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The Responsibility of States Indirectly Involved in an Armed Conflict to Provide Medical Care

A Contemporary Challenge for the Classification of Armed Conflicts

A Report of the Center for Human Rights and Humanitarian Studies at the Watson Institute for International and Public Affairs, Brown University

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List of Acronyms

CA1	Common Article 1 to the four Geneva Conventions
CA3	Common Article 3 to the four Geneva Conventions
CPA	Coalition Provisional Authority
GCs	Geneva Conventions
GC1	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949
IAC	International Armed Conflict
IHL	International Humanitarian Law
ICRC	International Committee of the Red Cross
IS	Islamic State/Daesh
NIAC	Non-International Armed Conflict
RULAC	The Rule of Law in Armed Conflicts
UN	United Nations

Introduction

Research Question
What is the legal responsibility of states indirectly involved in an armed conflict (i.e. providing material support to a warring party) to provide medical care for affected civilians and combatants in conflict settings under the Geneva Conventions/international humanitarian law? What national responsibility does a state undertake by working in a coalition with other actors?

In determining the legal responsibility of a state indirectly involved in an armed conflict to provide medical care for affected civilians and combatants, several fundamental questions arise. The research presented here is organized in order to address some of these questions first, before looking into the possible parameters for the provision of medical care for affected civilians and combatants. They include the following, and will be addressed in order: when is a state, or non-state armed group, a party to a conflict? It is necessary to determine the parameters for when a state's or non-state armed group's involvement in a conflict constitutes it being a party to the conflict, such that the various responsibilities and obligations under international humanitarian law become applicable to that party. This paper will then examine the parameters for what constitutes the provision of medical care for affected civilians or combatants.

Defining Legal Framework

The paper will now address the legal framework that governs the responsibilities of parties in a conflict, examining obligations that arise out of customary international law, the laws of state responsibility, international humanitarian law (under which the Geneva Conventions fall), and human rights law where applicable. In elaborating on the legal framework, we will then address the questions being asked about the obligation to provide medical care for affected civilians and combatants in conflict settings. It will become apparent that the questions posed complicates the legal framework as it exposes a gap in the protections the law affords non-combatants, or civilians in conflict settings.

Under international law, there are three possible conflict settings: an international armed conflict (IAC), a non-international armed conflict (NIAC), and the lack of conflict settings- in other words, peacetime. An IAC, defined as an armed conflict between two or more states, applies to all cases of declared war or any other armed conflict even if the state of war has not been recognised by the High Contracting Parties[1]. On the other hand, NIACs, defined to exist when there is a protracted armed violence between government authorities and organised armed groups or between such groups within a State[2], are governed by international humanitarian law. Peacetime, where there is no active conflict, is governed by international human rights law. If an armed conflict exists, whether as an IAC or a NIAC, then the setting is

[1] Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (hereinafter Geneva Convention II), Common Article 2.
[2] ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.

by definition a conflict setting. As long as a State or actor is found to be a party to the armed conflict, they would bear certain responsibilities and obligations under international humanitarian law.

International Humanitarian Law

The paper will begin with international humanitarian law (IHL), which applies to all parties to an armed conflict, whether as States or non-State armed groups. They are all are bound by the treaties and customary rules of IHL. These rules and obligations apply at all times to all parties to an armed conflict, irrespective of their ratification of the various IHL treaties. IHL, unlike many other branches of international law, expressly specifies in its main treaties (the four Geneva Conventions and Additional Protocols) positive obligations for third parties, regardless of whether or not they are parties to an armed conflict. Many international humanitarian law norms have also now attained the status of customary or, peremptory norms. Although IHL focuses on parties to a conflict, these third parties, although not parties to a conflict, will still be bound by the customary rules of IHL.

