

What Sort of Humanitarian Aid for Western Sahara?

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When considering the context of humanitarian aid and assistance, it is necessary to keep in mind their convergence with human rights and other doctrines of international law, including applicable international humanitarian law (IHL).¹ In order to uphold our unitary system of international law, we are compelled to apply also the relevant peremptory norms, refugee law and criminal law in the humanitarian context. These coinciding and overlapping frameworks cast a complex picture and require much more time to explore than a side-event would permit. So, I will only touch on some aspects to give a sketch of what is required of states and the UN System in the context of humanitarian aid to the people of largely occupied Western Sahara.

Consistent with both the voluntary commitments and binding obligations of states, I would like to address these overlapping regimes as they coincide also in the context of the global policy frameworks, in particular, the 2030 Agenda (2015), the so-called New Urban Agenda (2016) and the outcomes of the Global Humanitarian Summit (2015).

IHL naturally invokes the law of occupation and the norms of humanitarian assistance to protected (civilian) persons, while humanitarian aid and assistance form a much broader field. At the same time, humanitarian aid and assistance form part of the principle of international assistance and cooperation.

International Cooperation

International cooperation is an obligation of states arising from the Charter of the United Nations. The Charter's Article 1 sets out the three essential pillars and purposes of the Organisation: (1) international peace and security, (2) political, economic, social and educational advancement, and (3) for human rights and for fundamental freedoms.² International Cooperation form the indispensable buttress of these pillars of the System, as explained in several of the Charter's articles.³

Crucial to the specific case of Western Sahara, the Charter's Article 55 recognized the role of international cooperation "for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Moreover, the Charter's Declaration Regarding Non-Self-Governing Territories invokes international cooperation

to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes."⁴

Elaborating further the meaning and content of the Charter's human rights pillar and the corresponding obligations of states, International Covenant on Economic, Social and Cultural Rights provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.⁵

Self-determination

Echoing the Charter, both the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights share a common Article 1, which enjoins state parties to uphold self-determination also for peoples in non-self-governing territories:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁶

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

These sacrosanct principles continue to apply as the basis for international cooperation and diplomacy. The related treaty-bound obligations combine with general principles and peremptory norms to form the basis of the UN system and international order. Every qualified diplomat knows them. Among those peremptory norms is the inalienable right of peoples to self-determination and the unacceptability of the acquisition of territory by force, including by military means.

As provided in the Vienna Convention (1969), any international agreement "is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law...which can be modified only by a subsequent norm of general international law having the same character."⁷

Both principles of self-determination of peoples and international cooperation grounding the UN Charter and governing the UN System characterize the obligations of all states in the case of Western Sahara, including the corresponding obligation of all states, their subsidiaries and domiciled third parties not to recognize, not to cooperate with and not to benefit from the illegal situation.⁸ This obligation of all states to comply with this peremptory norm, involves also bringing the illegal situation to an end and to ensure international justice and accountability, including effective remedy and reparation for victims (to which we will return).

Occupation

In this construct of complex frameworks applying in the case of Western Sahara is the law of occupation, a branch of IHL. The application of the law of occupation applies not only because the UN Legal Counsel invoked that field of international law in his 2002 opinion to the Security Council on the exploitation of natural resources in the occupied Western Sahara,⁹ or the complementary references in resolutions of the General Assembly (A/RES/34/37 and A/RES/35/19).¹⁰ We do not use the term "occupation" lightly or rhetorically, but rest on its definition in law.

Determining the start of an occupation is essentially a question of fact,¹¹ which is distinguished from invasion by military or other means: Occupation is invasion plus taking possession of territory outside the internationally recognized boundaries of a state for the purpose of holding it, even temporarily. The difference between mere invasion and occupation becomes apparent by the fact that an occupant sets up some kind of administration, whereas the mere invader does not.¹² The situation in Western Sahara, therefore, is undoubtedly one of occupation, regardless of any descriptive euphemism promoted by its perpetrators and supporters operating outside the law.

Population Transfer

The practice of population transfer is governed by another field of IHL, as well as international criminal law. Population transfer is a serious crime that was prosecuted already before the International Military Tribunals at Nuremberg and Tokyo (1945–46).¹³ However, the crime was carried out by states and proto-states in the same period, including the *Vertreibung* of Germans from other countries after World War II,¹⁴ as well as in the partition of India/Pakistan¹⁵ and the Zionist ethnic cleansing of Palestine since 1947.

IHL prohibits the implantation of civilian persons of an occupying Power in an occupied territory in accordance with Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949).¹⁶ The prohibition covers both the push and pull factors of population transfer, involving both expulsion of the indigenous population and the implantation of settlers. This

serious crime is classified as such in both the ILC's draft Code of Crimes against the Peace and Security of Mankind¹⁷ and the Rome Statute of the International Criminal Court, in both its Article 7 on crimes against humanity and Article 8 concerning war crimes.¹⁸ In occupied Western Sahara, the Kingdom of Morocco has carried out both aspect of the serious crime of population transfer in the ongoing situation.

