as humanitarian assistance in situations of armed conflict and as disaster relief in situations of calamitous events. It analyses recent developments in the increasingly dense regulation of consent in this field and shows that these developments reflect a broader trend in international practice and legal scholarship towards a purpose-based approach to intervention by invitation.

In principle, relief operations require an invitation. When the International Court of Justice (ICJ) in its *Nicaragua* judgment held "that the provision of strictly humanitarian aid [...] cannot be regarded as unlawful intervention",¹ it left open the issue of consent and how, absent such consent, relief operations into another State's territory are to be reconciled with the international law rule protecting that State's territorial integrity.² Indeed, even if the exact scope of the principle of non-intervention remains unclear in this respect, non-consensual cross-border operations in principle violate the affected State's territorial integrity, and, more generally, its sovereignty.³ This concern is also reflected in specific rules both in the context of armed

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¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, para. 242.

² In the case, the ICJ was addressing relief supplied to actors at the borders. For a discussion see *E.-C. Gillard*, *The Law Regulating Cross-Border Relief Operations*, Int'l Rev. of the Red Cross 95 (2013), 351, 370.

³ See, e.g., UNGA Res. 46/182 (19.12.1991) UN Doc. A/Res/46/182, Annex I, Principle 3. See also *D. Akande/E.-C. Gillard*, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, 2016, 17.

conflicts⁴ and disasters,⁵ which explicitly require the affected States' consent to relief operations.

By definition, consent to relief operations is given for the specific purpose served by these operations, i.e. addressing the needs of the affected population. It is thus naturally in line with the "purpose-based" approach to intervention by invitation that has been discerned in State practice with respect to invited forcible interventions.⁶ In that context, consent is increasingly connected to a specific purpose on which an intervention's lawfulness in part depends, and to which States refer when relying on an invitation by the territorial State.⁷ Under this emerging practice, consent is thus not relied upon as a free-standing ground for intervention. This would mean that both forcible interventions and non-forcible operations by invitation need to be "purpose-based", that is, both consent and purpose need to be present.

Yet, the developments in the regulation of relief operations take the purpose-based approach a crucial step further. In light of the needs of the affected population, it is increasingly accepted that the affected State must not arbitrarily withhold its consent.⁸ There is a discernible convergence towards such an obligation in different areas of relief operations; in particular, when the International Law Commission (ILC) elaborated its recent draft articles on the protection of persons in the event of disasters, it explicitly built its approach to arbitrary withholding of consent on developments on humanitarian assistance in armed conflict.⁹ Many States welcomed and endorsed

⁴ Art. 70 of Additional Protocol I to the Geneva Conventions, Art. 18 of Additional Protocol II.

⁵ Art. 4(5) of the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, UNTS, Vol. 2296, No. 40906, 5; Art. 3(1) of the 2005 Agreement on Disaster Management and Emergency Response of the Association of Southeast Asian Nations; see also Art. 13(1) of the ILC Draft Articles on the Protection of Persons in the Event of Disasters, ILC Report 2016, UN Doc. A/71/10, 16.

⁶ See, e.g., *K. Bannelier/T. Christakis*, Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict, *LJIL* 26 (2013), 855.

⁷ *O. Corten*, Intervention by Invitation: The Expanding Role of the Security Council, in: *Max Planck Trialogues on the Law of Peace and War Vol. 4: Intervention by Invitation*, (A. Peters/C. Marxsen (series eds.), 2020 forthcoming).

⁸ For the situation of armed conflict see, e.g., *J.-M. Henckaerts/L. Doswald-Beck* (eds.), *Customary International Humanitarian Law*, 2005, Rule 55; for the situation of disaster: Institut de Droit International, *Humanitarian Assistance*, Resolution, 2.9.2003, Art. VIII; for the situation of internal displacement: Council of Europe, Recommendation (2006) 6 of the Committee of Ministers to Member States on Internally Displaced Persons, 5.4.2006, para. 4.

⁹ ILC Draft Articles on the Protection of Persons in the Event of Disasters (note 5), Commentary to Art. 13, para. 9. For a critical assessment of the techniques of law-making employed in the context of disaster relief see *S. Sivakumaran*, Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief, *EJIL* 28 (2017), 1097 and *A. Perez*, In Defense of Concurrent Application:

this approach, while others expressed doubts that a duty not to arbitrarily withhold consent existed under customary international law.¹⁰

According to the ILC, the obligation not to arbitrarily withhold consent, which necessarily limits the affected State's right to refuse an offer of assistance, "reflects the dual nature of sovereignty as entailing both rights and obligations".¹¹ In particular, it referred to "the duty to ensure the protection of persons and disaster relief assistance in its territory or in territory under its jurisdiction or control"¹² as well as the duty to seek assistance if a disaster "manifestly exceeds its national response capacity".¹³ While this conception of sovereignty could be seen as reminiscent of the debates on "responsibility to protect"¹⁴ the ILC deliberately refrained from any reference to this doctrine in its study on disasters.¹⁵ It also took great care to emphasise the primary role of the affected State in the direction, control, coordination and supervision of such relief assistance,¹⁶ thus reaffirming the importance of sovereignty in this area. Moreover, even if a violation by the affected State of the obligation not to arbitrarily withhold consent could be established, this would not automatically make a non-consensual relief operation

The ILC Draft Articles on the Protection of Persons in the Event of Disasters and International Humanitarian Law, Den. J. Int'l L. & Pol'y 46 (2018), 259.

