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Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance

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Humanitarian assistance is essential for the survival of the civilian population and people hors de combat *in the theatre of war. Its regulation under the laws of armed conflict tries to achieve a balance between humanitarian goals and state sovereignty. This balance, reflected in the provisions of the 1949 Geneva Conventions and their Additional Protocols, is not as relevant to contemporary armed conflicts, most of which involve non-state armed groups. Even those provisions relating to humanitarian assistance in conflicts involving non-state armed groups fail to address properly the key features of these groups, and especially their territorial aspect. This article proposes a different approach, which takes into consideration and gives weight to the control exercised by non-state armed groups over a given territory. Accordingly, it is suggested that provisions regulating humanitarian relief operations in occupied territories should apply to territories controlled by armed groups. This approach views international humanitarian law first and foremost as an effective, realistic and practical branch of law. Moreover, it has tremendous humanitarian advantages and reflects the aims and purposes of the law, while considering the factual framework of these conflicts.*

Keywords: humanitarian assistance, non-state armed groups, territorial control, occupation, Fourth Geneva Convention

1. Introduction

Most armed conflicts that occur globally now and in recent decades, regardless of their legal characterisation as international or internal, involve non-state armed groups as parties.[1] Those armed groups frequently exercise effective control over a territory and its inhabitants.[2] Yet, the law governing armed conflict does not properly and adequately address the issue in a concrete and comprehensive manner.[3] As argued by Sandesh Sivakumaran, it is because of the inherent differences between non-state armed groups and states that the law of international armed conflict cannot be extended to apply to internal conflicts.[4] On the contrary, this article suggests a more practical

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[1] Vincent Bernard, 'Editorial: Understanding Armed Groups and the Law' (2011) 93(882) *International Review of the Red Cross* 261.

[2] Sandesh Sivakumaran, 'How to Improve upon the Faulty Legal Regime of Internal Armed Conflicts' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 525.

[3] ibid.

[4] ibid.

approach in order to fill the lacuna: this misrepresentation of the territorial aspect of armed groups. The article suggests the use of traditional tools of interpretation and the existing jurisprudence to modify, adapt and reinterpret existing norms so as to extend their application, if needed, and ensure greater protection of victims in times of armed conflict – victims who find themselves under the control of a non-state party to a conflict.

One important aspect of the protection of victims in times of armed conflict is ensuring unimpeded access to humanitarian relief. This is essential for the civilian population. The regulation of unimpeded access to humanitarian assistance is vital, sometimes even to a greater extent, when civilians are located in a territory no longer under the control of a state, but under that of an armed group. The law regulating access to humanitarian action does not ignore the involvement of these armed groups. As is elaborated in the following section, non-state parties are acknowledged by international humanitarian law (IHL).[5] However, the nature of conflicts involving a non-state party (an organised armed group) may impose certain difficulties in providing relief consignments and protecting relief personnel. Such difficulties are reflected, for example, in the ongoing armed conflicts in the Middle East:[6] the city of Darayya (Syria), which was under siege by the Syrian army and at other times controlled by armed groups, only recently received relief for the first time in almost four years.[7] Previous convoys of food and medicine were refused access; the city's inhabitants suffer from malnutrition, sickness and lack of vital medical treatment as a result of the long fighting, the siege of the city, and refusal of humanitarian aid by either party to the conflict.[8]

Unfortunately, a simple and literal reading of the existing instruments regulating access to humanitarian relief does not also take into consideration the territorial aspect of armed groups operating in the theatre of the conflict. As mentioned above, the misrepresentation of the

[5] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31, art 3; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85, art 3; Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135, art 3; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 3; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (AP II), as well as Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (AP I), in cases of national liberation movements.

[6] Marco Sassòli, 'When are States and Armed Groups Obliged to Accept Humanitarian Assistance', Professionals in Humanitarian Assistance and Protection, 5 November 2013, https://phap.org/articles/when-are-states-and-armed-groups-obliged-accept-humanitarian-assistance.

[7] eg, 'Syria: UN Agencies Reach Families with Food in the Besieged Town of Darayya', *UN News Centre*, 9 June 2016, http://www.un.org/apps/news/story.asp?NewsID=54191#.V2Ef2VeBK_0.

[8] eg, International Committee of the Red Cross (ICRC), 'Syria: Aid Convoy Turns Back after Being Refused Entry to Besieged Daraya: Joint Statement by the ICRC and the UN', 12 May 2016, https://www.icrc.org/en/document/aid-convoy-turns-back-after-being-refused-entry-besieged-daraya. Unfortunately, the city of Aleppo is currently enduring a similar fate as the Syrian Army has confirmed the completion of the siege over the city: Human Rights Watch, 'Syria: Civilians at Risk as Aleppo Siege Tightens', 22 July 2016, https://www.hrw.org/news/2016/07/22/syria-civilians-risk-aleppo-siege-tightens; ICRC, 'Situation in Aleppo "Devastating and Overwhelming" Says ICRC's Most Senior Official in Syria', 21 July 2016, https://www.icrc.org/en/document/situation-aleppo-devastating-and-overwhelming-says-icrcs-most-senior-official-syria.

territorial aspect of certain armed groups in the provisions of IHL is not specific to humanitarian assistance – though, as will be discussed further in this article, the regulation of access to humanitarian assistance has much to do with the effective control of territory.[9] This lacuna, or misrepresentation, reduces the level of protection of the civilian population in the said territory. Therefore, it is suggested that under certain conditions, once an organised armed group exercises effective control over a territory, the law of occupation regulating access to humanitarian assistance should apply *mutatis mutandis* to that territory. This expansion is founded on the principles of humanity and effectiveness, two leading principles in IHL. Moreover, instead of focusing on the legal status of the armed group, it centres on the factual circumstances, which may reduce the risk of encountering issues of state sovereignty.[10]

This expansion of the law depends on the linkage between the main principles guiding humanitarian relief operations and the practical (and legal) role played by armed groups in the theatre of war. This article does not aim to cover all situations involving non-state actors; rather, it focuses on those armed groups that exercise a sufficient amount of control over a defined territory. Nor does it aim to discuss in depth what would be a sufficient amount of control exercised by the armed groups over that territory. Instead, the article argues that this expansion of the scope of application serves the principles guiding IHL. Moreover, relying on the applicable legal framework, it argues that such expansion is not implausible or fanciful.

The article will first identify the general legal framework regulating access to humanitarian relief, underlying the differences between the various legal instruments (Section 2). In order to frame the principles governing access to humanitarian relief and their effect on non-state armed groups, the article will briefly observe the requirement of consent as a key element (Section 3). As consent is one of the key components of the regulation of humanitarian assistance, it warrants a separate section. This is because of the central role this requirement plays in the regulation of access as well as the relevance of its guiding principles to the argument of this article (as will be elaborated further). The article then reviews the principle of *effectiveness* in international law, and especially its link with territoriality and control over territory (Section 4.1). This review will enable the analysis and appraisal of the impact that such control has on the role of armed groups in the context of humanitarian relief. Finally, the article will evaluate the outcomes of the suggested expansion of the scope of application (Section 4.2).