Geneva Conventions and the Additional Protocols

The Geneva Conventions (GCs) and their Additional Protocols form the core of IHL, which regulates the conduct of armed conflict and seeks to limit its effects, which encompass broad duties for all States to abide by the rules of the Conventions, as well as the duty to take all necessary measures to safeguard compliance with the Conventions by parties to a conflict. While the corpus of IHL is very large across the four Conventions and Additional Protocols, this paper will focus on those provisions relevant to the question of the provision of medical care to affected civilians and combatants in armed conflict.

The first core provision this paper will examine will be Common Article 1 (CA1), which obliges parties to ensure respect for IHL. The article, common to the four Geneva Conventions reads as follows: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".[3] The same provision is contained in Article 1 of the first Additional Protocol to the Geneva Conventions.[4] CA1 to the four Geneva Conventions creates a two-sided obligation for contracting parties, as each state is obliged to ensure compliance with the Conventions within their own jurisdictions; but also, and irrespective of any direct engagement with an armed conflict, each State is obliged to do everything that is reasonably in its power to ensure that IHL is respected by all.[5] CA1 creates a positive obligation on all states, including third parties, to an armed conflict. This positive obligation is generally understood to not be construed as an obligation to reach a specific result, but rather an "obligation of means" on States to take all appropriate measures possible to try and end the grave breaches of international humanitarian law.[6]

It is reasonable to conclude that CA1, when it was adopted, was not intended to confer an external dimension to the obligation for State Parties to ensure respect of the four Geneva

[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949, 75 UNTS 31–83 (hereinafter Geneva Convention I), Common Article 1.
[4] 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, 1125 UNTS 3–434 (hereinafter Additional Protocol I), Article 1.
[5] COMMENTARY OF 2016 , ARTICLE 1 : RESPECT FOR THE CONVENTION, https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt1, para 119.
[6] Ibid, para 150.

Conventions. This interpretation of CA1 is that it requires, in addition to States undertaking to adopt all measures necessary to ensure respect for the GCs by their own state organs and private individuals within their jurisdictions, that States ensure respect for the GCs by other states and also non-state actors.[7] This view had already been expressed in Pictet's commentary on GC1 in 1952.[8] However, today, it may arguably contain an external dimension and carries a proper legal obligation for States to take measures to induce compliance with international humanitarian law by other States.[9] If so, this could imply that States providing material or other forms of support to a State party that is party to an armed conflict may only do so to the extent that that party is complying with IHL. This will be further elaborated on below in the section on coalition forces.

Some authors have argued that CA1 requires third States to take measures to ensure respect for the GCs, even if this means in practice making this provision one of the most violated norms of international humanitarian law.[10] In their Expert Opinion on Third States' Obligations vis-à-vis IHL Violations under International Law, with a special focus on Common Article 1, Théo Boutruche and Marco Sassòli concluded that the obligation to ensure respect as enshrined in CA1 includes an obligation for States to adopt measures to induce other States to comply with international humanitarian law in case of a breach. As concluded by the authors, "Indeed in as much as the obligation to ensure respect of IHL accounts for the *erga omnes* nature of fundamental IHL substantive norms, this obligation itself could be considered as having such a character as well, considering that all States have a legal interest in the performance of the duty enshrined in CA1."[11] In light of the fact that CA1 is framed as a positive obligation, all States parties share, or should share, a common interest in seeing the four Geneva Conventions respected. It can therefore be argued that any violation of international humanitarian law, and that of the four Geneva Conventions, potentially triggers this obligation to ensure respect. This is further supported by the fact that CA1 contains the expression "in all circumstances." The gravity of the violation would then only matter for the determination whether a certain measure taken under CA1 is proportionate to the violation it is meant to stop.

The question here is therefore whether the provision of medical aid to civilians and combatants comes under this umbrella of *erga omnes* obligations in the sense that it would be considered as respecting and protecting the Geneva Conventions. It would be a stretch to construe this as an explicit positive obligation, in the absence of any other mention to the provision of medical care and its link with CA1. Even in the event that this connection could be made, it would seemingly undermine the belligerent's responsibility to provide for non-combatants in their jurisdiction. An argument for such a positive obligation may rest better on the moral and humanitarian intentions behind the drafting of the Conventions and the very purpose of the Conventions to protect those affected by armed conflict, if at all.

