Towards Greater Legal Protection for Medical-Humanitarian NGOs in Situations of Armed Conflict

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La médecine, comme la souffrance, ne connaît pas de frontière.[1]

I. Introduction

For decades, international non-governmental organisations (NGOs) have provided emergency medical care to victims of war. Guided by the principle that those who do not (or no longer) participate in armed hostilities have the right to "medical assistance wherever and whoever they are",[2] NGOs such as Médecins Sans Frontières (MSF) and Médecins du Monde[3] have entered conflict zones on medical-humanitarian missions. They are afforded the protection of international

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1 "Medicine, like suffering, knows no borders." Adapted from Maurice Torrelli, 'La protection du médecin dans les conflits armés' in Christophe Swinarski (ed), *Studies and essays on international humanitarian law and Red Cross principles* (Martinus Nijhoff 1984) 585.

2 Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations* (Martinus Nijhoff 1991) 347.

3 See Médecins Sans Frontières UK <www.msf.org.uk/> accessed 10 February 2018; Médecins du Monde <www.medecinsdumonde.org/en> accessed 10 February 2018.

humanitarian law (IHL)[4] provided, *inter alia*, that they practise non-discrimination and refrain from interfering in States' internal affairs.[5] The norms regulating humanitarian relief and guaranteeing personal protection acknowledge their non-combatant status.[6] This additional legal protection is not a 'homage' to the medical profession,[7] but recognises that proximity to combat zones when treating victims necessitates a "more specific protection than that afforded the civilian population in general".[8]

However, humanitarians' security has been significantly weakened in recent years. Warring parties increasingly threaten staff, harry aid convoys, and target medical personnel and facilities during armed attacks.[9] In 2015 alone, aerial and ground shelling in Syria killed or wounded 81 medical staff in 63 hospitals and clinics—all supported by MSF.[10]

Two issues are germane to this. The first issue is that the very nature of armed conflict has evolved. Whereas inter-State armed conflicts once formed the principal focus of IHL, internal conflicts between government forces and rebel armed groups (or 'insurgents') now abound. This rise in asymmetric warfare engenders

[4] The principal sources are the four Geneva Conventions (GC) (GC/I: Convention for the Amelioration of the Wounded and Sick in Armed Forces and Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; GC/II: Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; GC/III: Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; GC/IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31) and their two 1977 Additional Protocols (AP/I: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; AP/II: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3). Also see Adam Roberts and Richard Guelff, *Documents on the Laws of War* (3rd edn, OUP 2000) 2, 5–7, 10.

[5] Reginald Moreels, 'Humanitarian diplomacy: The essence of humanitarian assistance' in Frits Kalshoven (ed) *Assisting the Victims of Armed Conflict and Other Disasters* (Martinus Nijhoff 1989) 43.

[6] Kate Mackintosh, 'Beyond the Red Cross: The protection of independent humanitarian organizations and their staff in international humanitarian law' (2007) 89(865) IRRC 113, 118.

[7] Jean-Pierre Schoenholzer, 'Le médecin dans les Conventions de Genève de 1949' (1954) 35(410) IRRC 94, cited in Torrelli (n 1) 591.

[8] Mackintosh (n 6) 123.

[9] Rebecca Barber, 'Facilitating humanitarian assistance in international humanitarian and human rights law' (2009) 91(874) IRRC 371, 373.

[10] Médecins Sans Frontières, 'Syria 2015: Documenting war- wounded and war- dead in MSF- supported medical facilities in Syria' (*Médecins Sans Frontières*, 8 February 2016) <www.msf.org/sites/msf.org/files/syria_2015_war-dead_and_war-wounded_report_en.pdf> accessed 22 July 2018.

violation—or 'reinterpretation'—of IHL;[11] the consequent "toxic atmosphere of defiance of law and order"[12] arguably leaves States with a greater propensity to reject international humanitarian assistance.

The second issue is one of access. Under IHL, an offer of international humanitarian assistance must be accepted by a State before missions can enter its lands. Authorisation is often delayed or arbitrarily (and unlawfully) withheld[13]—particularly when a government wants to keep humanitarians out of insurgent-controlled territory.[14] The response by 'no-borders' NGOs, and particularly by MSF, is to refuse to accept State consent as a *sine qua non* of humanitarian access.[15] As private actors, they lack international status,[16] and so cannot violate the principles of State sovereignty and non-intervention.[17] However, unauthorised missions forfeit various IHL protections.[18] MSF may argue that it acts "in advance of a constantly changing International Law"[19] and its call for missions to have full and unconditional respect may well be justified, but the "grim reality"[20] is that States cede IHL protection only *when* and *if* it suits them.

This article examines the phenomenon of unauthorised, wartime missions by international, medical-humanitarian NGOs (MNGOs), and its effect on their international legal protection. The binary question this article seeks to answer is whether (a) 'no-borders' organisations should desist from such missions, and "find ways to achieve their aims within the existing legal… structure" of IHL;[21] or whether (b) as MSF believes, the pursuit of unconditional, international legal protection remains valid. Part II presents MNGOs' humanitarian 'credentials' and the effect of these on qualification for IHL protection. Following Part III's overview of the relevant IHL protection provisions, Part IV offers two case-studies which examine the contemporary challenge of securing humanitarian access and protection for MNGOs' unauthorised missions in non-international armed conflicts. After considering the limits of IHL in this context, Part V analyses alternative means

[11] Marco Sassòli, 'The implementation of international humanitarian law: Current and inherent challenges' (2007) 10 Yearbook of International Humanitarian Law 45, 58–59.

[12] Yoram Dinstein, *Non-international Armed Conflicts in International Law* (CUP 2014) 115.

[13] See Dapo Akande and Emanuela-Chiara Gillard, 'Arbitrary withholding of consent to humanitarian relief operations in armed conflict' (2016) 92 International Law Studies 483; Cedric Ryngaert, 'Humanitarian assistance and the conundrum of consent: A legal perspective' (2013) 5(2) Amsterdam Law Forum 5, 9–11.

[14] Beigbeder (n 2) 347–348.

[15] Moreels (n 5) 47.

[16] Beigbeder (n 2) 327.

[17] Ryngaert (n 13) 12–13.

[18] International Committee of the Red Cross (ICRC), 'Customary International Humanitarian Law Database, Rule 55. Access for Humanitarian Relief to Civilians in Need' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule55> accessed 22 July 2018.

[19] Beigbeder (n 2) 348.

[20] Michael Meyer, 'Humanitarian action: A delicate balancing act' (1987) 27(260) IRRC 485, 497.

[21] ibid 497.

of securing enhanced legal status and protection for such MNGOs. This article concludes that, like armed groups, 'no-borders' MNGOs are now key players in situations of armed conflict, but the limits of their protection under IHL have been reached. In consequence, it is time that the international community works to develop international law in such a way that MNGO personnel are afforded unconditional protection and access to victims of armed conflict.

II. Impartial Humanitarian Organisations and International Humanitarian Law

A. Medical-humanitarian ngos in international humanitarian law treaties

As there is no settled definition of 'international humanitarian assistance' in international law, this article draws on Kalshoven's reference to *emergency* assistance from *outside* a country: "activities and goods which, out of a feeling of solidarity and joint responsibility, are designed to provide direct support to the victims of an armed conflict".[22]

In the context of armed conflict, international medical assistance is the provision to non-combatants of hospital supplies and equipment, medicines, vaccines, and skills of professional medical volunteers (including doctors and nurses).[23] Although international (or 'external') humanitarian assistance should *supplement* that provided by national authorities, it sometimes becomes entirely substitutive when authorities cannot, or will not, assist vulnerable citizens.[24] Some MSF missions have built and funded health facilities in regions where none exist, and paid the salaries of local medical staff. In 2014, it supported 56 Syrian medical facilities in regions impenetrable to international staff.[25] By 2016, this had risen

[22] Kalshoven (n 5) 20.

[23] ICRC, 'Respecting and Protecting Health Care in Armed Conflicts and in Situations Not Covered by International Humanitarian Law' (ICRC, March 2012) <https://www.icrc.org/eng/assets/files/2012/health-care-law-factsheet-icrc-eng.pdf> accessed 22 July 2018.

[24] Mario Bettati, 'La contribution des organisations non-gouvernementales à la formation et à l'application des normes internationales' in Mario Bettati and Pierre-Marie Dupuy (eds) *Les O.N.G. et le Droit International* (Economica 1986) 21.

