

Accepting Assistance in the Aftermath of Disasters
Standards for States under International Law

Stefanie Jansen-Wilhelm



Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | mail@intersentia.co.uk

This publication is based on a doctoral dissertation defended at Tilburg University in June 2015.

Stefanie Jansen-Wilhelm
Accepting Assistance in the Aftermath of Disasters. Standards for States under International Law

© 2015 Intersentia
Antwerp – Cambridge – Portland
www.intersentia.com | www.intersentia.co.uk

ISBN 978-1-78068-329-4
D/2015/7849/70
NUR 828

Cover image: Leonardo da Vinci – ‘Natural Disaster’
(c. 1517, Royal Library, Windsor Castle, London)
Royal Collection Trust/© Her Majesty Queen Elizabeth II 2015

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

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

To Jeroen, Karen and Nico

ACKNOWLEDGEMENTS

There is more to life than working on a dissertation. There is a danger of getting sucked into the topic, to focus on everything that is remotely of relevance for the research, to wake up and go to bed with all kinds of novel ideas for finding that answer to the main question and to be too close to the research to see the bigger picture. I have been aware of that danger from the beginning and successfully avoided walking into that trap. Perhaps too successfully, being at times too distracted and occupied with other very important things, as such lengthening the process of the research. Yet I am very thankful for the opportunity Tilburg University has given me to write this dissertation – on a topic of my own choosing and which has with every disaster occurring over the last six years proved its importance (at the time of writing these acknowledgements I hear the sad news that the death toll of the earthquake in Nepal (and other Himalayan countries) passed 2500) – and for allowing me to teach, to organize a conference on international humanitarian assistance, to visit conferences abroad and to do many other activities (not always directly related to the research). I would love to thank a whole list of people who enabled me to do this research and who distracted me at the same time, but there is too little room to write down the full list. A couple of names are mentioned here nonetheless.

First and foremost I would like to thank my supervisors, Willem van Genugten and Conny Rijken. You have patiently read all those draft chapters and given me feedback, comments and useful insights. During our ‘tissues & issues’ meetings (luckily the tissues were not always necessary) you helped me brainstorm on all those questions that still needed to be answered and also on the structure of the book (the question of which came first, the chicken or the egg, now has a new meaning). Although you both are extremely busy with your own work, you have always made time to read my drafts and give feedback. At the moments that I thought I was heading nowhere, you were both very encouraging. Willem, you put me on the PhD-track during the Master’s programme at Tilburg University and you have always expressed your faith in me. I am happy that joking around did not lessen that faith (although to be fair, you were the one who once threw a breadroll at me during a staff meeting). Conny, you were my mentor during the Research Master and have kept the mentor-role throughout the PhD-track. The detailed feedback you give – although very welcome – can be daunting at times, yet it is amazing how you always see the tiniest of gaps in the reasoning, even when reading my draft chapters in a plane off to some major conference after only a few hours of sleep.

I would also like to express my gratitude towards the members of the reading committee, Professors Cees Flinterman, Jenny Goldschmidt, Nicola Jägers, Nico Schrijver and Eduardo Valencia-Ospina. Thank you for taking the time to read the manuscript and for your comments. Your feedback has been very valuable in finalizing the dissertation. A special word of thanks to Mr Valencia-Ospina for allowing me to assist with the preparation of his Fourth Report for the ILC. Also thanks to Pleased2ReadYou for proofreading my dissertation on such short notice (any remaining mistakes are my own).

To all my colleagues at the Department of International and European Public Law (past and present): thank you so much for the wonderful time. It has been great working with you (and drinking coffee, and having lunch, and drinks, and dinner...). While the group as a whole creates such a great atmosphere, I would like to single out a few people. Bas, you were my partner-in-crime during the Master's, the Research Master and while we were roommates during our PhD. You always managed to stop me from worrying about the PhD ('its just a couple of theses put together'). Thanks for sharing in your endeavours for the rights of indigenous peoples and for agreeing that the window should always be open. Drazan, thank you for being an excellent new roommate (albeit with a closed window) and for putting up with two girls questioning everything you say. Perhaps one day I will learn to pronounce your name correctly. Laura and Zahra, thank you for introducing me to the phenomenon of statelessness and to the difficulties it poses in the lives of those without nationality and for giving me the opportunity to contribute to combating it, small as the contribution may be. Good luck with your Institute on Statelessness and Inclusion. Hopefully you will one day manage to eradicate statelessness and still have time inbetween all the research to visit a theme park again (with Eefje and me of course). To Simone, Byung Sook, Niels and others who joined in our daily lunches: thanks for the non-academic discussions and for agreeing that talking about unimportant topics is important too. I am grateful that the senior staff (Anna, Cees, Conny, Floor, Helen, Jonathan, Nicola, Willem, and all others) acknowledged this as well and made plenty of time available for drinks and outings. Finally, Femke, Inge and the other ladies at the secretariat, thank you for your support and for the many chats over coffee and cookies.