Common Article 3 (CA 3) warrants some attention here, as it lays out the responsibilities of parties to a conflict that is not of an international character specifically (often referred to as a

[7] ICRC, Commentary of 2016, Article 1: Respect for the Convention, https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt1.
[8] Pictet (ed.), *Commentary on the First Geneva Convention*, 1952, p. 26
[9] Marco Sassoli, "State responsibility for violations of international humanitarian law", International Review of the Red Cross, 2002, No. 846, https://www.icrc.org/en/doc/resources/documents/article/other/5c6b83.htm
[10] Theo Boutruche and Marco Sassholi, Expert Opinion on Third States' Obligations vis-à-vis IHL Violations under International Law, with a special focus on Common Article 1 to the 1949 Geneva Conventions, https://www.nrc.no/globalassets/pdf/legal-opinions/eo-common-article-1-ihl---boutruche---sassoli---8-nov-2016.pdf.
[11] Ibid.

non-international armed conflict or NIAC), where CA1 refers to all armed conflicts. As stated in CA 3, in cases of NIAC occurring in the territory of one of the contracting parties to the Geneva Conventions, each party is bound to the following responsibilities as a minimum: the protection of civilians and hors de combat (persons who have laid down their arms), the prohibition on violence to life and person, the taking of hostages, outrages upon personal dignity and the passing of sentences and the carrying out of executions with due process. CA 3(2) states that "the wounded and sick shall be collected and cared for", bringing this obligation squarely within the research question, for those that are a party to the conflict. *Therefore, as long as a country is determined to be a party to the conflict, they would bear the responsibility of collecting and caring for the wounded and sick.*

According to the International Court of Justice, the obligation to respect and ensure respect for IHL also applies in respect to obligations provided for in CA 3. As affirmed by the Court in the Nicaragua case, [the State in question] was under "an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions […]".[12]

Article 12 of the first Geneva Convention (for the Amelioration of the Condition of the Wounded in Armies in the Field) pertains explicitly to the protection and care of the wounded and sick. Article 12 protects members of the armed forces who are wounded or sick, and states that they shall be respected and protected in all circumstances, including ensuring that they are treated humanely and cared for. It also states that "they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created. … Only urgent medical reasons will authorize priority in the order of treatment to be administered."[13] These obligations for care and protection also extend to members of the armed force regardless of whose power they may be under.

Article 24 of the first Geneva Convention addresses the protection of permanent personnel. "Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances."[14]

IAC vs NIAC Responsibilities

The duties and responsibilities owed by parties to a conflict, whether the provision of medical care for affected civilians and combatants in conflict settings or otherwise, is first and foremost determined by the classification of that armed conflict as either an International Armed Conflict (IAC) or a Non-International Armed Conflict (NIAC). Reference has been made above to the different obligations contained in CA 1 and CA 3 respectively for an IAC or NIAC. Additionally, in an IAC, the fourth Geneva Convention requires States to "allow the free passage of all consignments of medical and hospital stores" intended only for civilians and "the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases".[15] The responsibility for providing medical care therefore also extends to ensuring the safe and free passage of the

[12] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Reports 1986, p. 14, para. 115.
[13] Geneva Convention I, Article 12.
[14] Geneva Convention I, Article 24.
[15] ICRC Study on Customary International Humanitarian Law (2005), Rule 55.

consignments needed to ensure this possibility. Article 70 of Additional Protocol I broadens this obligation to cover "rapid and unimpeded passage of all relief consignments, equipment and personnel."[16] This broadening is generally widely accepted, even by States not party to Additional Protocol I.