Before delving into the analysis, a preliminary remark should be made. The aim of this article is not to define or review all aspects of humanitarian assistance, nor to evaluate in depth its key elements. At an initial stage, however, the term and definition of 'humanitarian assistance' or 'relief' should be clarified, at least for the purpose of this article, as it seems that a comprehensive, hard law definition of these terms does not exist in international law.[11] It could be defined

[9] Françoise Bouchet-Saulnier, 'Consent to Humanitarian Access: An Obligation Triggered by Territorial Control not States' Rights' (2015) 96(893) *International Review of the Red Cross* 207, 208.
[10] A problem emphasised in Bouchet-Saulnier, ibid.
[11] Flavia Lattanzi, 'Humanitarian Assistance' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 231.

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loosely as 'providing emergency relief for people affected by natural or man-made disasters'.[12] The terms 'humanitarian assistance' and 'humanitarian relief' will be used alternately and interchangeably in the following paragraphs.

2. THE LEGAL FRAMEWORK: DUTIES AND OBLIGATIONS

Because this article suggests that the law regulating humanitarian assistance in occupied territories should apply *mutatis mutandis* to armed groups that control territory, it is essential to track the historical development of this law and the obligations it imposes. Historically, the idea of providing relief to victims of armed conflicts appeared in the middle of the nineteenth century after Henry Dunant encountered hundreds of wounded soldiers left behind to die in the battlefield of Solferino. This event prompted the establishment of the International Committee of the Red Cross (ICRC).[13] Although its legal development in the sphere of international law can be, and sometime is, linked with the development of human rights law, human rights are rights granted to individuals, while humanitarian assistance is conceived rather as a collective right.[14] Unfortunately, at the time of its origination, the idea was sporadically regulated and it protected only specific groups of victims: prisoners of war and those wounded in the battlefield.[15]

It remains true that the drafting of the 1929 Geneva Conventions enabled the ICRC to carry out large relief operations during the Second World War, but it was the aftermath of that war and the adoption of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) that signified the increasing importance of the humanitarian aspect to the protection of *all* war victims (including civilians).[16] This shift, rooted in the tragedy of the war but also reflecting later conflicts of the twentieth century (such as the Biafra conflict), in parallel with the development of and emphasis given to human rights, had an impact on the content of the 1977 Protocols Additional to the Geneva Conventions (Additional Protocol I and Additional Protocol II).[17]

Following an understanding of the circumstances that led to the codification of humanitarian assistance to *all* victims of war rather than just selected groups, we shall move to the discussion of the regulation itself, the duties it imposes, and on whom. The primary responsibility to maintain and provide for a civilian population affected by hostilities lies on the affected state or states,[18] as an aspect of state territorial sovereignty.[19] This responsibility includes that of an

[12] Institute of International Law, Resolution on Humanitarian Assistance, 16th Session, 2 September 2003, s I(1), http://www.ifrc.org/Docs/idrl/I318EN.pdf.
[13] Lattanzi (n 11) 233.
[14] ibid.
[15] ibid 234.
[16] ibid 235.
[17] ibid.
[18] Institute of International Law (n 12) s III(1).
[19] Felix Schwendimann, 'The Legal Framework of Humanitarian Access in Armed Conflict' (2011) 93(884) *International Review of the Red Cross* 993, 996; see also UNGA Res 46/182 (19 December 1991), UN Doc A/RES/46/182, para 4.

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impartial organisation and distribution of needed relief.[20] This obligation is enshrined in Geneva Convention IV and differs between the general responsibility of any state, party to a conflict or not (but party to the Geneva Conventions), and the particular obligations in cases of occupation. In particular, Article 23 of the Convention states:

> *Each High Contracting Party shall allow* the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for the civilians of another High Contracting Party, even if the latter is its adversary. *It shall likewise permit the free passage* of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases. (emphasis added)

Article 59 of the Convention emphasises the following:

> If the whole or part of the population of an occupied territory is inadequately supplied, *the Occupying Power shall agree* to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal.
> …
> *All Contracting Parties shall permit* the free passage of these consignments and shall guarantee their protection. (emphasis added)

Moreover, Article 62 of the Convention recognises the individual right of 'protected persons', those civilians who find themselves 'in the hands of a Party to a conflict or Occupying Power of which they are not nationals'.[21] It recognises the provision of 'individual relief' and emphasises that such civilians will be allowed to receive such individual relief unless it is halted for 'imperative reasons of security'.[22] A similar reservation was proposed to be included in Article 59 ('collective relief') but was not adopted.[23] Article 59 enables the occupying power to seek assistance from other states and organisations. However, Article 60 of the Convention emphasises that 'relief consignments shall in no way relieve the Occupying Power of any of its responsibilities'.[24] In other words, the occupying power cannot escape its duties by outsourcing them.

Geneva Convention IV regulates the rights of protected persons fairly well, as noted above. However, the rights of a state's own nationals during an international armed conflict (IAC) or in a non-international armed conflict (NIAC) are not addressed adequately.[25] In this respect, Common Article 3 to the Geneva Conventions, which regulates NIAC within the scope of the Conventions,

[20] Institute of International Law (n 12) s III(1).
[21] As defined by GC IV (n 5) art 4.
[22] ibid art 62.
[23] Jean S Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 329.
[24] GC IV (n 5) art 60.
[25] Ruth Abril Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflicts: Achievements and Gaps' (2004) 86(855) *International Review of the Red Cross* 515, 519.

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might be understood as providing for such basic needs[26] as it provides a minimum humanitarian standard. However, the relevant provision is not spelled out explicitly. Read literally then, this right does not exist as such in NIACs,[27] nor with respect to civilians subject to the control of a party to the conflict who do not fall within the definition of 'protected persons', as provided for in Geneva Convention IV.

An attempt to complement and fill this gap was made in the adoption of Additional Protocols I and II, supplementing the Geneva Conventions and regulating respectively IAC and NIAC.[28] Article 70(1) of Additional Protocol I clarifies that:

> [i]f the civilian population of any territory under the control of a Party to the conflict, *other than occupied territory*, is not adequately provided … relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken subject to the agreement of the Parties concerned in such relief actions. (emphasis added)

Additional Protocol II, Article 18(2), establishes that:

> [i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

The basic obligations of states and the collective right of the civilian population, regardless of the type of conflict concerned, were recognised as part of customary law by the ICRC and the United Nations (UN) Security Council.[29] Later, the Institute of International Law endeavoured to apply to '[a]ny other authority exercising jurisdiction or de facto control over the victims' the same obligations as those imposed on states.[30] While the Institute recognises, among others, the obligation *to seek* assistance if necessary, it imposed such obligation only on *affected states*.[31]

Alongside the humanitarian obligations enshrined in the various IHL instruments, access to humanitarian assistance can also be perceived as a right, founded in international human rights law.[32] As mentioned above, the law regulating access to humanitarian assistance increasingly developed in parallel with the growth of human rights law. Arguably, denial of access to humanitarian relief can be considered a threat to human life and human dignity, and would constitute a

[26] ibid.
[27] ibid 521.
[28] Lattanzi (n 11) 235.
[29] Reflected in r 55 of Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009) (ICRC Study); UNSC Res 824 (6 May 1993), UN Doc S/RES/824.
[30] Institute of International Law (n 12) s III(2).
[31] ibid s III(3).
[32] Cedric Ryngaert, 'Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective (2013) 5(2) *Amsterdam Law Forum* 5, 8.

