

The International Legal Protection of Persons in Humanitarian Crises

Exploring the *Acquis Humanitaire*

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• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2017

Hart Publishing

An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

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First published 2017

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-84946-800-8
ePDF: 978-1-50990-403-7
ePub: 978-1-50990-404-4

Library of Congress Cataloging-in-Publication Data

A catalogue record for this book is available from the Library of Congress

Series: Studies in International Law, volume 67

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

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Crystallisation of a General Right to Humanitarian Assistance

I. INTRODUCTION

As a general rule, it appears that at the present time there is no right *de lege lata* to render humanitarian assistance. There is only a right to offer such assistance, but its exercise is contingent on consent by the State concerned ... As long as consent by the State concerned lies at the root of humanitarian assistance, one cannot speak of a genuine right to provide or receive such assistance.

Yoram Dinstein, 1995¹

The question of whether or not a general right to humanitarian assistance² currently exists in international law has been posed for more than 20 years, with Professor Dinstein arguing against the legal concept in the context of armed conflicts back in 1995. Conversely, the non-binding Bruges Resolution on Humanitarian Assistance from 2003 argued: 'Leaving the victims of disaster without humanitarian assistance constitutes a threat to human life and an offence to human dignity and therefore a violation of fundamental human rights.'³ Moreover, a large number of non-state actors have socially internalised a general right to humanitarian assistance in all humanitarian crises, for example through their adherence to the Sphere Standards and/or the RCRC Code of Conduct.⁴ Even so,

¹ Y Dinstein, 'The Legal Consequences of Infringing upon the Right to Humanitarian Assistance', paper presented at the International Colloquium on the Right to Humanitarian Assistance, Paris, 25–27 January 1995, para 3. See also Y Dinstein, 'The Right to Humanitarian Assistance' (Autumn 2000) *Naval War College Review* 77.

² It should be noted that the terminology of a 'right to humanitarian assistance' is used in many of the relevant texts. I understand the right to humanitarian assistance to include the right to protection and material assistance as set out in ch 1, Section II.

³ Arts II.1 and II.2 Resolution on Humanitarian Assistance, Institute of International Law, Bruges Session, September 2003.

⁴ As of August 2016, 618 NGOs have formally signed the Red Cross Red Crescent Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, see www.ifrc.org/Global/Publications/general/Code%20of%20Conduct%20UPDATED_August%202016.pdf. Meanwhile, over 400 NGOs from more than 80 countries

such assertions of the right explicitly recognise that it is not formulated in the same terms under international law, and while such texts may aim to reflect international law, they are primarily premised on the non-binding concept of humanity. Furthermore, only a small minority of states have expressly supported the existence of a right to humanitarian assistance in non-armed conflict settings,⁵ and the ILC has noted that ‘existing positive law on the subject remains unclear’.⁶

Therefore, to analyse the existence of a general right to humanitarian assistance in humanitarian crises, one has to separate the arguments into two strands. The first line of argument posits that despite the lack of explicit references to a binding right to humanitarian assistance in disaster settings, by drawing analogies from the law of armed conflict, international human rights law, and other relevant branches of international law, a legal right to humanitarian assistance in all humanitarian crises already exists.⁷ The second line of argument highlights the positive legal obligations for the protection of persons in the law of armed conflict, supported by specific provisions in international criminal law, human rights law and international refugee and displaced persons law, but concurrently notes the lack of equivalent legal rights in disaster settings. Nevertheless, while a general right to humanitarian assistance may not currently exist in international law, this approach argues that there is the potential for the creation of such a right or that such a right may be in the process of crystallisation.⁸

This chapter adopts this second strand of argument. In particular, for determining whether or not a general right to humanitarian assistance is in the process of crystallisation, a specific analysis and focus on the right to humanitarian assistance during armed conflicts and displacement provides an important comparison and reference point for discussion. By examining the humanitarian motivations and legal obligations to ensure a minimum standard of protection and material assistance for civilians in times of armed conflict or displacement, one can better understand

provided input for the 2011 revision of the Sphere Project’s Humanitarian Charter and Minimum Standards in Humanitarian Response, April 2011. See L McDougal and J Beard, ‘Revisiting Sphere: New Standards of Service Delivery for New Trends in Protracted Displacement’ (2011) 35(1) *Disasters* 87, 90.