Throughout the years the research took place I have met wonderful fellow-PhD-students who made the PhD a social endeavour through drinks, lunches or other activities and who were available for 'complaining' about our 'hard' lives as PhD-students at times of getting stuck. Annemarie, Esther, Iris, Lorena, Pinar, Shamiso and all others: thank you for sharing in the experience. A special thanks to co-PhD-student Emilie, with whom I was also able to share in the frustration about the scarcity of conferences on the legal aspects of international humanitarian assistance (so we organized a conference ourselves). Good luck with finalizing your dissertation. Another word of gratitude goes to Chenny, who adjusted so easily to life in the Netherlands but found an amazing job back in China. I hope I can soon enjoy your cooking skills again (in China or in Tilburg).

I am also very lucky with all my non-academic friends who very patiently listened to my (probably) rather boring stories about doing research and writing a book. Thanks for all the great distractions, Joyce, Esther (no, a PhD does not make me scary, please keep texting), Richard, Floortje, Laura, Jeff, Jolanda, Sander, Claire, Laura and Teun. Also thanks to Chantal, Paul, Geerie and Bob for understanding that I was not always available for dinner-plans.

Coming to the end of what has become a very long list (and I guess that many are now just scanning for their name or have stopped reading entirely), I realise that I have trouble categorizing one person. Eefje, I have met you in the Research Master but you have become more than a fellow student, fellow PhD-student or colleague. Not only are you my business partner (yay!) and roommate, you have become one of my dearest friends also outside of the university. Thank you for all the fun years and for your support, and of course for being one of my paranimfs (I have made sure that the book is not too heavy to hold during the defense). Good luck with finishing your own dissertation and after that we will find some fun jobs together.

Last but not least (a cliché but so true) I would love to express my gratitude to my family, Karen, Nico, Rutger, Sofie, Thijs. Thank you for all your love and support during all those years and for putting up with me whenever I was moody because I got stuck or had to delete a chapter, again. You have always believed in me even when I did not. And, not to forget, thanks for babysitting Fabienne. Jeroen, thank you for distracting me by marrying me. The honeymoon to Hawaii certainly put the dissertation to the far, far back of my mind. You have been a tremendous support through all the years even while you are always so busy yourself. You took most of the punches in times I got stuck and you never complained. I could not wish for a better, sweeter, greater husband.

Lieve Fabienne, misschien zie je op een dag een boek in de kast staan met je mama's naam erop. Wellicht raak je nieuwsgierig en kijk je erin, en zie je tot je grote verbazing dat het boek is opgedragen aan papa, oma en opa en niet aan jou. Toch was je al één toen het boek klaar was?! Dat komt, lieverd, omdat papa, oma en opa een grote steun zijn geweest gedurende de hele studie en het promotieonderzoek en dat wil ik graag benadrukken door het boek aan hen op te dragen. Natuurlijk was jij tijdens het laatste jaar ook een hele grote afleiding (en dat bedoel ik vooral heel positief) en ben ik heel erg blij dat je er bent. Dankzij jou heb ik tijdens het laatste jaar heel veel gespeeld, gewandeld en gefietst en niet alleen maar gewerkt. Daarom is dit boek toch ook een beetje voor jou.

*Stefanie Jansen-Wilhelm
Tilburg, April 2015*

CONTENTS

| | |
|--|-----------|
| <i>Acknowledgements</i> | v |
| <i>List of Abbreviations</i> | xv |
| | |
| <i>Part I</i> | |
| | |
| Chapter I | |
| General Introduction | 3 |
| 1. Introduction | 3 |
| 1.1 Disaster strikes | 3 |
| 1.2 Legal regulation of disaster response | 7 |
| 1.3 Research goal and main research question | 8 |
| 2. The scope of the research | 8 |
| 2.1 Focus on affected states' obligations to accept | 8 |
| 2.2 Legal scope | 10 |
| 2.3 The phases of disasters and their correlative legal issues | 11 |
| 3. Definitions | 12 |
| 3.1 The definition of 'disaster' | 12 |
| 3.2 Humanitarian assistance | 18 |
| 4. Structure and research methodology | 20 |
| | |
| Chapter II | |
| Disaster Response and International Humanitarian Assistance: Background and Legal Framework | 23 |
| 1. Introduction | 23 |
| 2. The field of international disaster response: background and main actors | 24 |
| 2.1 Introduction | 24 |
| 2.2 International disaster relief prior to the 20 th Century | 24 |
| 2.3 The Red Cross and Red Crescent Movement | 27 |
| 2.4 The International Relief Union | 28 |
| 2.5 The United Nations' activities within the field of disaster response | 33 |
| 3. Overview of relevant fields and instruments of international law | 37 |
| 3.1 Introduction | 37 |
| 3.2 International humanitarian law | 37 |
| 3.3 Human rights law | 42 |
| | ix |