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violation of fundamental human rights.[33] It could also be argued that the right of access to humanitarian assistance is encompassed in the right to life[34] because unreasonably preventing such access will cause the starvation of the civilian population.[35]

Accordingly, economic, social and cultural rights are also relevant when analysing the obligations and rights attached to humanitarian relief.[36] Among these rights should be considered the right to an adequate standard of living and freedom from hunger.[37] Unlike the right to life (or others), the realisation of economic, social and cultural rights may be gradual and to the extent feasible by the state.[38] Nonetheless, as clarified on numerous occasions by the Committee on Economic, Social and Cultural Rights, and especially in its General Comment 3, if a state is unable to provide for its civilians with the rights enshrined in the International Covenant on Economic, Social and Cultural Rights, it should seek outside international assistance.[39] Clearly then, the right to access humanitarian assistance is not solely a collective right regulated by IHL; it is also a protected individual right, provided for under human rights law.

Together with the right of the civilian population to assistance, there exists the right of international and *sui generis* organisations, such as the UN and the ICRC,[40] to offer and provide humanitarian relief.[41] Such an offer cannot be unreasonably denied if the needs of the civilian population are not adequately met.[42] It also means that any action by humanitarian organisations related to the provision of humanitarian relief in no way constitutes a breach of a state's internal affairs per se,[43] involvement in the armed conflict, or an unfriendly act.[44] Security Council practice may be considered contradictory, as it often *authorises* impartial UN agencies to offer and provide humanitarian assistance as if, without such authorisation, provision of aid would be seen

[33] Institute of International Law (n 12) s II(1).
[34] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 6.
[35] Stoffels (n 25) 517–18.
[36] Rebecca Barber, 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' (2009) 91(874) *International Review of the Red Cross* 371, 391.
[37] International Covenant on Economic Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 11.
[38] ibid art 2(2); Barber (n 36) 393.
[39] Office of the High Commissioner for Human Rights (OHCHR), Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 3: The Nature of States Parties Obligations (Art. 2, para 1 of the Covenant) (14 December 1990), UN Doc E/1991/23, especially para 13, which states: 'The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance'; Barber (n 36) 393.
[40] Lattanzi (n 11) 238.
[41] Institute of International Law (n 12) s IV(1).
[42] Stoffels (n 25) 521.
[43] Institute of International Law (n 12) s IV(1).
[44] AP I (n 5) art 70(1); *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*) Merits, Judgment [1986] ICJ Rep 14, [242]; see also Frits Kalshoven and Lisbeth Zegveld, *Constraints on the Waging of War* (ICRC 2001) 127–28.

as a violation of international law.[45] However, in his 1998 report the Secretary General emphasised that:[46]

> [w]hile full respect must be shown for the sovereignty, independence and territorial integrity of the States concerned, where States are unable or unwilling to meet their responsibilities … the international community should ensure that victims receive the assistance and protection they need to safeguard their lives. Such action should not be regarded as interference in the armed conflict or as an unfriendly act so long as it is undertaken in an impartial and non-coercive manner.

Derived also from this concept is the free movement allowed for humanitarian assistance personnel,[47] which means that in order to ensure that humanitarian assistance is properly provided, the personnel providing it should be allowed entrance and free movement.[48] It is clear that an affected party has an obligation to respect and protect humanitarian relief personnel,[49] although this obligation, established in Additional Protocol I, does not form part of the obligations provided in Additional Protocol II.

While all states must provide free passage for humanitarian relief, irrespective of the state's involvement in the said conflict,[50] belligerent states or other belligerent parties to the conflict have more elaborate obligations, which can be summarised as follows: authorisation (granting) of access; facilitation of access; and protection of relief consignments and personnel.[51] These obligations apply to all types of armed conflict.[52] Although the Institute of International Law equates the duties of 'affected states' and 'other types of authorities',[53] the wording of the law differs between the obligations of states and those of non-state armed groups. Hence, one cannot deduce from Additional Protocol II anything more than the obligations to authorise and not to obstruct.[54] In this respect, the most protective framework is that provided by Geneva Convention IV regulating the behaviour of the occupying power.[55]

3. The Requirement of Consent: General Observations and the Territorial Aspect

The regimes of humanitarian assistance within the framework of IHL emphasise the need for the parties' consent, and especially the consent of states.[56] With the exception of Article 59 of

[45] UNSC Res 2165 (14 July 2014), UN Doc S/RES/2165, para 2.
[46] UNSC, Report of the Secretary General on Protection for Humanitarian Assistance to Refugees and Others in Conflict Situations (22 September 1998), UN Doc S/1998/883, para 16.
[47] ICRC Study (n 29) r 56.
[48] Institute of International (n 12) s VII(3).
[49] AP 1 (n 5) art 71(2).
[50] Lattanzi (n 11) 248.
[51] Stoffels (n 25) 521.
[52] ibid 522; see also ICRC Study (n 29), rr 55 and 56.
[53] Institute of International Law (n 12) s III(2).
[54] Stoffels (n 25) 522.
[55] Lattanzi (n 11) 247.
[56] Ryngaert (n 32) 5.

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Geneva Convention IV, which addresses the obligations of the occupying power to accept a relief scheme,[57] all relevant provisions contain the need for consent, either by using the word 'permit',[58] 'agreement'[59] or the actual term 'consent'.[60] The requirement of state consent is considered to be an expression of state sovereignty or the authority of the state essential for the delivery of humanitarian assistance.[61] The following section aims to review briefly the term 'consent' and its limitations in each of the provisions regulating humanitarian assistance, although it does not aim to define the term or its synonyms.[62] It will also review whether the requirement of consent is connected to territorial control.

3.1. THE REQUIREMENT OF CONSENT: LEGAL FRAMEWORK AND OBSERVATIONS

The requirement of state consent and its conditions in IAC were first provided for in Article 23 of Geneva Convention IV. The Article subjects the state's obligation to provide free passage of humanitarian relief to the following three guarantees:[63] (i) that there is no danger of misappropriation; (ii) that there is the possibility of supervising the shipment of the supply; and (iii) that the supply does not give undue advantages to the adverse party.[64] These conditions appear to leave a wide range of discretion to states.[65] This reflects a compromise: on the one hand, the principle of free passage is literally included in the Convention and no longer depends on interpretation by the parties; on the other hand, it is limited by providing a wide margin of discretion for states to refuse such passage.[66] The requirement to receive consent has also been affirmed in Additional Protocol I.[67] Like Article 23, it mentions the conditions that may be imposed by the parties for free passage, such as technical arrangements and subjecting the distribution to supervision.[68] The inclusion of these specific conditions provides states with some margin of discretion. However, despite the vagueness of these conditions, consent may not be withheld arbitrarily.[69] Additional Protocol I also supplements Article 23, as it uses the term 'parties concerned', which seems also to encompass armed groups.[70]

[57] Lattanzi (n 11) 242.
[58] GC IV (n 5) art 23.
[59] AP I (n 5) art 70(1).
[60] AP II (n 5) art 18.
[61] Yoram Dinstein, 'The Right to Humanitarian Assistance' (2000) 53(4) *Naval War College Review* 77, 84.
[62] As explained by Lattanzi in her contribution, the difference in terms may and should be interpreted as imposing further obligations on states within the framework of AP I. As the meaning of the principle of consent is not the core subject matter of this article, these differences will not be explored further: Lattanzi (n 11) 242–43.
[63] GC IV (n 5) art 23.
[64] Pictet (n 23) 181–82.
[65] ibid 183.
[66] ibid.
[67] AP I (n 5) art 70(1).
[68] ibid.
[69] Schwendimann (n 19) 999–1000; see also Pictet (n 23) 183.
[70] Yves Sandoz, Christoph Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff 1987) para 2824 (emphasises that the obligations apply to both 'Parties to the conflict' and other 'High Contracting Parties').