⁵ For a summary of states’ views, see: Official Records of the General Assembly, Sixty-fourth Session, Report of the International Law Commission, *Supplement No 10* (A/64/10), Chapter IX, paras 241–46; *Secretariat Memorandum on the Protection of Persons in the Event of Disasters*, 60th Session of the ILC (11 December 2007) A/CN.4/590, 20–24.

⁶ ILC, *Secretariat Memorandum*, above para 5, 152–53.

⁷ D Fisher, ‘The Right to Humanitarian Assistance’, in W Kälin et al (eds), *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No 41 (2010) 51–52.

⁸ Dinstein, ‘Legal Consequences’, above n 1, para 3.

the rights and responsibilities of states and humanitarian agencies in all humanitarian preparation and response activities. Nevertheless, the concept of an *acquis humanitaire* is intended as a means of understanding the differential provisions of law, policy and practice relating specifically to the protection of persons in all humanitarian crises, without constraining its normative content per se. Therefore, the concept of an *acquis humanitaire* is not contingent on the crystallisation of a right to humanitarian assistance, and contains a spectrum of technical and operational approaches to humanitarian action alongside more normative ones.

As discussed in chapter three and visualised in Figure 10.1 below, one can separate these different approaches into needs-based and rights-based approaches. This monograph has consistently argued that these two approaches are not mutually exclusive and that both approaches can and should incorporate human rights principles into operational decision making.⁹ However, rights-based approaches can be further split into approaches which are premised on the application of existing human rights provisions (such as the right to food, housing or physical integrity) in humanitarian crises,¹⁰ and approaches premised on a specific right to humanitarian assistance. Moreover, a specific ‘right to humanitarian assistance’ entails two separate components: an individual or group’s right to request or receive assistance, and an organisational right to offer their services (the so-called right of initiative for humanitarian organisations).

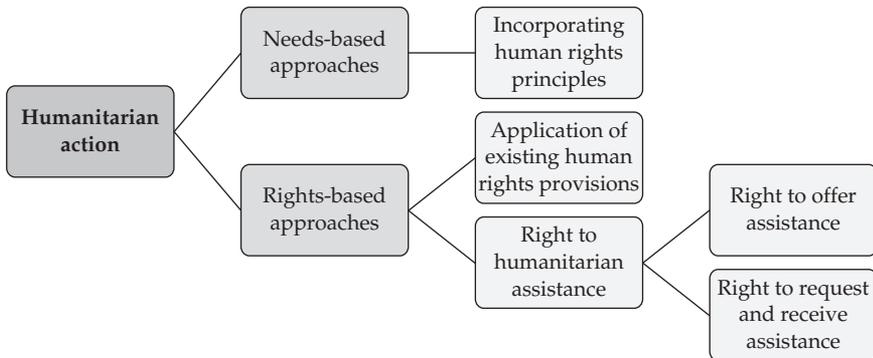


Figure 10.1: Approaches to humanitarian action

⁹ See ch 3, Section II.B.

¹⁰ For example, draft Art 5 of the ILC draft articles on the protection of persons in the event of disasters states that: ‘Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.’ For the final text of the preamble, draft articles and commentaries adopted by the ILC, see Official Records of the General Assembly, Seventy-first Session, *Supplement No 10* (A/71/10), Chapter IV: Protection of Persons in the Event of Disasters (2016). See also A Vandenbogaerde, ‘The Right to Development in International Human Rights Law: A Call for its Dissolution’ (2013) 31(2) *Netherlands Quarterly of Human Rights* 187.

Ruth Stoffels has stressed the coherence between these two components of a right to humanitarian assistance, noting that the law of armed conflict provides humanitarian organisations ‘the right to offer victims the relief supplies that they need and the right for the offer of aid not to be unreasonably refused when the needs of the victims are not met in some other way. This right should be regarded as a corollary to the right of victims to humanitarian assistance, without which it lacks a solid justificatory basis’.¹¹ Likewise, UNICEF has noted that: ‘The humanitarian imperative implies a right to receive humanitarian assistance and a right to offer it.’¹² If the right to receive humanitarian assistance is directly linked to the right to offer humanitarian assistance in this way, then one can think of a universal or general ‘right to humanitarian assistance’. However, the ILC Special Rapporteur on the Protection of Persons in the Event of Disasters highlighted the definitional challenges a potential right to humanitarian assistance in disaster settings may pose:

In international humanitarian law [the] right [to humanitarian assistance] has been recognised as a matter of law. In disaster situations, however, it appears that no legal instruments explicitly acknowledge the existence of such a right. At most, it could be said to be implicit in international human rights law. The nature of such a right is, however, unclear. Would it be a human right or just a right of those affected by a disaster? Would it be a human right or a collective right? Against whom, if at all, would it be enforceable? After all, the criteria to determine the existence and status of a human right are subject to controversy.¹³

Yet this analysis does not sufficiently distinguish between the right of third states and humanitarian organisations to offer assistance and an individual’s right to request and receive assistance. Indeed, Stoffels has highlighted that UNSC Resolutions calling for humanitarian assistance in specific armed conflicts usually make reference to ‘the duties of the parties to the conflict and the rights of humanitarian organizations and personnel, and not to the right of victims to humanitarian assistance’.¹⁴ Therefore, one needs to separate any potential rights that accrue to humanitarian organisations from that of the individual victims to determine the substantive content of these twin components of a general right to humanitarian assistance.

¹¹ R Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’ (September 2004) 86(855) *International Review of the Red Cross* 515, 521.

¹² UNICEF, *UNICEF’s Humanitarian Principles*, July 2003 www.unicef.org/pathtraining/Documents/Session%204%20Humanitarian%20Principles/Participant%20Manual/4.2%20UNICEF%20Humanitarian%20Principles.doc.

¹³ E Valencia-Ospina, *Preliminary Report*, 8 May 2008, A/CN.4/598, para 54.

¹⁴ Stoffels, ‘Legal Regulation’, above n 11, 522, fn 16.

II. INDIVIDUAL RIGHT TO REQUEST OR RECEIVE
HUMANITARIAN ASSISTANCE

A. During Armed Conflicts

Yoram Dinstein argued strongly against a general individual right to humanitarian assistance in armed conflicts when he noted: 'Surely, civilians do not have an absolute right to demand relief from the outside, applicable *erga omnes* (that is, vis-à-vis the entire international community) ... [I]t would be absurd to contend that every state in the world is duty bound to come up, on demand, with relief aid to civilians embroiled in any armed conflict, wherever it is raging.'¹⁵ Indeed, although Article 30 Geneva Convention IV expressly contains a right for individuals to request humanitarian assistance, this is constrained as Contracting Parties' may respond 'within the bounds set by military or security considerations' and only need to facilitate access to protected persons 'as much as possible'.¹⁶ The ICRC clearly acknowledges that military considerations are part and parcel of decisions surrounding the provision of humanitarian assistance to civilians in conflict zones.¹⁷ Furthermore, humanitarian access in war zones is a highly contentious issue, and can present serious dangers for both humanitarian personnel and civilians. Nevertheless, while the parameters of a binding international legal right to humanitarian assistance are contested, the fact remains that the law of armed conflict does provide specific rights to protection and assistance for individuals during armed conflicts. Moreover, an individual's right to request and receive humanitarian assistance may be bolstered by binding regional instruments, such as the AU Kampala Convention which is applicable during both international and non-international armed conflicts.

Within the context of international armed conflicts, Article 70 Additional Protocol I (API) utilises non-discretionary language: 'If the civilian population ... is not adequately provided ... relief actions which are humanitarian and impartial in character and conducted without any adverse distinction *shall* be undertaken.'¹⁸ Despite this mandatory language, Article 70 then introduces specific limitations—first and foremost that humanitarian assistance must be 'subject to the agreement of the Parties concerned'. Additionally, the Parties have the right to prescribe technical

¹⁵ Dinstein, 'Right to Humanitarian Assistance', above n 1, 78.

¹⁶ Art 30 Geneva Convention IV relative to the Protection of Civilian Persons in Times of War (1949).

¹⁷ ICRC, *Commentary: Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, J Pictet (ed) (1958) 180.