[25] Sophie Delaunay, 'Condemned to resist' (*Professionals in Humanitarian Assistance and Protection*, 10 February 2014) 5, <https://phap.org/system/files/article_pdf/Delaunay-CondemnedToResist.pdf> accessed 22 July 2018.

to around 70, principally run by local doctors,[26] in Syria's southern and north-western regions.[27]

Medical assistance should be provided according to the principles of humanity, impartiality and non-discrimination.[28] The principle of impartiality comprises "the recognition of equality of all people, the duty of equal treatment, and… appropriate relief without favour or prejudice".[29] In the *Nicaragua* case, the International Court of Justice (ICJ) went further, stipulating that external humanitarian actors should support both or all parties to a conflict.[30] However, Kalshoven disagrees with this finding and considers that it goes against Red Cross principles (to which MNGOs also adhere).[31] Barrat suggests that impartiality "does not necessarily mean mathematical equality",[32] especially in situations where humanitarians may not be authorised to access all parts of a State's territory (for example, during a non-international armed conflict).

B. Medical-humanitarian NGOs' qualification for international humanitarian law protection

The Geneva Conventions (GCs) and their Additional Protocols (APs) were drafted prior to MNGOs' rise in prominence, and do not expressly provide for their operation and protection. It is accepted, however, that treaty references to "impartial humanitarian organizations"[33] or "some humanitarian organization"[34] encompass MNGOs.[35] Insofar as the treaties suggest that organisations must be *independent* (citing the International Committee of the Red Cross (ICRC) as an

[26] Zena Tahhan, 'MSF: Attacks on aid groups part of Syrian regime plan' *Al Jazeera* (Doha, 10 October 2016) <http://www.aljazeera.com/news/2016/10/msf-attacks-aid-groups-part-syrian-regime-plan-161010062509695.html> accessed 22 July 2018.

[27] 'Syria: Mapping the conflict' *BBC* (London, 10 July 2015) <http://www.bbc.co.uk/news/world-middle-east-22798391> accessed 22 July 2018.

[28] UNGA Res 182, 'Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations' (19 December 1991) UN Doc A/RES/46/182.

[29] Claudie Barrat, *Status of NGOs in International Humanitarian Law* (Brill Nijhoff 2014) 148.

[30] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1984] ICJ Rep 392 [115].

[31] Frits Kalshoven, 'Impartialité et neutralité dans le droit et la pratique humanitaires' (1989) 71(780) IRRC 541, 548.

[32] Barrat (n 29) 150.

[33] Articles 9, 9, 9, and 10 of the GC/I, GC/II, GC/III, and GC/IV (n 4) respectively; also see GC/IV (n 4), Articles 59(2) and 61(1).

[34] GC/IV (n 4), Article 15.

[35] Mackintosh (n 6) 115–116.

example),[36] it seems that those maintaining financial and political independence can claim specific Convention protections.[37]

However, in interpreting the humanitarian principle of *neutrality*, there has been a conscious departure from the ICRC's position.[38] Having long since come to typify "the values of humanitarian universalism",[39] the ICRC practises neutrality not only by refusing to 'take sides', but also by refusing to criticise warring parties.[40] At times, the latter has been interpreted as indifference.[41] For French doctors witnessing large-scale atrocities and killings in the 1967–1970 Biafra conflict, the ICRC's silence was anathema to humanitarianism: they left to found MSF.[42] The MSF Charter declares that "principles of impartiality and neutrality are not synonymous with silence", and that its personnel "may speak out publicly [if witness to] extreme acts of violence… unacceptable suffering… [or when] medical facilities come under threat".[43]

Médecins du Monde goes further still in its commitment to "bear witness"[44] to atrocities, not infrequently 'taking sides' in conflict zones and denouncing the acts of warring parties.[45] Therefore, it is a matter of contention whether 'no-borders' neutrality—undertaking not to "take sides or intervene according to the demands of governments or warring parties"[46] but maintaining "freedom of criticism"[47]—breaches the conditions of humanitarian missions.[48] Beigbeder suggests that it

[36] The ICRC was not created by international treaty, qualifies as an NGO under the law of neutral Switzerland, and receives no funding from governments: see Beigbeder (n 2) 64–68.

[37] Mackintosh (n 6) 116.

[38] Note that the ICRC can function as a Protecting Power (a neutral intermediary between belligerent parties in an international (inter-State) armed conflicts (IACs)) if no State is able or willing to do so. See Articles 9, 9, 9, and 10 of the GC/I, GC/II, GC/III, and GC/IV (n 4) respectively; AP/I (n 4) Article 5(4)). The issue lies beyond this article's scope; for further, see Christophe Swinarski, 'La notion d'un organisme neutre' in Swinarski (ed) (n 1) 826–834.

[39] David Chandler, 'The road to military humanitarianism: How the human rights NGOs shaped a new humanitarian age' (2001) 23(3) Human Rights Quarterly 678, 679.

[40] ibid 684.

[41] Jacques Meurant, 'Principes fondamentaux de la Croix-Rouge et humanitarisme moderne' in Christophe Swinarski (ed) *Studies and essays on international humanitarian law and Red Cross principles* (Martinus Nijhoff 1984) 899.

[42] Rony Brauman, 'Médecins Sans Frontières and the ICRC: matters of principle' (2012) 94(888) IRRC 1523, 1524–1525.

[43] Médecins Sans Frontières, 'Who we are – The MSF Charter' <https://www.msf.org/who-we-are> accessed 22 July 2018.

[44] Médecins du Monde, 'Our Fundamentals' <http://www.medecinsdumonde.org/en/our-values> accessed 10 February 2018.

[45] Beigbeder (n 2) 266–267.

[46] Médecins Sans Frontières (n 43).

[47] Chandler (n 39) 685.

[48] Meyer (n 20) 495.

forfeits IHL protection of missions and personnel (though, as will be discussed, relevant personnel should remain entitled to protection as civilians).[49] Conversely, Plattner argues that the *legal* notion of neutral humanitarian assistance is "not dependent on the nature of the body" providing it;[50] if organisations' actions are impartial and non-discriminatory, the act of denouncing does not automatically forfeit IHL protection.[51] Barrat even suggests that, because neutrality was not identified by the ICJ in the *Nicaragua* case as essential to humanitarian assistance, it is not intrinsic to organisations' legitimacy.[52]

In reality, warring parties do not tolerate external medical-humanitarian actors who criticise, even those manifesting Plattner's conception of neutral action. The risk is that government forces might penalise or even attack MNGOs on the pretext that their public denunciations constitute internal interference.[53] In 1984, for example, a French MSF mission had to re-enter Ethiopia clandestinely after being removed for denouncing authorities' forced displacement of rural civilians.[54]

III. The Law on Protection and Access in Armed Conflict

A. The law applicable to armed conflicts

Today's medical-humanitarian NGOs operate amid a complex web of treaty provisions and customary IHL. The laws of war place armed hostilities within a "bifurcated legal framework".[55] International (inter-State) armed conflicts (IACs) are regulated by the Geneva Conventions and their First Additional Protocol (AP/I). Non-international (internal) armed conflicts (NIACs) commonly involve non-State insurgent groups and are regulated by common Article 3 of the four

[49] Beigbeder (n 2) 346–347.

[50] Denise Plattner, 'ICRC neutrality and neutrality in humanitarian assistance' (2006) 36(311) IRRC 161, 178.

[51] ibid 178–179.

[52] Barrat (n 29) 154.

[53] René Jean Dupuy, 'L'assistance humanitaire comme droit de l'homme contre la souveraineté de l'état' in Frits Kalshoven (ed) *Assisting the Victims of Armed Conflict and Other Disasters* (Martinus Nijhoff 1989) 33.

[54] Beigbeder (n 2) 264–265.

[55] Kenneth Watkin, '21st-century conflict and international humanitarian law: Status quo or change?' in Schmitt and Pejic (eds) *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff 2007) 267.