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Additional Protocol II also subjects the provision of relief consignment to consent, but only that of the 'High Contracting Parties'.[71] The basic principle underlying this provision is that states are the primary bearers of responsibility for the well-being of the civilian population, and external providers (such as relief organisations) are seen to be auxiliary – there to assist the authorities in their task.[72] Whereas the offering and providing of humanitarian aid should not be presumed as intervention in the armed conflict or as an unfriendly act,[73] refusing such aid is not an illegal act per se.[74] Moreover, while the denial of humanitarian assistance may amount to a violation of Article 14 of Additional Protocol II (which prohibits starvation of the civilian population as a method of warfare)[75] such denial would still be in compliance with Article 18(2), which frames the conditions for state consent. This idea is reflected in the ICC Statute,[76] which excludes the wilful impediment of humanitarian relief as the war crime of starvation in a NIAC.[77] Either way, clearly the refusal of humanitarian assistance cannot be arbitrary.

Another aspect of Article 18(2) relates to the identity of the party that should consent to the aid.[78] The term 'High Contracting Parties' has been interpreted by the ICRC as relating to the 'government in power'.[79] Indeed, the law *stricto sensu* refers only to states; in practice, however, it would be unrealistic to ignore the non-state armed groups operating in the territory of the state, and especially if these groups exercise control over parts of the territory.[80] For example, the FARC (the Revolutionary Armed Forces of Colombia – People's Army), the Liberation Tigers of Tamil Eelam in Sri Lanka, and the armed groups operating in Syria (ISIS, Jabhat Al-Nusra and others) all exercise (or exercised) effective territorial control and were taken into consideration when coordinating access to humanitarian assistance.[81] In other words, as a minimum, coordination should be with the non-state armed group as a *concerned party*, alongside the territorial state, once the aid is intended to pass through or is transferred to the territory it controls.[82]

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[71] AP II (n 5) art 18(2).
[72] *Commentary on the Additional Protocols* (n 70) para 4873.
[73] *Nicaragua* (n 44) para 242.
[74] Joakim Dungel, 'A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems', *The Journal of Humanitarian Assistance*, 15 May 2004, https://sites.tufts.edu/jha/archives/838.
[75] *Commentary on the Additional Protocols* (n 70) para 4885.
[76] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).
[77] Christa Rottensteiner, 'The Denial of Humanitarian Assistance as a Crime under International Law' (1999) 81(835) *International Review of the Red Cross* 555, 568.
[78] Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (Oxford University Press 2012) 332.
[79] *Commentary on the Additional Protocols* (n 70) para 4884.
[80] Sivakumaran (n 78) 332; Michael Bothe, 'Relief Actions: The Position of the Recipient State' in Frits Kalshoven (ed), *Assisting the Victims of Armed Conflicts and Other Disasters* (Martinus Nijhoff 1988) 91, 94.
[81] A good example would be the humanitarian talks held in Geneva with regard to Syrian cities under siege: see, among others, 'Life-Saving Humanitarian Aid Reaches Five Besieged Towns in Syria', *UN News Centre*, 17 February 2016, http://www.un.org/apps/news/story.asp?NewsID=53259#.V2Je2VeBK_0.
[82] Sivakumaran (n 78) 332; Dungel (n 74); see also UNSC, Report of the Secretary-General on Children and Armed Conflicts (26 November, 2002), UN Doc S/2002/1299, para 17.

Arguably, when the state no longer has control over a territory, obtaining the consent of just the armed group might suffice.[83] This argument is based on the factual (and true) assumption that the non-state armed group is in practice able to give or withhold such consent, which it might refuse, regardless of law, because it is not able to ensure free passage for other reasons.[84] In most cases, however, although not in control of the territory in practice, the state still has some influence over access; thus coordination with it is essential even if the armed group has consented to the relief operation.[85] The state either controls the territory through which the relief operation might pass or may use its diplomatic power, vis-à-vis other states, to influence such passage through the territory of other states.[86] The ICRC air relief in the Biafra conflict exemplifies these problems: the modalities for the relief operation chosen by the ICRC were not agreed by the government, resulting in severe consequences and the non-cooperation of the authorities later.[87] Clearly, all concerned parties should be consulted and consent to the relief operation should be procured for its success as well as the success of future operations. However, one may wonder what might be the power of the de jure government's consent in situations where the armed group in control of the territory withholds such consent? In any event, as in the case of international armed conflicts, consent in a NIAC cannot be withheld arbitrarily.[88]

3.1.1. WITHHOLDING CONSENT AND OCCUPIED TERRITORY

As consent is required, it may also be withheld for good reasons. These include[89] security considerations (if the safety of the relief consignment or personnel cannot be guaranteed); situations in which the state is able to supply the needs of the population and does so in fact; or where the relief operation and consignment are suspected to violate the basic requirements stated in the provisions of Geneva Convention IV or the Additional Protocols (for example, it is not impartial or neutral, or is diverted by the belligerent to fund the war efforts). However, IHL makes an exception and applies a different regime in cases where the relief consignment is directed to the population of an occupied territory.[90]

The exception established for occupied territories by Article 59 of Geneva Convention IV is reaffirmed in Article 70(1) of Additional Protocol I, which explicitly excludes occupied territories from its regime.[91] Article 69(2) of the Protocol reaffirms it, stating that '[r]elief actions for the benefit of the civilian population of occupied territories are governed by Articles … of the

[83] Payam Akhavan and others, 'There is no Legal Barrier for UN Cross Border Operations in Syria', *The Guardian*, 28 April 2014, https://www.theguardian.com/world/2014/apr/28/no-legal-barrier-un-cross-border-syria.
[84] eg, Jeffrey Gettleman, 'Somalis Waste Away as Insurgents Block Escape from Famine', *The New York Times*, 1 August 2011, http://www.nytimes.com/2011/08/02/world/africa/02somalia.html.
[85] Sivakumaran (n 78) 333.
[86] ibid.
[87] ibid 334.
[88] Institute of International Law (n 12) s VIII(1).
[89] Ryngaert (n 32) 9.
[90] GC IV (n 5) art 59.
[91] *Commentary on the Additional Protocols* (n 70) para 2790; AP I (n 5) art 70(1); see also Ryngaert (n 32) 6.

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Fourth Convention, and by Article 71 of this Protocol [relating to personnel participating in relief action]'.[92] Clearly, the exceptional conditions of occupation required a separate and stricter regime.