Displacement

The humanitarian situation arising from displacement of the people of Western Sahara by outright expulsion and other means, including the occupier's denial of Sahrawi refugees' right to return, forms an important part of an unfortunate regional phenomenon. This is one of the most-overwhelming challenges facing the Middle East and North Africa (MENA) region, with multiple and complex emergencies on a scale unprecedented since Israel's ethnic cleansing of Palestine. While the region has experienced mass forced displacements since the earliest human civilizations arose there,¹⁹ it is currently distinguished as the region hosting the largest proportion of the world's refugees and displaced.²⁰

In human rights terms, these displaced persons are victims of various kinds of forced eviction, which practice the UN Commission of Human Rights has twice affirmed as "a gross violation of human rights, particularly the [human] right to adequate housing."²¹ This invokes another legal framework, namely the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which the General Assembly has adopted without a vote.²²

The accumulated cases of displacement across the Arab states now has exceeded 33 million persons entitled to reparation. Among them are at least 174,000 Sahrawi refugees in camps, as well as untold others.²³ While this number may be among the most imprecise of displaced and refugees populations in the region by nationality, their reparation entitlement to land restitution is easily calculable as the largest in the region at 21,280,000^{ha}, or the 80% of the Sahrawi people's self-determination unit that is currently occupied by the Kingdom of Morocco.

The remedy to this illegal situation, which all states are bound by peremptory norms of international law to bring to an end, is the subject of yet another framework of declaratory and binding international law: *The Principles on Housing and Property Restitution for Refugees and Displaced Persons* (a.k.a. "Pinheiro Principles").²⁴ The practical application of these principles is the subject of a multi-agency Handbook on their application to the Middle East/North Africa that has been awaiting publication by the Office of the High Commissioner for Human Rights since last year.²⁵

Integrated Solutions in the Humanitarian Aid Context

All of these frameworks together constitute the formula for the international community to apply in such protracted illegal situations and consequent humanitarian crises such as the case of Western Sahara. When we fast-forward to the present set of international norms as developed since 2015, indeed these cumulative obligations, along with the current policy commitments referred to at the beginning of this presentation, give us an answer to the question: "What sort of humanitarian aid should apply to the Western Sahara." The new global sustainable-development policies offer an updated response.

The New Urban Agenda gives us a partial answer in paragraph 19:

Special attention should also be given to countries in situations of conflict, as well as countries and territories under foreign occupation, post-conflict countries and countries affected by natural and human-made disasters.²⁶

However, the New Urban Agenda is not the strongest of the current global policies, particularly given the background of the deliberate neglect of its custodian agency, UN-Habitat, to implement, monitor or evaluate its predecessor, the Habitat II Agenda. Nonetheless, the agency has demonstrated the

capability to carry out reconstruction and institution building in conflict zones under occupation such as Iraq and Afghanistan.²⁷

Humanitarian assistance is fundamentally civilian in function and character. In situations in which military capacity and assets are used, these are applied as a last resort to support the implementation of humanitarian assistance in the field. The need for their use to be undertaken with the consent of the affected State and in conformity with international law, including international humanitarian law, as well as humanitarian principles. Emergency response, rehabilitation and development form points on a continuum. In order to ensure a smooth transition from relief to rehabilitation and development, emergency assistance must be provided in ways that will be supportive of short-term and medium-term recovery, leading to long-term development that involves indigenous institution building. Thus, emergency measures should be seen as steps toward sustainable development,²⁸ beyond the mere return to the status quo ante embodied in the contemporary concept of resilience.

The World Humanitarian Summit (2016) reflected a similar commitment of integrated response to humanitarian needs. The states and other actors at the Summit assumed five core responsibilities: (1) political leadership to prevent and end conflicts; (2) uphold the norms that safeguard humanity; (3) leave no one behind; (4) change people's lives: from delivering aid to ending need; and (5) invest in humanity.²⁹ The Summit recognized that humanitarian actors need to move beyond repeatedly carrying out short-term interventions year after year toward contributing to the achievement of longer-term development results,³⁰ including national institution building as part of core responsibility 5.³¹

"Transforming our world: the 2030 Agenda for Sustainable Development" claims to enshrine a supremely ambitious and transformational vision. In paragraph 18, states have reaffirmed their "commitment to international law[,] and emphasize that the Agenda is to be implemented in a manner that is consistent with the rights and obligations of States under international law."³²

This promised transformation requires states to operationalize this transformative vision. The Core Integrated Functions of the UNDS to support implementation of the 2030 Agenda effectively involve:

- Drawing on diversity and expertise across the UN system, tools and analysis utilized by the different pillars of the UN – human rights, humanitarian action, peace and security, political economy and climate change.
- Normative support to countries to establish, implement, monitor and report on norms, normative standards and agreements, including on international human rights commitments [sic]...³³

The Secretary General has interpreted the repositioning the United Nations development system to mean:

- [the] peace, development and human rights pillars of the United Nations, provide a clear road map for Member States and the United Nations system alike...³⁴
- advancement of all human rights: economic, social and cultural rights, as well as civil and political rights.³⁵

New Development Understanding of the International Team of Advisors to the ECOSOC Dialogue on longer-term positioning of UN Development System in the context of the 2030 Agenda for Sustainable Development "...envisage a world:...reconciling humanitarian assistance with longer-term development objectives, within the framework of human rights."³⁶

Of course, that human rights framework involves both its remedial and preventive dimensions.

Interestingly, paragraph 35 of the General Assembly resolution A/RES/70/1 of 2015 is even more explicit as to what is required. It affirms that:

35. Sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development. ... We call for further effective measures

and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.

Likewise, in 2015, the UN Committee on World Food Security adopted its Framework for Action for Food Security and Nutrition in Protracted Crises, which promotes a set of "overarching values" that include:

- respect for human rights and international humanitarian law; [addressing] underlying causes of protracted crises.
- policy coherence in line with the progressive realization of the human right to adequate food in the context of national food security, by fostering coordination of policies and actions taken in the fields of humanitarian assistance, development and human rights.³⁷

Conclusion

To have any integrity, this new system-wide promise calls for a hybrid approach also in the case of Western Sahara, requiring the deliberate alignment of (1) short-term relief and humanitarian aid with (2) longer-term institution-building development approaches within (3) the framework of human rights with its dual remedial and preventive dimensions.

In other words, it is no longer sufficient to provide short-term relief without that assistance contributing also to the building of institutions and capabilities that give legs to the people's exercise of the inalienable right to self-determination with the realization of all the human rights that are conditioned on that exercise. And by definition, that means that all humanitarian assistance—as well as other obligatory international cooperation—must aid the Sahrawi people, "for their own ends, freely [to] dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. [And i]n no case may [the Sahrawi] people be deprived of its own means of subsistence," including the people's land and other natural resources.

This indispensable hybrid approach is not merely a matter of positioning, sympathy or bias. These are requisites to upholding international law and the maintenance of world order. It is also the formula for maintaining the integrity of the international system that is so clearly needed in this current era of plummeting trust in politics and the otherwise declining integrity of, and faith in our international system.

Endnotes

¹ See Human Rights Committee, General Comment No. 29: States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3, at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en; and General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en; *International Legal Protection of Human Rights in Armed Conflict* (New York and Geneva: OHCHR, 2011), HR/PUB/11/01, at: https://www.ohchr.org/documents/publications/hr_in_armed_conflict.pdf.

² Charter of the United Nations, 26 June 1945, at: <https://www.un.org/en/charter-united-nations/>.

³ Article 1 identifies international cooperation as necessary "3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms..." and "4. To be a centre for harmonizing the actions of nations in the attainment of these common ends." Article 2 calls for "5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." Article 11 adds that international cooperation is needed "1. ... in the maintenance of international peace and security. With respect to upholding legal norms, including the human rights pillar of the Charter, Article 13 recognizes the indispensability of international cooperation "1.a. ... in the political field and encouraging the progressive development of international law and its codification; b. in the economic, social, cultural, educational, and health fields, an assisting in the realization of human rights and fundamental freedoms..." UN Charter, *op. cit.*

⁴ UN Charter, *op. cit.*, Chapter XI, Article 73.d.

⁵ International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, Article 2.1, at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=en.