Geneva Conventions and, in certain circumstances, the Second Additional Protocol (AP/II).[56]

Unlike the Protocols, which are not universally ratified, the Geneva Conventions apply to all States. Common Article 3 of the four Geneva Conventions constitutes customary international law,[57] and it is generally accepted that certain rules of IAC-related law have also entered custom,[58] thereby enabling their application in NIACs.[59]

Yet, it is not always clear which provisions apply in a theatre of hostilities. The nature of contemporary conflict is such that some jurists speak of inter-State conflict "as a disappearing if not extinct concept".[60] There have been a few IACs in recent years (notably the 1999 Kosovo campaign and 2003 invasion of Iraq),[61] but most conflicts are NIACs. Moreover, the International Criminal Tribunal for the former Yugoslavia (ICTY) has previously stated that an IAC and NIAC can exist within the same territory.[62] For example, at the time of writing, Syria's armed forces are fighting against a US-led international coalition and various insurgent armed groups.[63]

B. International humanitarian law protection available to medical-humanitarian NGOs

In terms of the cardinal IHL principle of "distinction",[64] former and non-participants in hostilities must be protected from attack (this also extends to civilian

[56] ibid, 267–271. See also ICTY, *Prosecutor v Tadic* (Appeals Chamber) Judgment, IT-94-I-A, 15 July 1999 [84]: the ICTY declared that a NIAC becomes an IAC if "another State intervenes in that conflict through its troops' or 'some of the participants in the [NIAC] act on behalf of that other State".

[57] A "minimum yardstick" reflecting "elementary considerations of humanity": see Nicaragua (n 30) [218].

[58] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, CUP 2016) 16–17: As a general rule, customary international law is applicable to all States. Custom is constituted from State-practice and *"opinio juris"*, that is, the "[States'] belief that this practice is rendered obligatory by the existence of a rule of law requiring it." (See *North Sea Continental Shelf (Federal Republic of Germany/Denmark)* (Merits) [1969] ICJ Rep 3 [44]).

[59] Watkin (n 55) 273.

[60] ibid 269.

[61] ibid 269–270.

[62] ICTY, Tadic (n 56) para 84.

[63] Geneva Academy, 'Syria' (Rule of Law in Armed Conflict Project, 14 February 2018) <http://www.rulac.org/browse/countries/syria> accessed 22 July 2018: "Syria is currently engaged in a series of armed conflicts. First, the Syrian government is engaged in several non-international armed conflicts against a wide array of rebel groups. Secondly, there is arguably an international armed conflict between Syria and members of the US-led international coalition and Turkey."

[64] Dinstein (n 58) 12.

objects).[65] Although this is "intransgressible" under customary law,[66] the protection of MNGO missions and personnel in conflict zones can be unclear. Therefore, the international community has sought in recent years "to improve respect for the normative framework assumed to protect" them.[67] This has yielded introduction of the Red Crystal (a 'culturally neutral' protective emblem, identical in function to the Red Cross and Red Crescent symbols identifying medical personnel *attached to a warring party*) and an Optional Protocol to the Convention on Safety of UN and Associated Personnel.[68] MNGOs can only benefit if their missions are carried out under the aegis of the UN, or qualify for use of a protective emblem by their relinquishing political independence.[69] Those that eschew all such associations, such as MSF, must continue to rely on the far-from-perfect legal protection provided by the Geneva Conventions.[70]

(I) LEGAL PROTECTION DURING INTERNATIONAL ARMED CONFLICTS

During IACs, as a customary rule, volunteers, staff and facilities of impartial humanitarian organisations benefit from general, civilian immunity from attack.[71] MSF has previously suggested that its volunteers and staff qualify for additional protection as "civilian medical personnel",[72] and that "IHL protects the legal autonomy of the medical mission within the mandatory rules of medical ethics pertaining to that profession".[73] Of course, if the relevant belligerent State authorises the medical mission, MNGOs should have no need to claim this 'supplementary' protection: belligerent parties are obligated to "respect and protect" medical-humanitarian missions' units, transport and personnel.[74]

However, for MNGO personnel in the hands of a warring party, IHL is less straightforward: protection turns on the individual's nationality.[75] The Fourth Geneva Convention provides protection according to non-combatant status, but

65 ibid 72.

66 *Advisory Opinion on the Legality of the Threat or use of Nuclear Weapons* [1996] ICJ Rep 2.

67 Mackintosh (n 6) 113.

68 ibid 113–114.

69 ibid 113, 124–125.

70 Note that MNGO personnel are also entitled to protection under international human rights law, e.g. the right to life (Article 6) and freedom from torture (Article 7) of the ICCPR (International Covenant on Civil and Political Rights 1966 (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171).

71 Mackintosh (n 6) 118.

72 Françoise Bouchet-Saulnier, 'Coutume: espace de création et d'activisme pour le juge et pour les organisations non-gouvernementales' in Tavernier and Henkaerts (eds) *Droit international humanitaire coutumier: Enjeux et défis contemporains* (Bruylant 2008) 169, cited in Barrat (n 29) 191.

73 Françoise Bouchet-Saulnier, 'Consent to humanitarian access: An obligation triggered by territorial control, not States' rights' (2014) 96(893) IRRC 207, 212–213.

74 AP/I (n 4) Articles 9(2)(c), 12(2), and 71.

75 Mackintosh (n 6) 118–119.

largely covers "civilians in the hands of the adversary"[76]—nationals of an "enemy State", or a country without diplomatic ties with that State.[77] As Mackintosh notes, MNGOs looking to preserve their neutrality and impartiality might (like the ICRC) send only non-nationals of State-parties to the conflict, but those volunteers would have next to no protection under the Fourth Convention (excepting the diplomatic representation caveat).[78] The alternative—sending relief workers who *are* nationals of a warring State—guarantees Fourth Convention protection, but jeopardises the MNGO's perceived neutrality[79] (note, however, that *all* MNGO personnel qualify for the more limited protection under Article 75 of the first Additional Protocol, which provides that persons who, when under a belligerent Party's power, do not "benefit from more favourable treatment under the Conventions… shall be treated humanely in all circumstances").

Meanwhile, protection for MNGO personnel acting as *civilian medics* theoretically stems from belligerents' "basic obligations to respect the wounded and sick".[80] The wounded and sick must either be civilians or persons placed *hors de combat* who "refrain from acts of hostility".[81] The first Additional Protocol states that "[n]o one shall be harmed, prosecuted, convicted or punished for… humanitarian acts", nor "punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom".[82]

(II) LEGAL PROTECTION DURING NON-INTERNATIONAL ARMED CONFLICTS

All NIACs are covered by common Article 3 of the four Geneva Conventions.[83] Whether internal armed violence constitutes a NIAC thereunder is established "on a case-by-case basis".[84] Generally, hostilities must reach a certain level of 'intensity', with non-State armed groups constituting organised armed forces in possession of a command structure, and with the capacity to conduct military operations.[85] The threshold for applying the Second Protocol is significantly higher: a government's armed forces must be involved, and the non-State adversary must exercise "such

[76] Roberts and Guelff (n 4) 299.
[77] Article 4 GC/IV; Mackintosh (n 6) 119.
[78] Mackintosh (n 6) 119.
[79] ibid.
[80] Alexander Breitegger, 'The legal framework applicable to insecurity and violence affecting the delivery of health care in armed conflicts and other emergencies' (2013) 95(889) IRRC 83, 107–108. See also GC/I (n 3) Article 12 and GC/II (n 4) Article 12; GC/IV (n 4) Article 16; AP/1 (n 4) Article 16.
[81] AP/I (n 4) Article 8(a).
[82] AP/I (n 4) Articles 17(1) and 16(1).
[83] Dinstein (n 12) 20.
[84] ICTR, *Prosecutor v Rutaganda* (Trial Chamber) Judgment, ICTR-96-3-T, 6 December 1999 [95].
[85] ICTY, *Prosecutor v Tadic* (Trial Chamber) Judgment, IT-94-1-T, 7 May 1997 [561]–[568].

control over a part of [the State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[86]

The *level* of territorial control required for an armed group to implement the second additional Protocol is a matter of debate. The International Criminal Tribunal for Rwanda (ICTR) in *Akayesu* held that insurgents "must be able to dominate a *sufficient* part of the territory so as to" conduct military operations and implement the Protocol.[87] The deciding factor is quality, not quantity,[88] that is, "effective territorial control".[89]

MNGO personnel, as non-combatants, should fall within the protective scope of common Article 3 of the four Geneva Conventions. In NIACs occurring within a State-party to the second Additional Protocol, such protection is enhanced by Article 4 and includes, *inter alia*, prohibitions on "violence to life [and] health" and "outrages upon personal dignity". Volunteers should be also protected because they tend the wounded and sick;[90] they cannot be punished for medical activities.[91] In theory, this should apply even when authorisation to the mission has not been granted in accordance with Article 18 of the second Additional Protocol. Volunteers detained by a warring party are owed humane treatment, regardless of nationality.[92]

(III) LOSS OF PROTECTION FOR A MEDICAL-HUMANITARIAN NGO'S PERSONNEL

Civilian medical personnel lose their IHL protection by committing an act outside their humanitarian function or which could "harm the adverse party, by facilitating or impeding operations".[93] Crucially, MNGOs should guard against

[86] AP/II (n 4) Article 1(1).