Article 59 of Geneva Convention IV regulates this exceptional regime and states that the occupying power 'shall agree to the relief schemes on behalf of the said population [the population of an occupied territory inadequately supplied] and shall facilitate them by *all means at its disposal*'.[93] The regime provided by Article 59 was interpreted as establishing an unconditional obligation of the occupying power to consent and facilitate the relief operation. As explained by Pictet, the obligation imposed on the occupying power by Article 59 is interpreted differently from the general obligation provided in Article 23 because it is unconditional – that is, as long as the relief is directed to the civilian population in the occupied territory, the occupier must grant access.[94] The occupying power is expected to 'co-operate wholeheartedly in the rapid and scrupulous execution of these schemes'.[95] In other words, the occupying power should be notified of the relief operation and the modalities, but providing such relief does not depend on the occupier's consent.[96] Article 59 also obliges other states, whether belligerent or neutral, to permit the free passage of relief consignments through their territories and guarantee the protection of that relief.[97]

In parallel with these obligations, states granting free passage have the right to ensure that the nature of the relief consignment is humanitarian and neutral.[98] This right of the belligerents encompasses also their military and security considerations, with the general aim of avoiding hampering their general war efforts.[99] However, the safeguards provided by Geneva Convention IV must not be misused.[100] Nonetheless, while states (other than the occupying power) are obliged to authorise the passage and guarantee the protection of the relief consignment, the rights given to states in Article 59(4) (to search the consignment and regulate its passage) indicate that the relief operation should be based on prior agreement.[101] Agreement here does not entail consent, but rather a sense of prior arrangement or understanding whereby the state (third, belligerent or occupier) has been notified and has the ability to ensure its security.[102] Even though it is an unconditional obligation, violating the obligations set out in Article 59 is not a 'grave breach' of the Convention,[103] but it will constitute a war crime if carried out intentionally.[104]

[92] AP I (n 5) art 69(2).
[93] GC IV (n 5) art 59 (emphasis added).
[94] Pictet (n 23) 320.
[95] ibid.
[96] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 192–93; Schwendimann (n 19) 1002.
[97] GC IV (n 5) art 59.
[98] ibid.
[99] Pictet (n 23) 322.
[100] ibid.
[101] Dinstein (n 96) 193.
[102] Schwendimann (n 19) 1002.
[103] GC IV (n 5) art 147.
[104] ICC Statute (n 76) art 8(2)(b)(xxv).

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3.2. TERRITORIAL CONTROL: A KEY ELEMENT IN THE FRAMEWORK OF HUMANITARIAN ASSISTANCE?

As will be reviewed below, control of a territory is both a legal and a practical component of a relief operation. Both Additional Protocols (Article 70(1) Additional Protocol I and Article 18(2) Additional Protocol II) use the term 'concerned' when addressing the parties. The commentaries to both Additional Protocols, as well as the ways in which scholars have interpreted the term 'concerned', refer to the parties through whose territories the relief consignment must pass, from their territory the relief consignment is initiated and the receiving territory.[105] In other words, the law has recognised the link between territorial control and the requirement of consent. In practice, it will be favourable for an effective, rapid and safe relief operation, and to achieve the consent of the party (or parties) (state or armed group) which exercises control over the said territory.[106] Moreover, in a conflict involving non-state armed groups exercising control over territory, acquiring only the consent of the state is insufficient and may impede the relief operation.[107]

The requirement of consent by the concerned parties reflects in general the balance between the need to provide for the victims and respect for state sovereignty.[108] Typically, international law refers to sovereignty as a synonym of territorial integrity, assuming that control of territory by the state and the attribution of such territory to the state are the same.[109] This balance between the needs of the victims and state sovereignty in the controlled territory does not exist when dealing with an occupied territory; after all, the occupying power is obliged to agree unconditionally to the relief operation.[110] This probably reflects the fact that the occupying power is not the legal sovereign of the territory it occupies, but merely exercises its jurisdiction there. In other words, the occupier is effectively a substitute for the legal sovereign of the territory, but is not the sovereign itself.[111]

The link between territorial control and access to humanitarian assistance should be reviewed and analysed. Obviously, territorial control is relevant in the situation of occupied territories. However, there might be territories controlled by a party to a conflict other than those recognised as occupied.[112] In these former situations, the control required over the territory is of a material nature – the party concerned may exercise its decision to provide access to the humanitarian assistance.[113] The notion of 'party' includes not only sovereign states but also armed groups

[105] *Commentary on the Additional Protocols* (n 70) para 2806 (art 70(1), para 4884 (art 18(2).
[106] eg, Barber (n 36), the examples given regarding Somalia and Darfur.
[107] Sivakumaran (n 78) 332.
[108] Schwendimann (n 19) 998.
[109] Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Martinus Nijhoff 2006) 66–67.
[110] GC IV (n 5) art 59.
[111] Dinstein (n 96) 1–2; Milano (n 109) 96–97.
[112] AP I (n 5) art 70(1).
[113] *Commentary on the Additional Protocols* (n 70) para 2805.

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involved in an IAC as provided by Article 1(4) of Additional Protocol I.[114] Arguably, from a practical point of view, relief operations in an IAC will be coordinated with those exercising effective control over the territory in question (for passage or supply) which are able to permit and guarantee the safety of the relief consignment and personnel. This practicality is reflected in the legal framework, and in the manner in which the word 'concerned' has been interpreted.

In situations of NIAC the law relating to humanitarian assistance in short disregards the territorial aspect, as the consent of the armed group party to the conflict, which must exercise control over territory as a *sine qua non* condition for the application of Additional Protocol II,[115] is not required.[116] There is a literal difference between Article 70(1) of Additional Protocol I and Article 18(2) of Additional Protocol II, as only the former requires the consent of the non-state armed group as a concerned party, although both apply in practice to the same type of entity: a non-state armed group which materially controls parts of a state's territory.[117]

While this contribution does not intend to discuss to the fullest extent the territorial element of armed groups in international law, a few brief remarks should be made on this point. Indeed, while Additional Protocol II explicitly addresses the territorial features of an armed group, Additional Protocol I does not. However, debatably, this 'territoriality' is embedded in Article 1(4) of Additional Protocol I, as those armed groups falling within the scope of that Protocol probably already possess the features of regular armed groups.[118] In this respect, the requirements of intensity and organisation, which are required to fulfil the lower threshold of NIAC in accordance with Common Article 3, recognise territorial control as one of the indicators of such a threshold.[119] Whether or not this assumption is true, territorial control is a fairly well recognised indicator for the existence of an armed group appearing in many working definitions of military manuals, international organisations and other non-governmental organisations.[120] In any event, Additional Protocol I will consider national liberation movements as concerned parties in light of the territory controlled by them.