¹⁸ Art 70 Protocol relating to the Protection of Victims of International Armed Conflicts (1977) [emphasis added].

arrangements, including search procedures, under which the passage of humanitarian supplies is permitted. Meanwhile, although Article 71 API provides that humanitarian personnel shall be respected and protected in the discharge of their functions, it also stresses that '[u]nder no circumstances may relief personnel exceed the terms of their mission ... In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties'.¹⁹

Internal armed conflicts present specific challenges for humanitarian access, yet Additional Protocol II (APII) does not contain the same level of detail regarding relief activities for civilian populations. Article 18(1) only provides that 'relief societies located in the territory of the High Contracting Party ... may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict'.²⁰ Yet Article 18(2) uses mandatory language in proscribing that '[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival ... relief actions for the civilian population ... shall be undertaken'.²¹ However, once again, offers of assistance are subject to the consent of the High Contracting Party concerned. Therefore, one of the parties to an internal conflict can legitimately deny humanitarian activities for civilians, for example due to military necessity. Nevertheless, although Article 18 does not impose an obligation on parties to accept external humanitarian assistance, this does not absolve the party of their obligation to provide some form of relief for civilian populations to prevent and alleviate suffering. The provisions of humane treatment set out in Common Article 3 apply in all internal armed conflicts, and the ICRC has determined that the provision of humanitarian assistance to civilian populations in armed conflicts is part of customary international law.

Under Customary International Law Rule 55, the parties to a conflict must allow and facilitate the rapid and unimpeded passage of humanitarian relief for civilians in need,²² while Rule 56 states that Parties to a conflict must ensure the freedom of movement of authorised humanitarian personnel.²³ Crucially, only in the case of imperative military necessity may their movements be temporarily restricted. Nevertheless, all

¹⁹ *ibid*, Art 71.

²⁰ Art 18(1) Protocol II relating to the Protection of Victims of Non-International Armed Conflicts (1977).

²¹ *ibid*, Art 18(2). See also Stoffels, 'Legal Regulation', above n 11, 519.

²² The ICRC *Customary International Humanitarian Law Project* Rule 55 (Access for Humanitarian Relief for Civilians in Need). See JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law: Rules and Practice* (Cambridge University Press, 2005).

²³ The ICRC *Customary International Humanitarian Law Project* Rule 56 (Freedom of Movement of Humanitarian Relief Personnel).

these provisions reflect the recognition throughout the law of armed conflict that while parties to a conflict have explicit responsibilities towards civilians and those *hors de combat* under their control, individual rights may be legitimately constrained, either for military necessity, security reasons or due to insufficient resources.

B. During Other Humanitarian Crises

The legal obligations in place regarding an individual's right to request or receive humanitarian assistance in non-conflict situations are less well defined. For example, the 1951 Refugee Convention is premised on the equal treatment of recognised refugees in the territory of a host state, allowing refugees access to employment, training and welfare on at least the same basis as other foreign nationals. However, in recognition of the challenges refugees and those fleeing persecution face, and the practice of establishing large-scale refugee camps in the face of mass displacement, UNHCR's operational protection mandate has encompassed the provision of both legal protection and material assistance activities since its establishment. Yet there are wide divergences between state practice in different humanitarian crises, which indicates a lack of legal compulsion felt by state and humanitarian organisations in their responses. While the humanitarian imperative may be based on the desire to prevent and alleviate human suffering wherever it may be found, the reality is that for a range of political, financial and practical reasons not all victims of armed conflict, forced displacement or natural disaster receive adequate protection and assistance commensurate with their needs.²⁴ This does not negate the possibility that an individual right to request and receive humanitarian assistance exists—many economic, social and cultural rights are based on progressive realisation rather than immediate implementation,²⁵ and the rights to protection and assistance in the law of armed conflict may also be constrained due to military or financial reasons.²⁶ Moreover, a legally binding right to protection and assistance does exist for one specific group of refugees, namely refugee children.²⁷

²⁴ B Schweizer, 'Moral Dilemmas for Humanitarianism in the Era of "Humanitarian" Military Interventions' (September 2004) 86(855) *International Review of the Red Cross* 547, 551.

²⁵ M Dennis and D Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 98 *American Journal of International Law* 462.

²⁶ See, eg, Art 55(1) GCIV, above n 16; Art 69(1) API, above n 18, 'To the fullest extent of the means available to it ...'

²⁷ Art 22(1) Convention on the Rights of the Child (1989).