[87] *Prosecutor v Akayesu* (Trial Chamber) Judgment, ICTR-96-4-T, 2 September 1998 [626].

[88] Sandesh Sivakumaran, *The Law of Non-international Armed Conflict* (OUP 2012) 186; Dinstein (n 12) 45.

[89] Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 163.

[90] AP/II (n 4) Article 7.

[91] AP/II (n 4) Article 10.

[92] AP/II (n 4) Article 5.

[93] ICRC, Commentary to Article 21 of the GC/I (n 4) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=859FF3DB19BCAC7BC12563CD-00420FE1> accessed 22 July 2018.

actions which might threaten belligerents' perception of their impartiality and neutrality.[94]

IV. Case Studies: Problems of Access and Protection for Medical-Humanitarian NGOs in Non-International Armed Conflicts

Despite the range of legal protections available in IACs, it is submitted that NIAC-related law provides relatively scant protection, thereby posing a great challenge to MNGOs operating in the context of internal conflict. This is exacerbated when a warring party arbitrarily withholds consent to external assistance, as the following two case-studies will show.

A. When the territorial armed group consents to external medical aid, but the state does not

Entering territory under the *de facto* control of a non-State armed group without State consent has led to medical humanitarians being accused of 'siding' with rebels, such that their impartial status is deemed lost. During the Biafra conflict (1967–1970), for example, the ICRC defied the Nigerian Government's demand for aid to be transported through land corridors. When an unauthorised ICRC relief plane was shot down over Nigerian airspace, the Government accused the organisation of acting as "an agent for the [Biafra] secessionists".[95] More recently, MSF has been engaged in humanitarian missions in war-torn Syria. The Government repeatedly has refused to authorise the MNGO's work, criminalising any medical activity outside of government control.[96] Nevertheless, in 2012, MSF clandestinely opened a newly-built medical centre in the rebel-held north, smuggling equipment into the territory from neighbouring countries.[97] The MNGO maintained that its missions were valid under *international* law: "Maybe we were illegal for the Syrian regime, but at least we were legitimate".[98]

As noted above, the second Additional Protocol does not apply to all NIACs. When considering 'no-borders' MNGOs' access to a non-consenting State's

[94] For further discussion, see Breitegger (n 80) 110–111.

[95] Sivakumaran (n 88) 334.

[96] Kareem Shaheen, 'MSF stops sharing Syria hospital locations after "deliberate" attacks' *The Guardian* (London, 18 February 2016) <https://www.theguardian.com/world/2016/feb/18/msf-will-not-share-syria-gps-locations-after-deliberate-attacks> accessed 22 July 2018.

[97] Ruth Sherlock, 'Syria: Médecins Sans Frontières' secret hospital' *The Daily Telegraph* (London, 21 August 2012) <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9490764/Syria-Medecins-Sans-Frontieres-secret-hospital.html> accessed 22 July 2018; Tahhan (n 26).

[98] Tahhan (n 26).

sovereign territory, it is important to recall the differing legal protection when the State is not a party to this Protocol.

(I) TERRITORY OF A STATE WHICH HAS NOT RATIFIED ADDITIONAL PROTOCOL II

In territory controlled by non-State adversaries, there is a "divergence of views" regarding consent to humanitarian missions.[99] Common Article 3(2) of the four Geneva Conventions states that an "impartial humanitarian body… may offer its services to the Parties to the conflict"; this 'right of initiative' clearly also applies to MNGOs.[100] However, there is no provision as to *which* Party's consent is needed.[101] On the one hand, various jurists consider that humanitarian operations can be authorised by a non-State Party, provided that the territory it effectively controls can be accessed without entering onto that controlled by the non-consenting government.[102] Such was MSF's interpretation of IHL applicable to the Syrian conflict in the context of medical personnel's direct cross-border entry into rebel-held territory. And, as Syria is not party to the second Additional Protocol,[103] only common Article 3 would apply to MSF missions in a NIAC context. Conversely, Akande and Gillard indicate that common Article 3(2) cannot be interpreted to mean that *other States* may undertake humanitarian missions without State-party consent, as this would entail "the significant infringement of territorial sovereignty".[104] NGOs, as private actors, cannot be bound by the cardinal international law principles of sovereignty and territorial integrity[105]—an explanation which Bouchet-Saulnier offers as a possible reason for the Syrian government's manipulation of "domestic legal provisions converting medical relief into a weapon of war".[106]

[99] Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict, (The United Nations Office for the Coordination of Humanitarian Affairs and Oxford University*, October 2016) 16 <https://www.law.ox.ac.uk/content/oxford-guidance-law-relating-humanitarian-relief-operations-situations-armed-conflict> accessed 22 July 2018.

[100] Maurice Torrelli, 'From humanitarian assistance to "intervention on humanitarian grounds"?' (1992) 32(288) IRRC 228, 231.

[101] Akande and Gillard (n 99) 16.

[102] See, for example, Michael Bothe, 'Relief Actions: The position of the recipient state' in Frits Kalshoven (ed) *Assisting the Victims of Armed Conflict and Other Disasters* (Martinus Nijhoff 1989) 94; Torrelli (n 100) 233–234; Bouchet-Saulnier (n 73) 210–211.

[103] ICRC Database, Parties to Protocol II <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475> accessed 22 July 2018.

[104] Akande and Gillard (n 99) 17.

[105] Ryngaert (n 13) 12–13.

[106] Bouchet-Saulnier (n 73) 213.

(II) TERRITORY OF A STATE-PARTY TO ADDITIONAL PROTOCOL II

For medical-humanitarian missions undertaken in the territory of a party to the second Additional Protocol, the question of State consent is even murkier. Article 18(2) states:

> If the civilian population is suffering undue hardship owing to a lack of supplies essential for its survival… relief actions for the civilian population which are of an exclusively humanitarian nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party *concerned* [emphasis in italics added].

A literal reading suggests that a State's consent is *always* necessary for aid provision throughout its territory: it is 'concerned' by any humanitarian mission occurring there.[107] According to Sivakumaran, this renders the consent obtained from rebel groups insufficient because of the "insufficient attention paid to the specificities" of NIACs during the Protocol drafting process.[108] Consent from such insurgents exercising *de facto* control over State territory, in his view, is clearly a practical necessity for humanitarian actors.[109] And Bothe *et al* suggest that, as a State cannot be 'concerned' by operations occurring in territory over which it has no effective control, humanitarians may enter rebel-held territory provided they do not cross that of the State (as argued above in relation to common Article 3 of the four Geneva Conventions).[110]

Gillard challenges this interpretation of Article 18(2) of the second Additional Protocol, arguing that the decision to remove the phrase "*the party or parties concerned*" from the final draft demonstrated States' intention to exclude rebel groups from having power to consent.[111] However, Gillard does not analyse the silence of Article 18(2) of the second Additional Protocol on the legal status of humanitarian actors. It is submitted here that the provision implicitly refers to external relief provided by *States*. The Commentary reflects this: consent is not solely "left to the discretion

[107] Akande and Gillard (n 99) 17.

[108] Sivakumaran (n 88) 332.

[109] ibid.

[110] Michael Bothe, Karl Josef Partsch and Waldermar Solf, N*ew Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) 694.

[111] Emanuela-Chiara Gillard, 'The law regulating cross-border relief operations' (2013) 95(890) IRRC 351, 365–366.

of the parties".[112] "Relief actions must take place" in territory where civilians are "suffering undue hardship"[113] if an impartial humanitarian organisation "is able to remedy this situation".[114] On this interpretation, MNGO missions qualify for protection under the second Additional Protocol in armed groups' territory—even in the absence of State consent.

No clear solution exists for MNGOs operating in rebel-held territory without State authorisation; they must stake their safety on warring parties interpreting relevant IHL norms in good faith, respecting civilian and medical-humanitarian immunity. To complicate matters further, MNGOs like MSF insist on adherence to *medical* neutrality. If the needs of a wounded combatant are greatest, s/he will be treated first.[115] In light of the 'civilians-only' stipulation of Article 18(2) of the second Additional Protocol, a warring State-party to the Second Protocol might deem an MNGO's impartiality and neutrality defunct on learning of enemy combatants being treated.