Assuming that similarities exist between those armed groups addressed in Additional Protocol I whose consent is required, and those groups addressed in Additional Protocol II,

[114] ibid.
[115] AP II (n 5) art 1(1).
[116] Sivakumaran (n 78) 332.
[117] See the requirements of AP II (n 5) art 1(1); Sivakumaran (n 78) 185–86.
[118] Antonio Cassese, 'War of National Liberations and Humanitarian Law' in Paola Gaeta and Salvatore Zappalà (eds), *The Human Dimension of International Law* (Oxford University Press 2008) 104.
[119] Pictet (n 23) 35–36; Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 32, 51; ICTY, *Prosecutor v Boskoski*, Trial Judgment, IT-04-82, 10 July 2008, paras 199–204.
[120] eg, working definition provided by the UN Office for the Coordination of Humanitarian Affairs (OCHA) in Gerard McHugh and Manuel Bessler, 'Humanitarian Negotiations with Armed Groups: Guidelines for Practitioners', UN OCHA in collaboration with members of the Inter-Agency Standing Committee (IASC), January 2006, https://www.unicef.org/emerg/files/guidelines_negotiations_armed_groups.pdf; the ICRC in Bernard (n 1) 262; Geneva Call – a Geneva-based non-governmental organisation dealing with compliance of non-state armed groups in Anki Sjöberg, *Armed Non-State Actors and Landmines – Vol III: Towards a Holistic Approach to Armed Non-State Actors?* (Geneva Call and the Program for the Study of International Organization(s) 2007).

one should question why the consent of the latter group is not required. Sandesh Sivakumaran suggests that it was because of the insufficient attention paid to the specificities of NIAC while the Protocols were being drafted.[121] According to Sivakumaran, while the threshold of Additional Protocol II requires an armed group to exercise control over territory, its other provisions tend to ignore this aspect in practice.[122] Clearly then, both *concerned* armed groups have similar features (organisation, territory, responsible command) although legally they differ in their legitimacy: while national liberation movements have gained some sort of legitimacy in international law, demonstrated by the capacity to turn a conflict to which they are a party into an IAC, armed groups in a NIAC have not.[123] However, in the modalities of relief operations, one should ask what are the practical differences. Relying on these observations, assuming that from a practical standpoint no difference exists, and the failure to require the consent of the armed group literally should be addressed as an omission, one should still question whether the territorial control exercised by armed groups should entail a more restrictive regime, one that reflects the principle of effectiveness rather than gives precedence to state sovereignty.

4. EFFECTIVENESS AND THE OBLIGATION TO PERMIT ACCESS

As described above, humanitarian assistance and relief operations are aimed at assisting victims of a conflict in the event that the territorial state is unable to do so. The consent of the *states concerned* (those where there is a link between their territory and the relief operation) is required. As reflected above, the requirement of consent ensures that relief operations are organised and launched while, on the one hand, ensuring the facilitation and protection of the consignment and personnel and, on the other hand, respecting and preserving the principle of sovereignty. The exception to the requirement of consent arises in the situation of providing assistance to the population of an occupied territory. Nonetheless, even in those cases of occupation, in practice concerned states (beside the occupying power) should be consulted (as reflected by Dinstein).[124] They should give their consent, but they may inspect the consignment.[125] As elaborated above, this ensures a rapid and effective operation. In other words, the law regulating humanitarian assistance, like IHL, prefers realistic and effective guidelines. As such, the law of humanitarian assistance should be adapted to also embody the effective control exercised by armed groups. In the following section, effectiveness – a guiding notion in international law – is briefly explained along with its relationship with IHL, especially in the case of armed groups. Based on these understandings, a new framework that incorporates obligations provided in Article 59 of Geneva Convention IV will be presented.

[121] Sivakumaran (n 78) 332.
[122] ibid 529.
[123] ibid 212–13; *Commentary on the Additional Protocols* (n 70) para 67.
[124] Dinstein (n 96) 192–93.
[125] ibid.

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4.1. Territorial Non-State Armed Groups and Effective Capacity

The notion of effectiveness is central when discussing territorial situations, armed groups and sovereignty, as well as humanitarian assistance. It seems that the regulation of access to humanitarian action reflects this spirit as it primarily protects the civilian population, and the obligations and duties of the parties are designed by their legal and practical effects.[126] By focusing on the territorial features of the parties (as explained above), the law regulating humanitarian assistance in effect aims for its effective and realistic application. The importance of territorial control and its centrality reflects the significant and leading role of effectiveness in IHL. Moreover, the legal framework suggested by this article relies on this notion and its function. Hence, there is a need to briefly explain and define the notion of effectiveness.

4.1.1. Effectiveness

The notion of effectiveness plays an important role in international law. It has several functions.[127] In the international legal system following the Second World War and the Charter of the UN it implies that in parallel with basic principles, such as the prohibition on the use of force and self-determination, effectiveness could affect and even modify legal concepts, or assist in resolving disputes.[128]

Effectiveness describes a state of affairs by which a factual situation has a 'stronger and more widespread effect' in international law.[129] This is the idea that legal fictions are not welcome in international law. It has been understood and interpreted in two ways that reflect two basic positions. The first is that a factual situation strongly affects legal norms.[130] The second, and the more restricted interpretation, corresponds with acquiring rights and obligations in international law.[131] The latter 'view' is very much reflected in the law of acquiring territory or the protection of nationals.[132]

IHL is grounded primarily on the notion of effectiveness, as reflected in international jurisprudence and clearly exemplified by the International Criminal Tribunal for the former Yugoslavia (ICTY) in its *Tadić* appeals judgment:[133]

> Rather, [IHL] is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible. It follows, amongst other

[126] Barber (n 36) 381; Sivakumaran (n 78) 333.
[127] Milano (n 109) 43–44.
[128] ibid 44–45.
[129] Hiroshi Taki, 'Effectiveness' in Rüdiger Wolfrum (ed), *The Max Plank Encyclopedia of Public International Law* (Oxford University Press 2013) para 1, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e698?rskey=sl00YH&result=1&prd=EPIL.
[130] ibid para 3.
[131] ibid para 4.
[132] ibid paras 13–16.
[133] ICTY, *Prosecutor v Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, para 96.

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> things, that humanitarian law holds accountable not only those having formal positions of authority but also those who wield de facto power as well as those who exercise control over perpetrators of serious violations of international humanitarian law.

Hence, the application of IHL to territorial situations is triggered by the criterion of effectiveness and not sovereignty.[134] The norms that regulate the position of a territory unlawfully but effectively controlled apply regardless of the legitimacy of such control,[135] and are designed to *effectively* protect the civilian population.[136] This set of norms encompasses the classical state of belligerent occupation as well as other territorial situations in which armed groups are involved as parties.[137]

4.1.2. TERRITORIAL ARMED GROUPS

The control exercised by armed groups over territory is a central element of these groups in law and in practice. It is an explicit requirement for the applicability of Additional Protocol II,[138] it is implicitly required under the notion of 'organisation' of the armed group,[139] and is present in the working definitions applied by various actors. Nonetheless, this aspect, in terms of law, suffers from lack of regulation.[140] In fact, there are no written rules that regulate the relationship between the armed group and the population in the territory under its control.[141] In respect of human rights law, there emerges a position in which such groups exercising control over territory and which have a political structure are expected to comply with human rights obligations. This view is explicitly expressed by the UN Human Rights Council.[142] This idea is based primarily on the capacity to exercise a public function.[143] Moreover, some suggest that all rights conferred by international law belong to the population; therefore, even if a non-state armed group effectively controls a territory and consequently the population inhabiting it, these attributed rights should still be respected.[144] While this approach might still be considered controversial, there is no

[134] Dinstein (n 96) 2–3; Milano (n 109) 93.
[135] Dinstein, ibid.
[136] Milano (n 109) 92–93.
[137] ibid.
[138] AP II (n 5) art 1(1).
[139] Pictet (n 23) 35–36.
[140] Sivakumaran (n 78) 529.
[141] ibid.
[142] See, in particular, UN Commission on Human Rights, Report of the Special Rapporteur, Philip Alston, on Extrajudicial, Summary or Arbitrary Executions (22 December 2004), UN Doc E/CN.4/2005/7, para 76; and UNGA, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (12 February 2014), UN Doc A/HRC/25/65.
[143] Yaël Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 *Cornell International Law Journal* 21, 31.
[144] Beate Rudolf, 'Non-State Actors in Areas of Limited Statehood as Addressees of Public International Law on Governance' (2010) 4 *Human Rights and International Legal Discourse* 127, 139.