Likewise, the non-binding UN Guiding Principles on Internal Displacement clearly state:

Internally displaced persons have the *right to request and to receive* protection and humanitarian assistance from these [national] authorities. They shall not be persecuted or punished for making such a request.²⁸

However, the challenge of determining the substantive content of any proposed individual right to humanitarian assistance remains. An individual's right to request assistance is meaningless without a corresponding right to receive. Echoing Stoffels' argument, Walter Kälin's Annotations to the Guiding Principles state that the right to request and receive assistance is the corollary to a state's duty to protect and assist IDPs.²⁹ Indeed, one can argue that if a state is unable or unwilling to provide assistance to persons on its territory, it has an obligation to accept international humanitarian assistance. Yet the enforceability of a request for assistance is not elaborated within the Guiding Principles. Even within the African Union's Kampala Convention, which also includes an individual's right to request and receive humanitarian assistance,³⁰ if a state does not have sufficient resources to provide humanitarian assistance to IDPs their obligations are simply to co-operate with other state parties to seek assistance from international humanitarian organisations.³¹ In the absence of explicit compliance and accountability mechanisms, an individual's 'right' to assistance, either from their national authorities or from an international source, risks becoming an empty promise. So despite the authoritative non-binding influence of the UN Guiding Principles and regional importance of the Kampala Convention, and their potential internalisation into the domestic legal systems of specific states, pending the emergence of a broad-based international consensus on the implications of a binding right for individuals to request and receive humanitarian assistance, it is hard to argue that a general individual right to humanitarian assistance currently exists in all humanitarian crises.

²⁸ UN, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (1998), Principle 3(2) [emphasis added].

²⁹ W Kälin, *Guiding Principles on Internal Displacement: Annotations*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No 38 Revised Edition (2008) 20.

³⁰ Art 5(9) African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('Kampala Convention') (adopted 22 October 2009, entered into force 6 December 2012).

³¹ *ibid.*, Art 5(6). State parties have obligations to organise, enable and facilitate international humanitarian assistance subject to their right to prescribe technical arrangements for the delivery of assistance, Art 5(7). However, the Kampala Convention does not proscribe or propose an individual compliance mechanism to allow enforcement of an individual's right to assistance in Art 5(9).

III. ORGANISATIONAL RIGHT TO OFFER HUMANITARIAN SERVICES

Conversely, one can argue that both customary and general international law already recognises a right of initiative, or the right of humanitarian organisations to offer their services to affected states in certain circumstances. During armed conflicts, Common Article 3 provides a general provision for impartial humanitarian bodies to offer their services to the Parties to the conflict.³² Meanwhile, Article 63 GCIV and Article 18 APII allow humanitarian organisations to conduct humanitarian activities for civilians, with Article 70(1) API highlighting that '[o]ffers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts'. Therefore express provisions for impartial humanitarian organisations to offer humanitarian assistance, subject to certain limitations, exist in both international and non-international armed conflicts. Similarly, the non-binding Guiding Principles on Internal Displacement utilise rights-based language by proposing a specific right for international humanitarian organisations and other appropriate actors in the context of internal displacement.³³

It is noticeable that the original text of Article 12 of the ILC draft articles on the protection of persons in the event of disasters distinguished between a 'right to offer' for states and inter-governmental organisations, and weaker wording covering relevant non-governmental organisations who 'may also offer' their services.³⁴ The reluctance of states to expand a specific right of initiative to NGOs reflects on-going concerns regarding sovereignty and non-interference in domestic affairs, despite the fact that non-governmental humanitarian actors equally need legal certainty and standing commensurate to the role that they play in humanitarian activities.³⁵ Moreover, the final wording removed the 'right' to offer altogether and now simply states: 'In the event of disasters, States, the United Nations, and other potential assisting actors may offer assistance to the affected State.'³⁶ The reduction of language from a general 'right to offer' for all organisations, to a right only for states and inter-governmental organisations, to finally a reference only to offers of assistance implies a

³² Common Art 3(2) Geneva Conventions: 'An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.'

³³ Principle 25(2), *Guiding Principles*, above n 28.

³⁴ For discussion, see G Bartolini, T Natoli and A Riccardi, *Report of the Expert Meeting on the ILC's Draft Articles on the Protection of Persons in the Event of Disasters*, Roma Tre University Department of Law, 8–9 June 2015, International Law and Disasters Working Papers Series 03 (2015) 63–67. Note, Art 12 was originally Art 16.

³⁵ For comments by states expressing caution regarding an organisational right to humanitarian assistance, see: Greece (A/C.6/67/SR.19, para 57); Malaysia (A/C.6/67/SR.19, para 107); USA (A/C.6/67/SR.19, para 116); Iran (A/C.6/67/SR.20, para 15); Pakistan (A/C.6/67/SR.20, para 32).