B. When the territorial armed group does not consent to external medical aid

Without an armed group's consent to external humanitarian assistance, it is almost impossible for an external MNGO to carry out unauthorised missions in territory under that group's effective control. In such circumstances, the humanitarian toll can be staggering. Between 2012 and 2016, for example, Syrian government forces besieged and bombarded rebel-held Darayya. Without access to humanitarian assistance (to which neither side consented),[116] approximately

[112] International Committee of the Red Cross, Commentary to the Additional Protocols, para 4885 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=086657E594BB4CC2C12563CD0043ADD0> accessed 22 July 2018.

[113] AP/II (n 4), Article 18(2).

[114] Commentary to the Additional Protocols (n 112), para 4885.

[115] A senior MSF staff-member has criticised States for challenging medics' "right and duty to treat everyone, including combatants": see Kareem Shaheen, 'Hospitals are now targets of war, says Médecins Sans Frontières' *The Guardian* (London, 1 June 2016) <https://www.theguardian.com/world/2016/jun/01/hospitals-are-now-normal-targets-of-war-says-medecins-sans-frontieres-adviser> accessed 22 July 2018.

[116] ICRC, 'Syria: Aid convoy turns back after being refused entry to besieged Daraya: Joint statement by the ICRC and the UN' (ICRC, 12 May 2016) <https://www.icrc.org/en/document/aid-convoy-turns-back-after-being-refused-entry-besieged-daraya>; UN News Centre, 'Syria: UN Agencies Reach Families with Food in the Besieged Town of Darayya' (9 June 2016) <http://www.refworld.org/docid/575e59e940c.html> accessed 22 July 2018.

8,000 civilians were trapped without adequate food or medicine, with dozens dying through starvation or illness.[117]

(I) FEASIBILITY OF THE EXTENSION OF THE LAW OF BELLIGERENT OCCUPATION TO TERRITORIES CONTROLLED BY ARMED GROUPS

Clearly, for a population no longer under a State's *de facto* control, the legal protection-gap is significant within the context of a NIAC. As a somewhat radical solution, Gal has proposed extending norms of the international law of belligerent occupation to territory under insurgents' effective control.[118] Occupation law—a 'branch' of the laws of war[119]—currently regulates only IAC situations in which one State's armed forces take effective control of territory in an enemy State after "combat stabilizes along fixed lines … not coinciding with the original international frontiers".[120] Principally, this legal regime regulates "a trilateral relationship between the Occupying Power, the displaced sovereign and the civilian population of the occupied territory".[121] Its "cornerstone"[122] is constituted by the 1907 Hague Regulations[123] (now part of customary international law). Article 42 of the Regulations provides: "[T]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

For civilians in occupied territory, specific provisions of the Fourth Geneva Convention and First Protocol guarantee "enhanced protection",[124] including a suite of obligations on the Occupying Power regarding humanitarian assistance.[125] Crucially, the law of occupation obviates the requirement of consent to external humanitarian assistance.[126] Article 59 of the fourth Geneva Convention imposes

[117] Hugh Naylor, 'In a Syrian town under a brutal siege, a young girl is left deaf and hopeless' *Washington Post* (Washington DC, 20 June 2016) <https://www.washingtonpost.com/world/middle_east/in-a-syrian-town-under-a-brutal-siege-a-young-girl-is-left-deaf-and-hopeless/2016/06/19/d65ccbc0-27e5-11e6-8329-6104954928d2_story.html?utm_term=.31e078d48413> accessed 22 July 2018.

[118] Tom Gal, 'Territorial control by armed groups and the regulation of access to humanitarian assistance' (2017) 50(1) Israel Law Review 25, 27.

[119] Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 3.

[120] ibid 1.

[121] ibid.

[122] ibid 4–6.

[123] Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV) 1907 (adopted 18 October 1907, entered into force 26 January 1910).

[124] Dinstein (n 119) 6–7.

[125] ibid 194.

[126] GC/IV (n 4), Article 59.

an "unconditional"[127] obligation on the Occupying Power to grant access and protection to humanitarian relief for the civilian population if the territory is "inadequately supplied".[128] The occupant should be informed of planned missions, but consent (or lack thereof) is irrelevant. Gal suggests that these provisions could apply, *mutatis mutandis*, to territory under the effective control of non-State actors.[129] She argues that had occupation law extended to insurgents and applied to Darayya, the rebels' effective control would have obliged them to admit aid into the city. Syrian government authorities would also have been obliged to provide safe passage for aid convoys transiting through government-controlled territory.[130] In theory, since Article 59 permits "impartial humanitarian organisations" to provide assistance, MNGOs would be able to undertake missions in this context.

However, this thesis is arguably not without doctrinal obstacles. Occupation law applies only to territory controlled by an enemy *State* during an IAC.[131] Common Article 2(2) of the four Geneva Conventions requires that relevant Convention (and, now, first Additional Protocol) provisions apply to territory occupied during *international* conflict. In its *Wall* Opinion, the ICJ also confirmed the law's application to "territory occupied… by one of *the contracting parties*".[132] Consequently, it seems legally impossible to extend the occupation regime to NIACs.[133]

Yet, Gal argues that the "factual circumstances" of armed groups' territorial control should transcend the law's preoccupation with such groups' legal status or with State sovereignty.[134] The notion of effectiveness in international law can cause "a factual situation [to] strongly affect legal norms",[135] as the ICTY recognised: "[IHL] is a realistic body of law, grounded on the notion of effectiveness… [it] holds accountable not only those having formal positions of authority but also those who wield *de facto* power".[136] In short, since the effective control required of a State for occupation law to apply is analogous to that required of insurgents to

[127] ICRC, Commentary on GC/IV (n 4), Article 59 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15B5740DF2203BE4C12563CD0042C966> accessed 22 July 2018.

[128] GC/IV (n 4), Article 59.

[129] Gal (n 118) 27.

[130] Nevertheless, the authorities would have had the right to inspect aid consignments, to be 'reasonably satisfied' that relief provided to Darayya's civilian population would not 'be used for the benefit' of enemy belligerents (GC/IV (n 4), Articles 59(3)–(4)).

[131] Barber (n 9) 384–385.

[132] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* [2004] ICJ Reports 136 [95] (emphasis added).

[133] Torrelli (n 1) 599.

[134] Gal (n 118) 27.

[135] ibid 40.

[136] ICTY, *Prosecutor v Tadic* (Appeals Chamber) Judgment, IT-94-1-A, 15 July 1999 [96].

trigger the Second Protocol's application to (relevant) NIACs,[137] Gal suggests that extending occupation law to such internal conflicts would reflect "the spirit of this body of law", ensuring that "political aspirations and interests will not diminish the rights and needs of victims of war".[138]

Reference to the ICJ's *Wall Advisory Opinion* is absent from Gal's analysis. Perhaps her proposition is more in tune with academic support for extending occupation law to UN-controlled territory.[139] In this, Roberts observes that UN forces and non-State armed groups are similar: IHL treaties apply to them, even though they are not party thereto.[140] Common Article 3[141] of the four Geneva Conventions and Article 1(4) first Additional Protocol[142] already expressly cite armed groups as *addressees* of IHL. Ferraro notes not only that various UN peacekeeping and enforcement missions have exercised "functions and powers over a territory that could be compared to those assigned to an occupant under occupation law",[143] but also that the law of occupation is arguably "the only body of law capable of addressing the tension between the suspended sovereign and the new administering authority",[144] thereby facilitating continued civilian protection. Gal's argument about insurgent groups also reflects that of a panel of ICRC experts who agreed that UN forces' *effective control* of territory would be the key factor in applying occupation law.[145]

(II) Arguments against "extending" the law of belligerent occupation to rebel-held territory during non-international armed conflict

First, any *legal* solution such as Gal's would have little traction with States. It may well be that "[i]nternational reality… is less and less state-centred",[146] but there is still little or no incentive for States to extend occupation law to insurgent-controlled territory. Despite the enhanced protection guarantees for civilians,

[137] Gal (n 118) 42; Bothe (n 102) 94.
[138] Gal (n 118) 47.
[139] Adam Roberts, 'What is a military occupation?' (1985) 55(1) BYIL 249, 289.
[140] ibid.
[141] Sassòli (n 11) 63.
[142] This provision refers to national liberation movements 'fighting against colonial domination', 'alien occupation' and/or 'racist régimes'. The full raft of GC and AP/I (n 4) provisions apply to such conflicts. See Gal (n 118) 38–39, 43–44.
[143] Tristan Ferraro (ed), 'Expert meeting: Occupation and other forms of administration of foreign territory' (ICRC, March 2012) 33 <https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf> accessed 22 July 2018.
[144] ibid.
[145] ibid.
[146] Sassòli (n 11) 63.