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reason for a gap in IHL to exist in respect of these situations.[145] In this respect, analogy with the law of occupation can be made. The law could be broken down into those parts and provisions that could and should in fact apply to the territory and population controlled by armed groups.[146]

It is submitted, therefore, that this analogy with the law of occupation is relevant to the framework that regulates access to humanitarian action. First, access to humanitarian assistance has been recognised not solely as an obligation of the parties but as a right of the civilian population.[147] Second, in the regulation of humanitarian assistance, the legal and practical rights and obligations of the parties derive mainly from their control of a territory.[148] This is even truer with regard to non-state armed groups, as their general status in the cadre of IHL, and especially as concerned parties (legally and practically) in relation to relief operations, stems from their control of a territory. Arguably, once a non-state armed group controls a territory, it has the capacity to comply with the various international obligations, IHL, human rights law and specifically the obligations set out by the law of belligerent occupation, for example, by way of analogy.[149] This idea is not as far-fetched as it seems: the wording of Article 1(1) of Additional Protocol II assumes that groups with these features can 'implement this Protocol'.[150]

4.2. Applicability of Article 59 as a Matter of Effectiveness – the Armed Group as a Power

The territorial feature of armed groups is essential; it reflects and enhances their ability to comply with IHL and, in specific circumstances, such control may trigger the application *mutatis mutandis* of certain provisions of the law of occupation. From this starting point, it is argued that Article 59 should regulate access to humanitarian assistance in situations of armed groups exercising effective control over a territory. This applicability of the Article 59 regime will not only impose further obligations on the armed group itself, but also on the other parties concerned with the conflict and the relief operations. In the following section, the applicability of Article 59 will be addressed in light of two different legal frameworks: IAC and NIAC.

Before reviewing the modalities of applying Article 59 to the different types of conflict, one should briefly address the capacity of armed groups to comply with IHL. Even before the adoption of the Geneva Conventions, armed groups were recognised as having the ability to comply with international law, especially with IHL; this ability is one of the conditions for the

[145] Sivakumaran (n 78) 530.
[146] ibid.
[147] Stoffels (n 25) 520–21.
[148] Barber (n 36) 381.
[149] eg, Sivakumaran (n 78) 530–31. Also, for a more in depth analysis of the legal capacity of non-state armed groups to exercise control over a territory see Tom Gal, 'The Unexplored Outcomes of *Tadić*: Applicability of the Law of Occupation to War by Proxy' (2014) 12 *Journal of International Criminal Justice* 59 (in this respect the author argues that the level of control that needs to be exercised by the armed group should amount to *effective* control, as expressed by the ICTY (eg, ICTY, *Prosecutor v Naletilić and Martinović,* Judgment, IT-98-23-T, Trial Chamber, 31 March 2003).
[150] AP II (n 5) art 1(1).

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recognition of belligerency.[151] The wording of Common Article 3 to the Geneva Conventions did not mention this requirement expressly, but the Commentary refers to it as a useful indicator for differentiating between a genuine armed conflict and other acts of banditry.[152] International jurisprudence later included it as one of the criteria defining the level of organisation possessed by the armed group, and which ensured that the violence in question amounted to an armed conflict.[153] Finally, such ability to comply with IHL was explicitly included as a *sine qua non* condition in Additional Protocol II.[154] The requirement to comply with IHL does not mean that violation of the law will mean that the group is not meeting the conditions set by the law per se.[155]

4.2.1. IN INTERNATIONAL ARMED CONFLICTS

Traditionally, the law of occupation is defined as IHL norms applicable to a territory of one 'high contracting party' controlled by another: that is to say, its application was fairly limited to inter-state conflicts.[156] However, one could foresee three situations that might trigger the applicability of Geneva Convention IV (and consequently Article 59): (i) national liberation wars covered by Additional Protocol I;[157] (ii) recognition of belligerency, which turns a prima facie NIAC into an IAC;[158] and (iii) when a prima facie internal conflict is classified as an international conflict based on the overall control a state exercises over the group.[159] This latter situation is also referred to as 'occupation by proxy'.[160] While it is clear that Article 59 applies in the second and third situations, from both the legal and practical perspectives, this is much less evident with regard to the first situation.

The second and third scenarios, both prima facie NIAC, are internationalised based on a legal or factual structure. Hence, as a matter of application of Article 59, they will be considered together. Arguably, from a substantive point of view, there is no difficulty in applying to the said scenarios the obligations set by Article 59 of Geneva Convention IV. The armed groups in both scenarios exercise effective control over territory; as a matter of law, one of the conditions for an armed group to be recognised as belligerent is the level of control it exercises over a defined territory.[161] As to the scenario of occupation by proxy, addressed extensively by the

[151] Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 176.
[152] Pictet (n 23) 36.
[153] *Prosecutor v Boskoski* (n 119) para 202.
[154] AP II (n 5) art 1(1).
[155] *Prosecutor v Boskoski* (n 119) para 205; Sivakumaran (n 78) 189.
[156] Dinstein (n 96) 34. See also GC IV (n 5) art 6 and Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land, *Martens Nouveau Recueil* (ser 3) 461 (entered into force 26 January 1910) art 42.
[157] Dinstein (n 96).
[158] ibid.
[159] *Prosecutor v Tadić* (n 133); Gal (n 149).
[160] Gal (n 149).
[161] Lauterpacht (n 151) 176.

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ICTY, the group itself must exercise effective control over the territory, while the state exercises overall control over the group.[162] Hence, in both cases the armed group has effective capacity without conferring legitimacy or wholly changing its legal status.[163] Applying Article 59 to these scenarios fulfils the essential ideas behind the regulation of humanitarian assistance: ensuring an effective and unimpeded relief operation for the well-being of the civilian population as its primary goal. In this respect, the identity of the actual 'player' (an armed group) does not matter.

As for the first situation – national liberation wars falling within the scope of Additional Protocol I – the position might be somewhat different. It seems clear that relief operations in these cases are regulated solely by Article 70(1), which states that it applies to any cases of 'territory under the control of a Party to the conflict, *other than occupied territory*'.[164] The Commentary to Article 70(1) seems to support such a limitation of applicability:[165]

> In fact, we are obviously concerned primarily here with the national territory of a State involved in a conflict. However, the article also covers the few territories in the world which still have special status, and, above all, territories under the control of movements fighting in conflicts such as those mentioned in Article 1.

Indeed, and as elaborated above, Article 70(1) was designed first and foremost to complement and fill the lacuna in Geneva Convention IV concerning the civilian population not of an occupied territory,[166] and primarily the nationals of a territorial state involved in a conflict.[167] It also limits the legal framework, ensuring that all territories controlled by any party to the conflict, except occupied territories, will be regulated by Article 70(1).