³⁶ Draft Art 12(1). See Official Records of the General Assembly, A/71/10, above n 10, 15.

move away from a rights-based approach, even on the less contentious or onerous organisational right to offer as opposed to an individual right to request and receive humanitarian assistance.

A fundamental issue for any organisation offering their assistance is whether or not an affected state has the power to refuse their offer, and on what grounds. The Annotations to the UN Guiding Principles note that a state cannot withhold their consent arbitrarily,³⁷ while the ICRC has noted: 'It is nonetheless self-evident that a humanitarian organisation cannot operate without the consent of the party concerned. However, such consent must not be refused on arbitrary grounds.'³⁸ Likewise, the ILC draft articles propose that an affected state has a duty to seek assistance from other states and humanitarian agencies if a disaster exceeds its domestic capacities. While highlighting the requirement for such agencies to receive consent from the affected state, the draft articles similarly propose that such consent shall not be withheld arbitrarily.³⁹

The general convergence of opinions across these binding and non-binding texts, covering all types of humanitarian crises, suggests that a right for humanitarian and impartial organisations to offer their services to an affected state may exist in general international law. However, the revised wording of the ILC draft articles in the context of disasters may reflect a move away from rights-based approaches to humanitarian action, at least on the part of state representatives. Moreover, any such organisational right to offer is constrained by the requirement to obtain the affected state's consent before assistance is provided, although the affected state cannot withhold their consent arbitrarily. Considering the 'soft' nature of such a right, whereby sovereignty is maintained as states may accept or reject an offer of assistance, the determination of whether an offer is being refused 'arbitrarily' will be hard to make, particularly in the midst of a complex humanitarian crisis and in the absence of any legal accountability mechanisms that a humanitarian agency could call upon beyond moral and political arguments to prove their good intentions for assisting victims in an affected state.⁴⁰ As noted by the Overseas Development Institute: 'whatever the duties imposed by international law, it is humanitarian organisations' persuasive power and relevance on the ground that matter most in the end.'⁴¹

³⁷ Kälin, *Annotations*, above n 29, 118–19.

³⁸ Henckaerts and Doswald-Beck, *Customary IHL*, above n 22, Rule 55.

³⁹ Draft Art 11 (Duty of the affected state to seek external assistance) and draft Art 13 (Consent of the affected state to external assistance). See Official Records of the General Assembly, A/71/10, above n 10, 15–16.

⁴⁰ For discussion of this point, see E Valencia-Ospina, *Fourth Report*, 11 May 2011, A/CN.4/643, paras 51–77.

⁴¹ S Collinson and S Elhawary, 'Humanitarian Space: A Review of Trends and Issues', Overseas Development Institute, Humanitarian Policy Group Report No 32, April 2012, 2.

IV. THE CRYSTALLISATION OF A GENERAL RIGHT TO HUMANITARIAN ASSISTANCE

Based on the above observations, one can summarise the current legal situation as follows. There is a limited individual right to request and receive assistance from impartial humanitarian organisations in armed conflicts, although there are no compliance mechanisms for individuals to enforce their rights to assistance in a war zone, and these rights differ between international and non-international armed conflicts. There is not yet a comparable individual right during peace-time humanitarian crises, although binding international law provides such a general right for refugee children, and non-binding global texts and regional binding texts have proposed such a right for all internally displaced persons. Furthermore, there is a right for impartial humanitarian organisations to offer their services to affected states in both international and non-international armed conflicts, and the affected state should not refuse such offers arbitrarily. However, the practical implications and application of such a right need further elaboration. Moreover, the status of a right for humanitarian organisations to offer their services in other types of humanitarian crisis is not yet evident and the language in the ILC draft articles appears to be moving away from an express invocation of such a right, even for states and inter-governmental organisations.

Therefore, it is clear that international law is currently in the process of developing, interpreting and refining a range of individual and organisational rights to humanitarian assistance in both conflict and non-conflict settings. Yet there is limited international consensus on the boundaries and limitations of each of these rights. Explicit references to a right to humanitarian assistance in authoritative and diverse documents emanating from the UN, Red Cross Movement,⁴² respected academics and humanitarian agencies may mean that a general right to humanitarian assistance covering armed conflicts, forced displacement and natural and human-made disasters is in the process of formation. There are compelling arguments to justify such a stance based on the importance of humanity and human dignity in international law, which are further strengthened by extensive state practice in undertaking humanitarian action and authoritative non-binding norms endorsing a right to humanitarian assistance.