¹⁰ See ILC, Comments and Observations Received from Governments and International Organizations on the Draft Articles on the Protection of Persons in the Event of Disasters (2009) UN Doc. A/CN.4/696, 43 et seq. The ILC suggested the elaboration of a convention based on its draft articles, ILC Report 2016, UN Doc. A/71/10, 13, para. 46. Whether this will happen remains uncertain at present. The topic has been included in the provisional agenda of the UN General Assembly's 75th session (2020), see UNGA Res. 73/209 (20.12.2018) UN Doc. A/Res/73/209, OP 4.

¹¹ ILC, Comments and Observations Received ... (note 10), para. 3. See also Art. 12(1) of the Draft Articles on the Protection of Persons in the Event of Disasters, as adopted on first reading: "The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory." (ILC Report 2014, UN Doc. A/69/10, 88).

¹² Art. 10(1) of the ILC Draft Articles on the Protection of Persons in the Event of Disasters (note 5).

¹³ Art. 11 of the ILC Draft Articles on the Protection of Persons in the Event of Disasters (note 5).

¹⁴ See for example the 2001 Report of the International Commission on Intervention and State Sovereignty; see also A. Peters, Humanity as the A and Ω of Sovereignty, EJIL 20 (2009), 513, 522 et seq.

¹⁵ See ILC Report 2008, UN Doc. A/63/10, 313, para. 222; see also UN Secretary General, Implementing the Responsibility to Protect – Report (2009), UN Doc. A/63/677, 8, para. 10b.

¹⁶ Art. 10(2) of the ILC Draft Articles on the Protection of Persons in the Event of Disasters (note 5).

ZaöRV 79 (2019)

lawful.¹⁷ Yet, the ILC's approach appears to allow the integration of both the purposes of the operations and the right to consent or not to consent to them into the concept of sovereignty.

Although much uncertainty remains surrounding the meaning of "arbitrary", an increasingly fine-grained understanding of the concept is developing.¹⁸ Different aspects of these developments clarify and intensify the connection between consent and an intervention's purpose. In particular, reasons must be provided if consent is withheld: whether this withholding has been arbitrary can only be assessed against the background of the reasons put forward to justify it.¹⁹ In other words, it is necessary to give reasons to show that the purpose of the relief that was refused would be better served in some other way (for example by accepting a different offer of assistance), or that it is outweighed by other purposes served by the refusal of consent.

Connecting consent to purposes and requiring reasons for the denial of consent inevitably raises questions as to who assesses the purposes and reasons. In this respect, the United Nations Security Council has taken on an active role in recent practice. In the realm of forcible interventions by invitation, the Security Council has engaged in what has been described as validating interventions and their purposes.²⁰ As regards relief operations, the Security Council has pointed out that arbitrary denial of humanitarian access can constitute a violation of international humanitarian law,²¹ has condemned the withholding of consent to relief operations in Syria as arbitrary²² and has even, in that case, authorised the delivery of aid, overriding the consent requirement.²³ Thus both of these fields of invited interventions or operations have seen instances suggesting a development towards an increasing, if still modest, centralisation and institutionalisation of decisions

¹⁷ The wrongfulness of such operations could, however, be precluded in narrowly confined circumstances under the law of international responsibility if they are justified by necessity or as counter-measures, see *D. Akande/E.-C. Gillard* (note 3), 51 et seq.

¹⁸ Commentary to Art. 13 of the ILC Draft Articles on the Protection of Persons in the Event of Disasters (note 5), 61 et seq., paras. 8 et seq. For detailed assessments of the meaning of "arbitrary" withholding of consent in armed conflict and situations of disaster, respectively, see *D. Akande/E.-C. Gillard*, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, *International Law Studies* 99 (2016), 48; *S. Sivakumaran*, *Arbitrary Withholding of Consent to Humanitarian Assistance in Situations of Disaster*, *ICLQ* 64 (2015), 501.

¹⁹ *S. Sivakumaran* (note 18), 519.

²⁰ For a detailed analysis see *O. Corten* (note 7).

²¹ See, e.g., UNSC Res. 2139 (22.2.2014) UN Doc. S/Res/2139, PP 10.

²² UNSC Res. 2165 (14.7.2014) UN Doc. S/Res/2165, PP 15.

²³ UNSC Res. 2165 (14.7.2014) UN Doc. S/Res/2165, OP 2.

appraising the objectives of an intervention and the reasons for refusing consent.

Despite these parallels, States are unlikely to accept similarly far-reaching obligations restricting their sovereign decision to consent to forcible interventions than for non-forcible relief operations. This reveals the careful balancing process between the purpose served by an intervention and the infringement of the host State's territorial integrity which underlies the regulation of intervention by invitation. Given the severity of this infringement if force is used, the balance is struck differently in such a case.

Giving due effect to the requirement of consent by the affected State whose territorial integrity and sovereign decision-making are at stake while adequately taking account of the purpose of these interventions remains a crucial tension within the international law framework of interventions by invitation. The developments in the realm of relief operations illustrate this balancing process, and show that both of these elements can be interwoven in an even denser purpose-based regulation of consent to which many States, though not all, have shown themselves to be increasingly willing to subject their sovereign decisions.