While Article 70(1) excludes occupied territory from its application, it does not exclude the applicability of the law of occupation *in toto* to Article 1(4) conflicts (national liberation wars).[168] Article 69(2) – which regulates access to humanitarian assistance in occupied territory and is intended to complement Geneva Convention IV[169] – does not limit its application to interstate situations. In other words, assuming that a territory could be defined as 'occupied' in the said scenario, Article 69(2) would be the applicable regime and not Article 70(1), regardless of the identity of the occupier. As the only situation currently recognised as a national liberation war (fulfilling the requirements of Article 1(4)) may be the conflict in western Sahara between the Polisario and the state of Morocco,[170] one could envisage that during hostilities either party

[162] *Prosecutor v Naletilić and Martinović* (n 149) paras 220–22.
[163] Rudolf (n 144) 139; Milano (n 109) 93, 128.
[164] AP I (n 5) art 1(1) (emphasis added).
[165] *Commentary on the Additional Protocols* (n 70) para 2793.
[166] Kalshoven and Zegveld (n 44) 127–28.
[167] *Commentary on the Additional Protocols* (n 70) para 2793.
[168] Dinstein (n 96) 34.
[169] *Commentary on the Additional Protocols* (n 70) 813, para 2786.
[170] See declaration of the Polisario made under AP I, art 96(3): Swiss Federal Department of Foreign Affairs, Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims', 26 June 2015, https://www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150626-GENEVE_en.pdf.

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may acquire control over territory and its inhabitants that were formerly seen as belonging to the other party. Can this situation be referred to as 'occupied'? This article does not aim to address this question; rather, it establishes that the Article 59 regime is not excluded per se from conflicts falling under Additional Protocol I in which one party to the said conflict is an armed group.

Applying Article 59 to an IAC involving non-state armed groups will ensure the unconditional consent to relief schemes entering the territory controlled by the armed group. This obligation will be imposed on the armed group, the adverse state and other concerned third states or armed groups. On the other hand, paragraph 4 of Article 59, which provides the parties with certain safeguards, will also apply, providing the states and the armed groups with the right to ensure the humanitarian nature of the relief consignment passing through their territory.[171]

4.2.2. IN NON-INTERNATIONAL ARMED CONFLICTS

Article 18(2) of Additional Protocol II literally and legally requires only the consent of the state to the relief scheme, although the consent of the armed group is necessary from a practical point of view. This is also relevant to situations covered only by Common Article 3 to the Geneva Conventions, involving solely non-state armed groups.[172] In order to understand how Article 59 might apply to NIAC, one needs to address two different issues: (i) whether *legally* there is any support for the fact that non-state armed groups should be taken into account as parties when organising humanitarian relief operations (and not as a practical action to ensure the protection of the consignment and personnel);[173] and (ii) whether and when Article 59, as a provision relative to occupied territories, should and could bind parties to a NIAC.

Unfortunately, and as addressed above, the feature of territorial control exercised by armed groups is somewhat neglected in the legal framework of IHL. Some have claimed that in certain situations these groups could be bound by IHL obligations, as they should be considered agents of necessity.[174] This legal concept is founded on Article 9 of the International Law Commission Articles on State Responsibility for International Wrongful Acts and its Commentary (2001).[175] Article 9 states:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

[171] GC IV (n 5) art 59; Pictet (n 23) 322–23.
[172] Barber (n 36) 385.
[173] Sivakumaran (n 78) 332.
[174] Rudolf (n 144) 140–43, founding this proposition on International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), UN Doc A/56/10 (ILC Articles), art 9. This idea is expressed and applied specifically to the context of humanitarian assistance by Ryngaert (n 32) 18.
[175] Rudolf, ibid.

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The purpose of this article, however, is to ensure that such acts will be attributed to the state in question.[176] The Commentary specifically distinguishes this situation from cases of insurgency.[177] This is fairly clear, as the aim of the said Articles is to ensure that a state bears responsibility for acts performed on its behalf. It would be hard to argue that the acts of an armed group operating in a state's territory and against it are automatically attributable to the territorial state.

However, borrowing from the law of international responsibility, it has been argued, quite convincingly, that at least within the framework of IHL, once armed groups comply with the conditions provided in Article 9 above – exercising governmental authority and control of territory – they become addressees of international law.[178] Arguably, deciding on humanitarian assistance and relief schemes, as well as asking for outside assistance and deciding these issues, all reflect traditional governmental functions and the exercise of governmental authority.[179] In this respect, while armed groups will not possess sovereignty, they will be bound by the same rights and obligations within the regime of humanitarian assistance.[180] This suggests that there will be a legal obligation to ask for the consent of the armed group and, on the other hand, the armed group will be obliged not to withhold it arbitrarily.[181] Whether or not a legal obligation exists, it will be difficult in practice (almost impossible) to conduct a relief operation without securing the consent of the armed group.[182]

We now turn to the second question addressing the applicability of the Article 59 regime to territories effectively controlled by armed groups, and its merits. As the law stands today, Article 59 does not apply to NIAC. However, the idea of 'borrowing' or cross-referencing provisions from the law of belligerent occupation to the position of territories controlled by armed groups has its merits, and is not as imaginary as one might think. As expressed by Sivakumaran, albeit the controversies, one should consider addressing the misrepresentation of territorial control by armed groups by referring to the law of occupation.[183] Such an approach has its practical advantages.[184] Furthermore, an armed group operating in a NIAC, meeting all of the IHL conditions of organisation and intensity, and which also exercises control over territory, resembles armed groups operating within the legal framework of an IAC (whether as proxy or after being recognised as belligerency). In this respect, it is hard to argue against the application *mutatis mutandis* of the minimum protection provided in Article 59 to ensure the well-being of civilians. In practice, the term 'occupation' has been used to refer to situations in which an armed group controls a territory during a NIAC, thus implying further international obligations.[185]

[176] ILC Articles (n 174) 49.
[177] ibid.
[178] Ryngaert (n 32) 18.
[179] ibid.
[180] ibid.
[181] ibid.
[182] Sivakumaran (n 78) 332.
[183] ibid 531.
[184] Gal (n 149).
[185] ICC, *Prosecutor v Ahmad Al Faqi Al Mahdi*, Decision on the Confirmation of Charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Pre-Trial Chamber, 1 March 2016.

The outcome is clear and extremely beneficial: an unconditional obligation on all parties to the conflict as well as other concerned parties (be it a state or an armed group) to allow access and the passage of humanitarian relief. This will ensure that in situations of NIAC the legal framework of relief operations and the obligations it entails will continue to be effective, practical, up to date and concerned primarily with protection of the victims. It will especially ensure that the civilian population living in cities affiliated with the adverse party are not starving to death because access to relief operations is refused by the state.

5. CONCLUSION

International humanitarian law should be more attentive to the role played by non-state armed groups and their features, as they too affect the civilian population. Recognising the functional capacity of non-state armed groups exercising control over territory and their effectiveness has many outcomes and encompasses many aspects at different levels from their administrative state-like governmental capacities to their obligations under human rights law.[186]

Accepting, at least, that what concerns the basic humanitarian needs of the civilian population – that the principles of humanity and effectiveness supersede other general principles of law such as sovereignty – is a reflection of the spirit of this body of law and lessons learned from the past. To require all parties concerned in these territorial situations to unconditionally accept and permit access to humanitarian action is not only supported by these legal principles, but is rather a promise, an assurance, that political aspirations and interests will not diminish the rights and needs of victims of war. It is clear, therefore, that focusing solely on state obligations is insufficient; it neglects another important actor in the theatre of war.

[186] Rudolf (n 144); Ronen (n 143).

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