States would likely baulk at insurgents' acquiring any status which might lend them administrative legitimacy, for the Occupying Power is permitted, in occupation law, to exercise its jurisdiction and conduct itself as "substitute for the legal sovereign".[147] It is simply not credible that Iraq or Syria, for example, would have accepted the extension of occupation law to parts of their territory controlled by so-called Islamic State.[148]

Secondly, an occupying power's territorial control can fluctuate, both in terms of effectiveness and geography. Dinstein notes that "loss of effective control as a result of defeat in the field may not last long, inasmuch as the pendulum of military ascendancy in war may swing again in the opposite direction".[149] One seasoned MSF aid-worker has compared the realities of the Syrian conflict with power struggles between insurgents and State forces in Mali:

> Timbuktu is emblematic of the need for impartial care as front lines shift… If one of our Syrian hospitals currently located in a rebel-controlled area would end up being located in government-held territory… our medical support would be… valuable for them…[150]

Whilst such a scenario has the potential to disrupt MNGOs' work, Gal's proposed NIAC scenario might engender even greater uncertainty.[151] An armed group's loss of effective territorial control would precipitate the loss of occupation protection guarantees to medical-humanitarian missions,[152] replacing them with the relative paucity of protection available in the law relating only to NIACs, and compromise the ability of MNGO personnel to establish medical facilities and enjoy free operational movement within the territory. The risk would be exacerbated by belligerent occupation, like armed conflict, being a question of

[147] Gal (n 118) 37.

[148] 'Islamic State and the crisis in Iraq and Syria in maps' *BBC* (London, 28 March 2018) <http://www.bbc.co.uk/news/world-middle-east-27838034> accessed 22 July 2018.

[149] Dinstein (n 119) 272; GC/IV (n 4), Article 70(1).

[150] Delaunay (n 25) 3.

[151] Gal notes that the International Criminal Court (ICC) referred to armed groups' control of Timbuktu as an 'occupation'; she interprets this as attaching 'further international obligations' to the insurgents. (See above, n 118, 46). Nevertheless, it is submitted here that the Court used "occupation" as a *non-legal* descriptor. See ICC, *Prosecutor v Ahmad Al-Faqi Al-Mahdi*, Decision on the Confirmation of Charges, ICC-01/12-01/15, Pre-Trial Chamber, 24 March 2016, [44]–[45], [55].

[152] An Occupying Power is obliged to permit 'medical personnel of all categories… to carry out their duties' and to respect and protect new hospitals established in the territory, in additional to medical convoys/transport. Civilian medics must be given 'every assistance'. See GC/IV (n 4) Articles 18, 20, 21, 56; AP/I (n 4) Article 15(3)

fact.[153] Even if an armed group respected the law of occupation, its analysis of events on the ground could diverge dramatically from that of the sovereign State or humanitarian organisation. This *ex post facto* determination of occupation—"whether this degree of control was established at the relevant times and in the relevant places"[154]—offers little consolation for medical-humanitarians whose IHL protection waxes and wanes with a NIAC's shifting contours.

V. Beyond International Humanitarian Law: Exploring Legal-Protection Options

Preventing or alleviating human suffering is a fundamental principle of IHL.[155] No-borders MNGOs, seeking to uphold that principle through medicine, venture into conflict zones despite decades of mistreatment of their personnel. Most of the international community has progressed from dismissing these organisations as "mercenaries in white coats",[156] but States remain ambivalent about granting them enhanced protections. Like armed groups, MNGOs are now key players in situations of armed conflict, but they remain "largely non-existent for international law".[157]

The requirement of State consent to external assistance in IHL remains the principal doctrinal (and practical) obstacle to protection for MNGOs in conflict zones. As Dinstein observes, "as long as consent is essential… authorities can usually find plausible excuses for delaying humanitarian assistance, and even for frustrating it altogether".[158] It is submitted, therefore, that the limits of IHL protection have been reached. MNGOs unwilling either to put up with States' arbitrary withholding of consent or to work under the aegis of UN or third-party States' military personnel, brave warring parties' capricious observance of IHL. Whilst jurists endeavour to develop new approaches in this area (as examined above), that corpus of law remains mired in States' competing interests.

This does not mean, however, that the need for greater legal protection has gone unnoticed by the international community. Various Resolutions of the

[153] Tristan Ferraro, 'Determining the beginning and end of an occupation under international humanitarian law' (2012) 94(885) IRRC 133, 134–135.

[154] ICTY, *Prosecutor v Naletilić & Martinović* (Trial Chamber) Judgment, IT-98-34-T, 31 March 2003 [218].

[155] Dupuy (n 53) 29.

[156] Torrelli (n 1) 600.

[157] Sassòli (n 11) 63.

[158] Yoram Dinstein, 'The right to humanitarian assistance' (2000) 53(4) Naval War College Review 77, 85.

Council of Europe and the UN Security Council[159] have addressed different aspects of international law in this regard. Time and again, however, there has been little or no meaningful progress, principally because, on a practical level, the provisions have been piecemeal and have not thoroughly dealt with rights of access and State consent. The final section of this article reflects on the merits and shortcomings of legal-protection options which have been proposed for MNGOs over the years.

A. Early draft instruments

At a Council of Europe conference in 1984, a draft Charter for the Protection of Medical Missions was proposed.[160] Several 'no-borders' MNGOs initiated the project, seeking recognition by States of the dangers faced by medical-humanitarian personnel in conflict zones.[161] The draft Charter reaffirmed several IHL norms (including the proscription of punishment for medical activities, respect for medical ethics, and free operational movement within a territory), and formulated various rights and obligations for civilians and medical humanitarians alike.[162] These included the right of civilians to be treated by competent medical professionals, the right of medical personnel to protection during missions, and the creation of an identifiable symbol or professional badge, to be ascribed by the ICRC.[163]

In the wake of this Charter proposal, the Council of Europe produced Resolution 904 (1988) "on the protection of humanitarian medical missions". A non-binding legal document, it advocated a rights-based approach to healthcare provision,[164] decreeing that "unrestricted exercise of the right to care implies a *duty of solidarity* among all states of the world".[165] Notably, it deemed the prevailing IHL protections inadequate (especially for medical volunteers not working for the ICRC or a State), and advocated that a UN 'charter' for medical-humanitarian

[159] See, for example, UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296; UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139; UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127.

[160] Jean-Jules Fiset, 'Les privilèges et immunités humanitaires' (1997) 38(1) Les Cahiers de droit 119, 135; Beigbeder (n 2) 347.

[161] Beigbeder (n 2) 347; Fiset (n 160) 135.

[162] Beigbeder (n 2) 348.

[163] ibid.

[164] Council of Europe Resolution 904 (1988) "on the protection of humanitarian medical missions", para 2.

[165] ibid para 3 (emphasis added).

missions be "given the same universal recognition".[166] In short, the rights and responsibilities suggested for relevant personnel were largely similar to those being demanded by no-borders MNGOs at that time.[167]

Beigbeder describes the Council of Europe Resolution as "a constructive compromise between the traditional values and practices of the Red Cross, and the more activist and impatient demands of the 'no-border' Movement leaders".[168] The document, however, did not answer two key questions. The first regards the nature of an international body which could ascertain MNGOs' fulfilment of the requisite principles of humanitarianism, impartiality and neutrality.[169] Beigbeder suggests creating a "specific body of international, independent health-specialists for this purpose… in close consultation with the ICRC".[170] This would serve to allay fears of undue political influence being wielded by wealthy, powerful States. The second question regards the rights of access to a warring State's territory. The Resolution does not mention issues surrounding consent to international assistance, nor whether the duty of solidarity[171] imposed on States would necessitate unimpeded access to MNGOs fulfilling internationally established criteria.