In a NIAC, Article 18(2) of Additional Protocol II requires that relief actions for the civilian population in need should be organized[17]; however the Protocol does not contain a specific provision on access of humanitarian relief, despite this being an indispensable and essential facet of any response effort. What constitutes these relief actions is unclear in this article. It should be noted, however, that both Additional Protocols I and II require the consent of the parties concerned for relief actions to take place.[18] While it is agreed that what this means is that parties to a conflict do not have an obligation to provide consent, consent cannot be arbitrarily withheld.[19] It is evident that humanitarian actors and parties to the conflict cannot operate in such a context without the consent of the party required, however, most of the practice collected does not mention this requirement. In this case, we can turn to international human rights law as a source of obligation to consent to humanitarian assistance. The International Covenant on Economic, Social and Cultural Rights obliges State parties to take steps to the maximum of their available resources in order to ensure the satisfaction of minimum essential levels of rights in this Covenant.[20] "Where a state's population is deprived of its rights to essential food, water, shelter or healthcare, the state is under an obligation to seek and consent to humanitarian assistance in order to ensure minimum essential levels of those rights."[21]

With regard to situations of occupation, Article 55 of the Fourth Geneva Convention imposes an obligation on the occupying power to ensure that food and medical supplies are provided for the population under said occupation.[22] Although practice has yet to clarify, it would logically make sense for all parties to a conflict to ensure that their populations have access to such basic necessities.

Customary International Law Rules

As was introduced in the first part of this paper, many international humanitarian law norms have now attained the status of customary or, peremptory norms. Where the GCs and Additional Protocols bind only parties to a conflict to the obligations contained therein, these customary norms can be a source of obligation for states who are not found to be directly involved in an armed conflict.

As mentioned above, CA1 of the GCs, by committing states to respect and ensure respect for the GCs, recognizes the importance of adopting all reasonable measures to ensure that

[16] Additional Protocol I, Article 70.
[17] Additional Protocol II, Article 18(2).
[18] Additional Protocol I, Article 70(1); Additional Protocol II, Article 18(2).
[19] Is Security Council Authorisation Really Necessary to Allow Cross-Border Humanitarian Assistance in Syria? EJIL: Talk!, February 24, 2020, https://www.ejiltalk.org/is-security-council-authorisation-really-necessary-to-allow-cross-border-humanitarian-assistance-in-syria/.
[20] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, Article 2.1.
[21] Is Security Council Authorisation Really Necessary to Allow Cross-Border Humanitarian Assistance in Syria? EJIL: Talk!, February 24, 2020, https://www.ejiltalk.org/is-security-council-authorisation-really-necessary-to-allow-cross-border-humanitarian-assistance-in-syria/.
[22] Geneva Convention IV, Article 55.

violations can be prevented. As also mentioned above, this is the prevailing view adopted for the interpretation of CA1, which was already expressed in Pictet's commentary to the GCs in 1952 and supported by the International Committee of the Red Cross (ICRC). Developments in customary international law have also since affirmed this view, with the International Court of Justice affirming this commitment in all circumstances, "since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression."[23]

The ICRC provides us with an incredibly useful database of the 161 rules of customary international humanitarian law as identified in the first volume of the ICRC's study on customary international humanitarian law.[24] However, it should be noted that while this database provides helpful guidance, not all states or commentators agree on the scope and application of these rules. Looking at state practice, this database provides evidence that shows that many rules of customary international law only apply in both IACs and NIACs. It also shows the extent to which state practice has gone beyond existing treaty law, thereby expanding the rules applicable to armed conflict, and NIACs in particular. Where the Geneva Conventions and their Additional Protocols may not provide direct answers to our research question about the responsibilities of countries indirectly involved in a conflict to provide medical care, these rules of customary international law oblige states to adhere to their obligations, just as treaty obligations would create binding obligations. Customary international law has also provided guidance in situations where their reliance is required, such as in international criminal law, and in situations where some rules of customary international law have been incorporated into domestic legal systems and could be invoked by national courts (for example, in the situation where a country indirectly involved in a conflict decides to adjudicate this research question within their national courts).