| | |
|---|-----------|
| 3.4 Refugees and internally displaced persons | 47 |
| 3.5 Other fields of international law | 50 |
| 3.6 Regional cooperation in disaster response | 52 |
| 3.7 Resolutions, guidelines and other instruments on humanitarian assistance and disaster response | 52 |
| 3.8 Recent standard-setting initiatives | 55 |
| 3.8.1 International Disaster Response Laws | 55 |
| 3.8.2 Protection of Persons in the Event of Disasters | 57 |
| 4. Sovereignty and international action | 59 |
| 4.1 Traditional reading of state sovereignty | 59 |
| 4.2 Non-Authorised humanitarian intervention | 62 |
| 4.3 The Responsibility to Protect | 63 |
| 5. Conclusions: rules and principles on accepting humanitarian assistance | 68 |
| 5.1 Introduction | 68 |
| 5.2 Primary role of the affected state | 69 |
| 5.3 The triggering and initiation of international humanitarian assistance | 70 |
| 5.4 The affected state's right to withhold consent and limitations of this right | 71 |
| 5.5 Conclusion | 74 |
| | |
| Chapter III | |
| Practical Application of the Rules on International Humanitarian Assistance in Response to Disasters | 77 |
| | |
| 1. Introduction | 77 |
| 2. The first response by the affected state: making a needs-assessment | 78 |
| 3. Initiating international humanitarian assistance | 84 |
| 3.1 Introduction | 84 |
| 3.2 Requesting assistance | 84 |
| 3.3 Offers of assistance | 88 |
| 4. Accepting international assistance: the role of consent | 92 |
| 4.1 Introduction | 92 |
| 4.2 General features of consent | 93 |
| 4.3 Practical issues relating to consent | 95 |
| 4.3.1 Blanket consent | 96 |
| 4.3.2 Underhandedly refusing assistance and delayed consent | 97 |
| 4.3.3 No authority to give consent | 99 |
| 4.3.4 Not giving consent for valid reasons | 99 |
| 4.4 Conclusion | 100 |
| 5. Provision of assistance and termination of operations | 100 |
| 6. International humanitarian assistance without consent | 102 |
| 6.1 Introduction | 102 |
| 6.2 Action when consent cannot be obtained | 102 |
| 6.2.1 Introduction | 102 |

| | | |
|-------|--|------------|
| 6.2.2 | Poor disaster response as a crime against humanity | 105 |
| 6.2.3 | Applicability of RtoP in disaster situations | 109 |
| 6.2.4 | Usefulness of RtoP in disaster response | 110 |
| 6.3 | The persisting gap in providing humanitarian assistance | 112 |
| 7. | Conclusion | 113 |
| | Preliminary Conclusions | 115 |
| | <i>Part II</i> | |
| | Chapter IV | |
| | The Content and Meaning of Article 2(1) ICESCR | 121 |
| 1. | Introduction | 121 |
| 2. | Context: Article 2(1) in the immediate context of the ICESCR | 125 |
| 3. | Object & purpose: the nature of obligations stemming from article 2(1) | 128 |
| 3.1 | Purpose | 128 |
| 3.2 | Object | 129 |
| 4. | Ordinary meaning of words: the legal content and meaning of article 2(1) | 132 |
| 4.1 | Introduction | 132 |
| 4.2 | Undertakes to take steps | 133 |
| 4.3 | Individually and through international assistance and cooperation | 135 |
| 4.4 | To the maximum of its available resources | 141 |
| 4.5 | With a view to achieving progressively the full realization | 145 |
| 4.6 | By all appropriate means | 148 |
| 4.7 | Conclusion | 149 |
| 5. | Considering context, object and purpose and ordinary meaning together: conclusions | 149 |
| | Chapter V | |
| | Applying the ICESCR on Disaster Situations: Specific Obligations | 153 |
| 1. | Introduction | 153 |
| 2. | Derogation during the state of emergency | 154 |
| 2.1 | Introduction | 154 |
| 2.2 | Position 1: Derogation is not possible in the context of the ICESCR | 155 |
| 2.3 | Position 2: Even in the absence of an explicit clause, derogation is possible | 156 |
| 2.4 | To derogate or not to derogate? | 157 |
| 3. | Post-disaster obligations following from article 2(1) | 158 |
| 3.1 | Introduction | 158 |
| 3.2 | Undertakes to take steps | 159 |
| 3.3 | International assistance and cooperation | 160 |
| 3.4 | Using the maximum of available resources and other appropriate means | 164 |