B. Proposed privileges and immunities for medical-humanitarian personnel

As the law stands, IHL protection does not accord personal privileges to medical-humanitarian personnel but is a by-product of protection guaranteed towards vulnerable civilians.[172] Fiset suggests, therefore, that an international convention be drafted specifically to grant MNGOs certain legal privileges and immunities. The latter idea is not novel insofar as it concerns humanitarian personnel. In 1971, for example, the UN General Assembly called for governments of States receiving humanitarian assistance "[t]o consider appropriate legislative

[166] ibid para 11.
[167] ibid Appendix.
[168] Beigbeder (n 2) 351.
[169] ibid.
[170] ibid.
[171] Council of Europe Resolution (n 164) para 11.
[172] Mackintosh (n 6) 117–118.

or other measures to facilitate the receipt of aid, including… necessary privileges and immunities for relief units".[173]

Fiset contends that, in emergency situations, medical-humanitarians should have clear-cut, *functional* privileges[174] such as a 'right' of entry to a State whose population requires emergency assistance, a right to help victims, jurisdictional immunity, and guarantees of protection from attack.[175] These would be in line with the concept of '*l'intérêt de la fonction*',[176] through which diplomats[177] and UN personnel[178] enjoy immunities and privileges requisite to their function.

The catalyst for Fiset's proposition is MNGOs' apparent lack of international status relative to their operational needs.[179] He suggests that such a status be established to safeguard the "interests of humanity".[180] However, international status cannot attach to medical-humanitarian personnel *in abstracto*. Their function in conflict zones derives from the mission itself—a mission mandated by a private MNGO which does not currently have international status equivalent to the UN or sovereign States. Mindful of this, Fiset posits the option of legal personality for relevant organisations.[181] He does not, however, elaborate on how the requisite personality might be negotiated. This question is further investigated below.

C. Could medical-humanitarian NGOs have international legal personality?

An "entity" with international personality has "legal rights and/or obligations and legal capacities directly conferred on it under international law".[182] International law emanates "from state will",[183] with States remaining its primary

[173] UNGA Res 2816, 'Assistance in Cases of Natural Disaster and Other Disaster Situations' (6 December 1971) UN Doc A/RES/2816.
[174] Fiset (n 160) 145–146.
[175] ibid 151, 156–160.
[176] ibid 144–145.
[177] See Vienna Convention on Diplomatic Relations (adopted 14 April 1961, entered into force 24 April 1964) 500 UNTS 95.
[178] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI Article 105.
[179] Fiset (n 160) 122.
[180] ibid 146–147.
[181] ibid 151.
[182] Christine Bakker and Luisa Vierucci, 'Introduction: a normative or pragmatic definition of NGOs?' in Dupuy and Vierruci (eds) *NGOs in International Law: Efficiency in Flexibility?* (Edward Elgar 2008) 1.
[183] Roland Portmann, *Legal Personality in International Law* (CUP 2010) 83.

subjects.[184] In recent decades, it has been contended that international personality can derive from States' explicit or implicit recognition.[185] Consistent with this, the ICJ has observed that "subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights".[186]

Dominicé harnesses this 'recognition conception' to argue that the ICRC has international legal personality.[187] The ICTY confirmed the ICRC's capacity to hold international rights and obligations,[188] noting it had "functions and tasks… directly derived" from the Geneva Conventions (its mandate) ratified by 188 States (its 'recognition').[189] The ICRC is unique: it is a private legal association referred to by jurists as a 'hybrid' or *sui generis* organisation that is neither NGO nor intergovernmental organisation, since its mandate stems from international law.[190]

Whether NGOs can have international legal personality is another question altogether.[191] There may be no academic consensus about their eligibility as potential international subjects,[192] but in "fields of international concern"—once dominated by States—NGOs are increasingly active, no matter the "limited legal regulation of such participation".[193] It is therefore submitted that, by elaborating some formal status for MNGOs, States could more easily "require them to comply with certain international standards",[194] thereby reducing the likelihood of accusations of partiality or of helping 'the enemy'.

Some jurists argue that the international community should adopt a "more flexible recognition of the role played by NGOs in the international legal order… without attempting to place them in a fixed legal framework".[195] This would perhaps be more appropriate for MNGOs such as MSF, which perceive the legal constrictions placed upon the ICRC in humanitarian crises as burdensome. The

[184] Barrat (n 29) 195.
[185] Portmann (n 183) 83–84.
[186] *Advisory Opinion Concerning Reparations for injuries suffered in the service of the United Nations* [1949] ICJ Rep 174 [178].
[187] Christian Dominicé, 'La personnalité juridique internationale du CICR' in Christophe Swinarski (ed) *Studies and essays on international humanitarian law and Red Cross principles* (Martinus Nijhoff 1984) 668–672.
[188] ICTY, *Prosecutor v Simic et al.* (Trial Chamber) Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the Testimony of a Witness, IT-95-9, 27 July 1999 [46].
[189] ibid.
[190] Barrat (n 29) 198–199; Bothe (n 102) 95.
[191] Barrat (n 29) 207–208.
[192] ibid 207.
[193] Bakker and Vierucci (n 182) 6.
[194] Sassòli (n 11) 63.
[195] Bakker and Vierucci (n 182) 6.

ICRC, as "promoter and guardian" of the Geneva Conventions,[196] operates "without exception… with the consent of the parties to the conflict", invoking "legal mandate when reminding them of their obligations",[197] rather than entering territory unauthorised and risking accusations of breached neutrality.

Under the 'flexible' form of international status, NGOs could be granted rights and responsibilities "on a case-by-case basis" if such an approach were 'functional' to the pursued objective.[198] To ascertain an NGO's functional sufficiency, Thuerer advocates recourse to the legal maxim, *ubi societas, ibi ius*[199]—'wherever there is society, there is law'.[200] From this mutual dependence of 'society' and 'law' in international law comes an international society of States encapsulating "the facts of international life".[201] Whilst Dominicé suggests that the ICRC's international "legal consecration" reflects its moral authority as "servant of the suffering",[202] Sandoz has a more pragmatic explanation: the ICRC forced open the doors of the international legal system because it corresponded to international society's *needs at that time*.[203]

This begs the question: does the medical-humanitarian role of 'no-borders' MNGOs in armed conflict correspond with *contemporary* international society's needs, such that States should afford them rights and responsibilities to succour the most vulnerable? As already seen, States jealously guard their territorial sovereignty in times of war. And as "the public sphere has [long] been represented entirely by

196 Rotem Giladi, 'The utility and limits of legal mandate: humanitarian assistance, the International Committee of the Red Cross and mandate ambiguity' in Andrej Zwitter, Christopher Lamont, Hans-Joachim Heintze and Joost Herman (eds) *Humanitarian Action: Global, Regional and Domestic Legal Responses* (CUP 2015) 83.

197 ibid 99.

198 Bakker and Vierucci (n 182) 6.

199 Daniel Thuerer, 'The emergence of non-governmental organizations and transnational enterprises in international law and the changing role of the State' in Rainer Hofmann (ed) *Non-State Actors as New Subjects of International Law* (Duncker & Humblot 1999) 91, cited in Bakker and Vierucci (n 182) 7.

200 Aaron X Fellmeth and Maurice Horwitz, Guide to Latin in International Law (OUP 2009).

201 Jesse Reeves, 'International society and international law' (1921) 15(3) AJIL 361, 368.

202 Dominicé (n 187) 673.

203 Yves Sandoz, 'Le droit d'initiative du Comité international de la Croix-Rouge' (1979) 22 German Yearbook of International Law 352, 371.

the state",[204] Allott observes that international society is a fundamentally "unsocial world".[205]

Nevertheless, Westphalian conceptions of sovereignty and non-intervention[206] are coming under increasing scrutiny.[207] Legal equality among sovereign States holds firm,[208] but there is momentum for "increasing balance… between the rights of sovereign states and the rights of the people who make up their populations".[209] NGOs' role in 'international *civil* society'—a phenomenon, according to Cullen and Morrow, evidencing "the socialisation of international law"[210]—further shapes these 'facts of international life'. What emerges is an increasingly moral, *meta-juridical* basis for MNGOs' arguments when urging States to compromise for the sake of victims' human rights.[211] And, as argued by Judge Ammoun of the ICJ, there is a risk that international law, "in rejecting the moral, social and political elements, described as meta-juridical, [will] become isolated from international realities and their progressive institutions: *ubi societas, ibi ius*".[212]

It is therefore submitted that Thuerer's proposed functional framework would evidence MNGOs' eligibility for international legal status. Just as international law accommodated the already-existent ICRC after that organisation's utility became clear, so too could States recognise MNGOs' unique position in the humanitarian arena, especially given their willingness to tend to civilians who remain inaccessible to State or UN aid agencies. Such a legal development would complement both Fiset's approach to granting legal immunities and privileges, and the "general

[204] Holly Cullen and Karen Morrow, 'International civil society in international law: The growth of NGO participation' (2001) 1 Non-State Actors and International Law 7, 8.