One such rule worth highlighting for the purposes of this research is Rules 55. Rule 55 states that "parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control."[25] This is in line with the obligation mentioned in Article 23 of Geneva Convention IV, wherein each High Contracting Party should allow for the free passage of all consignments of medical and hospital stores.[26] Both parties to the conflict and each High Contracting Party should allow and facilitate the rapid and unimpeded passage of all relief consignments[27], and free passage should be allowed.[28] It can be argued that the humanitarian relief to reach civilians in need, as well as medical care for civilians and combatants in a conflict setting, could fall within this obligation. However, this in itself is not an active responsibility to provide medical care, but is an obligation to not impede such relief where it is being provided for. State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts, as with all the other customary rules of international humanitarian law.

Rule 110 also clearly obliges parties to a conflict to provide medical care and attention to the wounded, sick and shipwrecked, to the fullest extent possible and with the least possible delay.

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[23] ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 220.
[24] ICRC Study on Customary International Humanitarian Law (2005).
[25] ICRC Study on Customary International Humanitarian Law (2005), Rule 55.
[26] Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, 75 UNTS 287–417 (hereinafter Geneva Convention IV), Article 23.
[27] Additional Protocol I, Article 70(2).
[28] Additional Protocol II (draft), Article 33.

This rule states that no distinction should be made among them other than medical grounds.[29] This obligation dates back to the first Geneva Convention of 1864, but has found more modern expression in Article 10 of Additional Protocol 1 which also uses the language of "to the fullest extent practicable and with the least possible delay."[30] The obligation to provide such medical care and attention with the least possible delay can also be read together with Rule 109 which states that whenever circumstances allow, especially after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.[31] This language is similar to that contained in Common Article 3 of the Geneva Convention and Article 8 of Additional Protocol II, as it applies to a NIAC. The ICRC construes Rule 110 as applying to combatants and those rendered *hors de combats*, while Rule 109 is interpreted more broadly to include civilians among those to whom this duty is owed.[32] The ICRC has interpreted the obligation contained in Rule 110 as an obligation of means, and has stated that in addition, most military manuals have stated this rule in general terms.[33] The ICRC already lists 35 countries that have military manuals with language consistent with this rule.[34]

Rule 25 of customary IHL states that medical personnel who are exclusively assigned to medical duties must be respected and protected in all circumstances, and they lose their protection if they commit acts disproportionately harmful to any belligerent.[35] This custom is reflected, for an IAC, in Articles 24-26, 36 and 20 respectively of the First, Second and Fourth Geneva Conventions, [36] In the case of a NIAC, this rule is implicit in CA3, which states that the wounded and sick are to be collected and cared for, "because the protection of medical personnel is a subsidiary form of protection granted to ensure that the wounded and sick receive medical care."[37] These distinct personnel from military medical services and permanent medical personnel therefore play a crucial role in the protection scheme that has been foreseen by the core IHL treaties.[38] Their clear purpose is to ensure that wounded and sick in an armed conflict are protected, collected and cared for, regardless of the State or party they may belong to. This distinction is important, as it draws the line between medical personnel and combatants. This distinction occurs even if some members of an armed force are medically trained, as it separates them when performing these medical duties even if they may also have combat roles within those armed forces. However, States and armed groups are not upholding this distinct category of medical personnel, which is regulated by international humanitarian law. This tends to happen because doing so allows States and parties to an armed conflict to have a greater number of trained medical personnel within their troops without renouncing their capacity to fight in the armed conflict. This often happens also because parties do not