However, if a general right to humanitarian assistance encompassing both the right of individuals to request and receive assistance and for

⁴² It has been argued that the Red Cross itself contributes to the formation of international law, both by its activities and by the drafting of legal instruments submitted to diplomatic conferences. See F Bugnion, 'Red Cross Law' (September–October 1995) 308 *International Review of the Red Cross* 491, 492.

organisations to offer assistance is already in existence, why are states reticent to adopt rights-based language when discussing the concept of humanitarian action? The removal of the reference to a right to humanitarian assistance in the 2011 IASC Operational Guidelines for Natural Disasters would seem to be at odds with the 2009 AU Kampala Convention and 2011 edition of the *Sphere Handbook*, which both incorporate such a right. This is even more striking considering that the 2002 IASC publication, *Growing the Sheltering Tree*, clearly stated: ‘The right to receive humanitarian assistance—and the right to offer it—are fundamental humanitarian principles underpinned by international law.’⁴³ Furthermore, the ILC’s work on the protection of persons in the event of disasters has contained limited references to a ‘right to humanitarian assistance’,⁴⁴ and it is noticeable that even in the context of offers of assistance, the Special Rapporteur’s original proposal for draft Article 12 entitled ‘Right to Offer Assistance’ has been modified to simply ‘Offers of Assistance’. Nevertheless, the inclusion of substantive articles on human dignity and human rights by the ILC, even in the absence of specific references to an individual right to receive or request assistance or organisational right to offer their services, clearly ties the emerging international legal framework for disasters into the broader international human rights mechanisms.⁴⁵

Thus, while the law of armed conflict has formalised an individual’s right to assistance in certain situations, a more general right for individuals to request and receive assistance and for organisations to provide assistance (as opposed to simply offering their services) in all humanitarian crises does not yet exist in international law due to the continuing reliance on respect for state sovereignty. This means that claims for assistance are generally dependent on domestic mechanisms, which often lack enforcement procedures.⁴⁶ On this basis, it is clear that Professor Dinstein’s view is as applicable today as it was 20 years ago; namely, ‘there is no right *de lege lata* to render humanitarian assistance. There is only a right to offer such assistance, but its exercise is contingent on consent by the State concerned.’⁴⁷

⁴³ IASC, *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action* (2002) 5.

⁴⁴ The 158-page ILC Secretariat background Memorandum of 2008 only devoted six pages to the question of a right to humanitarian assistance and existing human rights law applicable in the event of disasters. See ILC, *Secretariat Memorandum*, above n 5, 149–54.

⁴⁵ Draft Art 4 reads: ‘The inherent dignity of the human person shall be respected and protected in the event of disasters’; while draft Art 5 states: ‘Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.’ See Official Records of the General Assembly, A/71/10, above n 10, 14–15.

⁴⁶ Fisher, ‘Right to Humanitarian Assistance’, above n 6, 48–49.

⁴⁷ Dinstein, ‘Legal Consequences’, above n 6, para 3.

Yet despite this pessimistic conclusion, arguably a right to humanitarian assistance is in the process of crystallisation. The increased attention and analysis of international law, policy and practice surrounding humanitarian crises, signified by the expanding normative content of the *acquis humanitaire*, highlights the norm life-cycle that a general right to humanitarian assistance may be engaged in. The increasing focus on the human rights implications of humanitarian crises is recasting the debate about humanitarian responses into the language of rights. A broad range of non-binding sources developed by both inter-governmental and non-governmental actors have proclaimed the existence of a right to humanitarian assistance, while the African Union's Kampala Convention provides the first binding multilateral convention which expressly provides for a general right to humanitarian assistance in displacement settings. It follows that the transnational legal process of on-going interactions between states, humanitarian actors, affected communities and academics will lead to increasing interpretations of what a general right to humanitarian assistance may entail for both rights-holders and duty-bearers, leading to increased internalisation of the right(s) by individual states, regional organisations, and the international community. However, while providing a strong moral and ethical call for action, until sufficient states accept the legal obligations which arise from a general right to humanitarian assistance, its applicability as a legal concept remains limited.