[205] Philip Allott, 'International Law and International Revolution: Reconceiving the World' (Josephine Onoh Memorial Lecture 1989 Hull: Hull University Press, 1989) 8, cited in Cullen and Morrow (ibid) 8.

[206] As enshrined in UN Charter (n 178) Articles 2(1) and 2(7).

[207] Alpaslan Özerdem, 'The "responsibility to protect" in natural disasters: Another excuse for interventionism?' (2010) 10(5) Conflict, Security and Development 693, 700.

[208] Anne Peters, 'Humanity as the A and Ω of sovereignty' (2009) 20(3) EJIL 513, 517.

[209] Özerdem (n 207) 700.

[210] Cullen and Morrow (n 204) 10.

[211] Dupuy (n 53) 31.

[212] *North Sea* (n 58), Separate Opinion of Judge Ammoun.

rationale of IHL to provide protection to categories of persons on the basis of their specific status or function".[213]

D. Towards a right of intervention for mngos' personnel?

Almost three decades ago, Kalshoven and van Reesema posited that better protection for MNGO workers could be secured by coupling victims' "right to receive medical assistance" with recognition of MNGO workers' "right to intervene on humanitarian grounds".[214] They anticipated a groundswell of "[i]nternational pressure… as relief workers are seen to be expelled or imprisoned".[215] As established, however, little progress has been made. Whether war victims have a *positive right* under international law to receive humanitarian assistance remains a moot point.[216] And humanitarian workers seeking a right to intervene encounter a critical stumbling block: Article 3 of the second Additional Protocol enshrines a *general prohibition* on violation of States' sovereignty and non-intervention during NIACs[217]—a prohibition which the Commentary makes clear is also aimed at NGOs.[218]

Yet, there has been progress with regard to the 'humanisation' of IHL. Courts and scholars state that IHL and international human rights law (IHRL) apply in tandem;[219] and the ICJ has confirmed the continued applicability of IHRL in conflict settings.[220] Generally speaking, where human rights law "emphasises granting positive rights to the individual", IHL "protects the interests of individuals through *other means* than the granting of rights".[221] Individuals do not have the capacity to have their IHL rights *enforced*,[222] but this does not preclude them from *claiming* the right in situations of armed conflict.[223] And, in situations where IHL

[213] Breitegger (n 80) 91.

[214] Frits Kalshoven and Charlotte Siewertsz van Reesema, 'Summary of discussions' in Frits Kalshoven (ed) *Assisting the Victims of Armed Conflict and Other Disasters* (Martinus Nijhoff 1989) 205.

[215] ibid.

[216] Dinstein (n 158) 77.

[217] Torrelli (n 100) 237.

[218] Commentary to Additional Protocols (n 112) para 4503. Note, also, that the ICRC/impartial humanitarian organisations' offer of services 'cannot be considered a hostile act' (see Commentary (n 112) para 4505; common Article 3 of the four Geneva Conventions (n 4); AP/II (n 4) Article 1(1).

[219] Barrat (n 29) 18–19.

[220] The ICJ declared IHL to be *lex specialis*, meaning that its norms 'prevail' over the *lex generalis* of IHRL, when appropriate; see *Nuclear Weapons* (n 66) [25]; Dinstein (n 58) 32.

[221] Barrat (n 29) 215 (emphasis added).

[222] ibid.

[223] Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63 Law Quarterly Review 455, cited in Barrat (n 29) 228.

treaties (particularly relating to IACs) prove "ineffectual", Barrat suggests that human rights law can be used to "clarify IHL guarantees where uncertainty exists".[224]

Consistent with these IHL/IHRL developments, it is submitted that victims of war do have a positive right to receive medical-humanitarian assistance when the State fails to provide it. The ICRC's study on customary IHL indicates civilians' entitlement "to receive humanitarian relief essential to [their] survival",[225] and the right "to make application to… any organization that might assist them".[226] As these are IHL rights, their applicability is confirmed by the international human rights to life, freedom from degrading treatment, and health.[227]

Where does that leave the posited right to intervene on humanitarian grounds?[228] As promulgated by MSF, the right is based on notions about the *universality* of doctors' mission and medicine's transcendence of all borders.[229] If consent is "the expression of sovereignty",[230] then MSF's meta-juridical arguments challenge sovereignty's habitual "precedence over humanity" during conflicts.[231] In this way, it might justify its defiance of States' will, without sacrificing neutrality or impartiality.[232]

For the moment, Ryngaert argues that theories about "'humanising' tendencies in international law" are not universally supported, thus weakening any "claim that a norm limiting the role of state consent has already acquired customary law status".[233] Nevertheless, it is suggested in this article that State sovereignty need not be considered an obstacle to MNGOs' desired right to intervene for their personnel. With the principle of non-intervention considered "as the corollary of… state sovereignty",[234] Peters argues that it is "ultimately grounded in the well-being

[224] Barrat (n 29) 20.
[225] ICRC, 'Customary IHL', Rule 55 (n 18).
[226] ibid; GC/IV (n 4) Article 30(1).
[227] See ICCPR Articles 6 and 7; International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted 16 December 1966, entered into force 3 January 1976) Article 12. See also Barber (n 9) 392–395.
[228] Note that this article does not examine concepts of States' *military* humanitarian intervention or Responsibility to Protect. MSF has criticised such practices for their blurring of humanitarianism and militarism; see Fabrice Weissman, 'Not in our name: Why MSF does not support the "Responsibility to Protect"' (MSF, 3 October 2010) <https://www.msf-crash.org/sites/default/files/2017-05/2749-fw-2010not-in-our-name-msf-and-the-r2p-eng.pdf> accessed 22 July 2018.
[229] Torrelli (n 1) 592.
[230] Torrelli (n 100) 232.
[231] ibid 235.
[232] Chandler (n 39) 683.
[233] Ryngaert (n 13) 13–14.
[234] Peters (n 208) 533.

of natural persons. Non-intervention protects, first, the inhabitants of potential victim-states… and… secures international stability, including the stability of state boundaries."[235]

It seems not unreasonable to extrapolate from this that a State which arbitrarily withholds consent for impartial medical missions cannot cite the principle of non-intervention as a barrier to MNGOs' legitimate entry to the territory. State sovereignty, which Peters likens to "state autonomy", is both a fact of the international legal order and a principle which MNGO personnel, as private actors, cannot possibly undermine.

VI. Conclusion

Medical-humanitarians committed to borderless healthcare have evolved from 'modern-day adventurers'[236] to become a mainstay of victims of conflict in the international community. MNGOs, and MSF in particular, have a standing that affords them the same protection in IHL as that granted to the ICRC. However, there is a large gap to be bridged between that legal protection and the realities of modern conflict. Inter-State wars have been rapidly eclipsed in number by those involving non-State groups, and IHL Conventions and norms arguably have not caught up. In zones inaccessible to external relief, the human toll becomes literally incalculable as the UN is subject to competing political interests, and the ICRC—the exemplar of humanitarianism—stands by traditional interpretations of impartiality and neutrality.

Into this breach step MNGOs such as MSF. 'No-borders' MNGOs, by definition, will man and finance missions in defiance of unpredictable States which arbitrarily withhold consent to entry. Holding themselves to a higher order—medical humanitarianism—comes at a price: unauthorised missions' presence in conflict zones renders legal protection forfeit or subject to the whim of warring parties. This article has examined the prevailing (and relatively nominal) IHL protection for those missions, especially in the context of non-international armed conflict. It has assessed the limits which the current IHL regime places on MNGOs' pursuit of unconditional protection in war zones and analysed alternative legal avenues which might confer enhanced international status.

For too long, the uncomprehensive and, at times, unpredictable nature of IHL protection has left 'no-borders' MNGOs at the mercy of warring parties' caprice. Rather than wait for that legal regime to adapt, MNGOs should receive the legal protection they have requested for decades. The international community may remain reticent to accord international legal personality to NGOs which are

[235] ibid 534.

[236] Torrelli (n 1) 600.

highly active in areas traditionally of State concern, but this should not prohibit an organisation like MSF from being accorded certain rights and responsibilities which complement its role in succouring the sick and wounded. For international law to remain in step with international reality, MNGOs could receive a form of flexible legal status which confirms both their functional necessity and continuing *private* nature, so as to guarantee States' sovereignty. In this context, it is not impossible for international law to strike a balance between the concerns of States and the urgent, medical needs of civilians in wartime.