[29] ICRC Study on Customary International Humanitarian Law (2005), Rule 110.
[30] Additional Protocol 1, Article 10.
[31] ICRC Study on Customary International Humanitarian Law (2005), Rule 109.
[32] "Interpretation", ihl-databases.icrc.org/customary-ihl/eng/docs/v1-rul-rule109
[33] Ibid.
[34] Footnote 25, ibid.
[35] ICRC Study on Customary International Humanitarian Law (2005), Rule 25.
[36] Geneva Convention I, Articles 24–26; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949, 75 UNTS 85–133 (hereinafter Geneva Convention II), Article 36; Geneva Convention IV, Article 20.
[37] ICRC Study on Customary International Humanitarian Law (2005), Rule 25.
[38] Marco Sassoli, "Medical care in armed conflict, Part 1", 24 January 2019, https://blogs.icrc.org/law-and-policy/2019/01/24/joint-blog-series-medical-care-armed-conflict-part-i/?utm_source=ICRC+Law+%26+Policy+Forum+Contacts&utm_campaign=ec5cf47673-LP_EMAIL_BLOG_2019_01_24_01_42&utm_medium=email&utm_term=0_8eeeebc66b-ec5c and Part 2: https://blogs.icrc.org/law-and-policy/2019/01/24/joint-blog-series-medical-care-armed-conflict-part-ii/

believe, or themselves do not respect this distinction, of the protection of said medical personnel in an armed force.

This responsibility goes even further because a party to a conflict without any medical services violates international humanitarian law towards its own forces, as the obligation to respect, protect, collect and care for wounded or sick soldiers applies to both parties to a conflict. The ICRC's commentary states, however, that there are no precise rules that require the deployment of a specific, or a minimum, number of medical personnel if a certain number of wounded people are to be expected. In the situation where a party to a conflict fails to provide any medical personnel at all, or medical equipment and facilities whatsoever, this failure would violate the obligation in the Geneva Convention to care for the wounded and sick. The Eritrea-Ethiopia Claims Commission confirmed this when it stated that "Eritrea and Ethiopia cannot, at least at present, be required to have the same standards for medical treatment as developed countries. However, scarcity of finances and infrastructure cannot excuse a failure to grant *the minimum standard of medical care* required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict."[39] The Commission confirmed that there is a level of minimum medical care that can be reasonably expected regardless of the circumstances, such as a State lacking significant resources, although what exactly is expected to constitute this minimum level of medical care may vary from State to State. In short, States involved in an armed conflict have to create a medical service that allows them to fulfil their obligations under humanitarian law.[40] "Civilians who are wounded or sick in a time of conflict are incapable of feeling, protecting themselves, or providing for their own needs. They are vulnerable and threatened by their illness. They are entitled to reinforced protection against the effects of fighting and to the right to receive treatment."[41] This assertion relies on both the Geneva Conventions and customary international law as outlined above.

However, it is apparent that while the obligations laid out above are clear when they come to the provision of medical services, this applies to parties to a conflict only. What is missing is how such obligations, if at all, would apply to non-parties, or in this case in particular, those parties indirectly involved in an armed conflict.

International Human Rights Law

Before exploring obligations that parties may have under international human rights law, it is necessary to highlight the debate between IHL as *lex specialis*. As mentioned above, some IHL principles, as have been referred to in the jurisprudence of the International Court of Justice, have attained the status of customary law, or have assumed the status of "*jus cogens"* norms, which means that they would apply, directly or indirectly, to all States. This can also apply to key principles of human rights law, a body of law that can apply concurrently with IHL in the context of an armed conflict or occupation.[42]

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[39] Ibid.

[40] ICRC, Commentary of 2016, Article 12: Protection and Care of the Wounded and Sick, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=CECD58D1E2A2AF30C1257F15004A7CB9#99

[41] Françoise Bouchet-Saulnier, in *The Practical Guide to Humanitarian Law, Third English Language Edition,* New York: Rowman & Littlefield, 2014, p. 364.