| | |
|--|------------|
| 3.5 Progressive realization and retrogressive measures | 166 |
| 4. Disaster-specific obligations stemming from substantive rights | 170 |
| 4.1 Introduction | 170 |
| 4.2 On benchmarks and core contents | 171 |
| 4.3 The Right to Housing | 173 |
| 4.3.1 Introduction | 175 |
| 4.3.2 Core contents | 177 |
| 4.3.3 Obligations relating to disasters | 178 |
| 4.4 The Right to Food | 181 |
| 4.4.1 Introduction | 181 |
| 4.4.2 Core contents | 182 |
| 4.4.3 Obligations relating to disasters | 183 |
| 4.5 The Right to Water | 185 |
| 4.5.1 Introduction | 185 |
| 4.5.2 Core contents | 186 |
| 4.5.3 Obligations relating to disasters | 186 |
| 4.6 The Right to Health | 188 |
| 4.6.1 Introduction | 188 |
| 4.6.2 Core contents | 190 |
| 4.6.3 Obligations relating to disasters | 191 |
| 4.7 Disaster-specific obligations under the substantive rights | 193 |
| 5. Conclusion | 195 |
| | |
| Chapter VI | |
| Final Conclusions | 197 |
| 1. Introduction | 197 |
| 2. The current standing of public international law on accepting international humanitarian assistance in response to a disaster | 198 |
| 2.1 International approaches to disaster response versus state sovereignty: the origin of the conflicting notions | 198 |
| 2.2 The common rules and principles on humanitarian assistance in disaster response | 199 |
| 2.3 Ongoing developments trying to combine international humanitarian assistance and state sovereignty | 203 |
| 2.3.1 Preparing national legal frameworks for accepting international assistance | 203 |
| 2.3.2 Development of a new legal basis: the ILC's draft articles on the Protection of Persons in the Event of Disasters | 203 |
| 2.3.3 Bypassing sovereignty through humanitarian action: usefulness of RtoP | 204 |
| 2.4 The persisting problems in applying the legal framework | 206 |

| | |
|--|-----|
| 3. Using the ICESCR to complement the legal framework | 206 |
| 3.1 Using the ICESCR for making a needs-assessment and for triggering international assistance | 206 |
| 3.2 The role of the ICESCR in limiting the freedom to withhold consent | 208 |
| <i>Summary</i> | 211 |
| <i>Bibliography</i> | 221 |
| <i>Index</i> | 239 |
| <i>Curriculum Vitae</i> | 243 |
| <i>School of Human Rights Research Series</i> | 245 |

LIST OF ABBREVIATIONS

| | |
|------------|--|
| AP | Additional Protocols to the Geneva Conventions |
| ASEAN | Association of Southeast Asian Nations |
| AU | African Union |
| CAT | Convention against Torture |
| CDERA | Caribbean Disaster Emergency Response Agency |
| CEDAW | Convention on Elimination of Discrimination against Women |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CO | Concluding Observation |
| CRC | Convention on the Rights of the Child |
| CRED | Centre for Research on the Epidemiology of Disasters |
| CRPD | Convention on the Rights of Persons with Disabilities |
| DHA | UN Department of Humanitarian Affairs |
| ECOSOC | Economic and Social Council |
| ECtHR | European Court of Human Rights |
| ESC | European Social Charter |
| ESC-rights | Economic, social and cultural rights |
| FAO | Food and Agriculture Organisation |
| GA | General Assembly (UN) |
| GC | General Comments |
| GCI-IV | Geneva Conventions (I-IV) |
| GNP | Gross National Product |
| HRC | Human Rights Council |
| IASC | Inter-Agency Standing Committee |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICISS | International Commission on Intervention and State Sovereignty |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross and Red Crescent |
| IDP | Internally Displaced Persons |
| IDRL | International Disaster Response Laws |
| IFRC | International Federation of the Red Cross and Red Crescent Societies |
| IHL | International Humanitarian Law |
| ILC | International Law Commission |
| ILO | International Labour Organisation |
| IMF | International Monetary Fund |

List of Abbreviations

| | |
|--------|--|
| IRU | International Relief Union |
| ISDR | International Strategy for Disaster Reduction |
| M_w | Moment Magnitude Scale |
| NATO | North-Atlantic Treaty Organisation |
| NGO | Non-governmental organisation |
| OCHA | Office for the Coordination of Humanitarian Affairs |
| OHCHR | Office of the High Commissioner for Human Rights |
| OP | Optional Protocol |
| RtoP | Responsibility to Protect |
| SC | Security Council |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNDP | UN Development Programme |
| UNDRO | UN Disaster Response Organisation |
| UNESCO | UN Educational, Scientific and Cultural Organisation |
| UNHCR | UN Office of the High Commissioner for Refugees |
| UNRRA | UN Relief and Rehabilitation Administration |
| VCLT | Vienna Convention on the Law of Treaties |
| WHO | World Health Organisation |