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- ⁶ ICESCR, *op. cit.* and International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en.
- ⁷ Vienna Convention on the Law of Treaties, signed at Vienna 23 May 1969, entry into force: 27 January 1980, Article 53: Treaties conflicting with a peremptory norm of general international law (*jus cogens*): For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
- ⁸ Maastricht Guidelines on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011); Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Resolution 1514 (XV) of 14 December 1960); Resolutions of the OAU - decolonization and boycott (CIAS/Plen.2 / Rev.2, Addis Ababa, May 25, 1963) and boundary disputes between states (AHG/Res 16 (1) of Cairo, July 21, 1964); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (GA Resolution 2526 (XXV), 24 October 1970); Definition of Aggression (GA Resolution 3314 (XXIX) December 14, 1974); Advisory opinion of the International Court of Justice, the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, adopted on June 21, 1971, p. 16; Advisory opinion of the International Court of Justice, the international legal status of Western Sahara, adopted 16 October 1975; S/RES/465 (1980), 1 March 1980, para. 7; Advisory opinion of the International Court of Justice, the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, adopted July 9, 2004, paragraph 157; Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001); Draft articles on Prevention of Transboundary Harm from Hazardous Activities (2001); Draft Articles on International Liability in Case of Loss from Transboundary Harm arising out of Hazardous Activities (2006); Basic Principles and Guidelines on the Right to a Remedy and Reparation," *op. cit.*
- ⁹ Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, S/2002/161, 12 February 2002.
- ¹⁰ UN General Assembly 34/37 (1979) and A/RES/35/19 (1980).
- ¹¹ See Lord Arnold Duncan McNair and Sir Arthur Watts, *The Legal Effects of War* (Cambridge: Cambridge University Press, fourth edition, 1966), pp. 377–78; and Georg Schwarzenberger, *International law as Applied by International Courts and Tribunals*, Vol. II: "The Law of Armed Conflict" (London: Stevens & Sons, 1968), p. 324.
- ¹² Hersch Lauterpacht, "Disputes, war and neutrality," in Lassa Francis Lawrence Oppenheim, *International law: a treatise*. Vol. II: (London: Longman, 7th edition, 1952), p. 434; Re Lepore, *Annual Digest of Public International Law Cases*, Vol. 13 (Supreme Military Tribunal, Italy, 1946), p. 354–55; Disability pension case, *International Law Reports*, Vol. 90 (Federal Social Court, Federal Republic of Germany, 1985), p. 403; and Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press, 1957), pp. 28–29.
- ¹³ See Awn Shawki al-Khasawneh and Ribot Hatano, "The Human Rights of Population Transfer, including the Implantation of Settlers and Settlements," E/CN.4/Sub.2/1993/17, at: <https://digitallibrary.un.org/record/171114>.
- ¹⁴ Alfred M. de Zayas, *Die Nemesis von Potsdam. Die Anglo-Amerikaner und die Vertreibung der Deutschen* (Herbig, 2005).
- ¹⁵ William Dalrymple, "The Great Divide: The violent legacy of Indian Partition," *The New Yorker* (29 June 2015), at: <https://www.newyorker.com/magazine/2015/06/29/the-great-divide-books-dalrymple>; P. R. Brahmananda, "The Impact on India of Population Transfers in 1947 and After," in Briney Thomas, *Economics of International Migration*, proceedings of International Economic Association conference (London: Palgrave Macmillan, 1958).
- ¹⁶ Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), Article 49. See Jean S. Pictet, *Commentary* (Geneva: International Committee of the Red Cross, 1958), at: https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf.
- ¹⁷ Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, Article 20, at: http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf.
- ¹⁸ The Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>.
- ¹⁹ Bustenay Oded, *Mass deportations and deportees in the Neo-Assyrian empire* (Wiesbaden: Dr. Ludwig Reichert Verlag, 1979), at: <https://books.google.com/books?id=Nn9ftwAACAAJ>; Karen Radner, "Mass deportation: the Assyrian resettlement policy," *Assyrian empire builders* (London: University College London, 2012), at: <http://www.ucl.ac.uk/sargon/essentials/governors/massdeportation/>.
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- ²¹ Commission on Human Rights, "forced eviction," resolution 1993/77, 10 March 1993, at: <http://www.hlrn.org/img/documents/ECN4199377%20en.pdf>; and "Prohibition of forced evictions," resolution 2004/28, 16 April 2004, para. 1, at: http://www.hlrn.org/img/documents/E-CN_4-RES-2004-28.pdf.
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- ²³ In the Tindouf refugee camps alone, they number some 174,000, rounded from UNCHR's total camp census of 173,600. See UNHCR, Sahrawi Refugees in Tindouf, Algeria: Total In-Camp Population, March 2018, at: http://www.usc.es/export9/sites/webinstitucional/gl/institutos/ceso/descargas/UNHCR_Tindouf-Total-In-Camp-Population_March-2018.pdf.
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- ³¹ *Ibid.*, paras. 34, 42–43, 45, 84(b), 88, 143, 152–53.
- ³² Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.
- ³³ ECOSOC Dialogue on the longer-term positioning of the UN development system in the context of the 2030 Agenda, UNDG key messages for Workshop 5, 13 April 2016.
- ³⁴ Repositioning the United Nations development system to deliver on the 2030 Agenda: ensuring a better future for all, Report of the Secretary-General, A/72/124–E/2018/3, 11 July 2017, para. 2.
- ³⁵ *Ibid.*, para. 14.
- ³⁶ Independent Team of Advisors Findings and Conclusions, ECOSOC Dialogue on longer-term positioning of UN Development System in the context of the 2030 Agenda for Sustainable Development, 16 June 2016, pp. 72, 74, at: <https://www.un.org/ecosoc/sites/www.un.org.ecosoc/files/files/en/qcpr/ecosoc-dialogue-publication.pdf>.
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