[42] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Reports 1996, para. 25

When adopting the approach that certain key principles of human rights law apply concurrently with IHL even during armed conflict or occupation, such *jus cogens* norms apply universally and create rights and obligations that by their very nature are the concern of all states; in other words, they create rights and obligations *erga omnes* (towards all). Article 53 of the Vienna Convention[43] defines these peremptory norms of international law as norms that have been accepted and recognised by the international community of States as a whole, from which no derogation is permitted. These *jus* cogens norms "arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values."[44] States have an interest in the protection of such rights, but *jus cogens* norms place additional duties on States regarding their promotion, respect, and implementation. When an *erga omnes* violation has occurred, third States have the right to demand that the wrongful act ceases, or they have the right to demand reparation for the benefit of the victims affected by this violation. Third states are also bound to cooperate to end such serious breaches through lawful means, as well as refraining from recognizing the unlawful situation or providing assistance to the offending State.

There remains much debate about the applicability of both IHL and international human rights law from scholars and States that argue for the *lex specialis* (meaning that more specific rules will prevail over more general rules) nature of IHL as displacing international human rights law entirely during times of armed conflict.[45] The International Court of Justice, in the Nuclear Weapons case[46], tried to find a middle ground by stating that while both regimes applied, IHL was the *lex specialis* during times of armed conflict. Therefore human rights treaties and their obligations therein should therefore be interpreted in light of the *lex specialis* status that IHL had in these situations. In the Court's later advisory opinion on the Palestinian Wall, it stated that there were three possible situations for the relationship between IHL and human rights law: some rights may be exclusively matters of IHL, others may be exclusively matters of human rights law, and yet others may be matters of both these branches of both.[47] The ICRC supports the approach that IHL constitutes the *lex specialis* governing the assessment of lawfulness when it comes to the use of force against lawful targets in IACs, and notes that the interplay between IHL and international human rights law specifically on the use of force is less clear in a NIAC.[48]

In situations where the threshold for armed conflict has not been reached, international humanitarian law is no longer applicable. However, that does not mean that there is no regime under international law that does not provide obligations for parties to a conflict to provide medical care for those affected. Where the threshold for armed conflict has been reached, regardless of whether the parties to the conflict are States or non-State armed groups, IHL applies. Where the threshold has not been reached, States are still obligated under international human rights law; however this does not apply to non-State armed groups (as the regime of international human rights law is premised on States as the key rights holders and therefore protectors of these rights).

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[43] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 53.
[44] Draft Articles on State Responsibility (2001), Article 40, Note (3)
[45] Lex Specialis, https://casebook.icrc.org/glossary/lex-specialis
[46] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Reports 1996.
[47] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 157
[48] Ibid.

In this example, the protection offered by both international human rights and humanitarian law can be divided into four main issues[49]: first, the protection of the wounded and sick, and of health-care personnel and facilities and of medical transports; next, medical ethics and confidentiality; additionally, the use of the distinctive emblems (such as the red cross, crescent or crystal); and finally, sanctions.

One such key principle of international human rights law is the right to health. While the scope of the human right to health is broad, in a conflict setting, this right obliges States towards at least its own forces and other persons under its jurisdiction. This is seen alongside obligations under IHL which a State would be in violation of if it did not provide the same level of care to enemy forces.[50] As noted in the GCs and their Additional Protocols, any distinction in this provision of medical care on grounds other than medical, is prohibited by international humanitarian law.[51] When a belligerent party knows that they may be involved in an armed conflict in a place where the local health system is insufficient, or cannot be expected to function properly, the belligerent party has an obligation to prepare and provide the necessary health services if they turn into an occupying power. Consequently, they have the choice to do so either through their own military medical services or through local health services that they would build and develop. However, the main responsibility for the provision of medical care still remains with the territorial State in which the armed conflict is occurring and the parties to that conflict.

Draft Articles on the Responsibility of States for Internationally Wrongful Acts

Where a state is not a direct party to a conflict, and therefore where IHL may not apply to it, we have seen above how customary international law and international human rights law can still oblige that state to uphold some responsibilities and obligations. Under these responsibilities and obligations comes the provision of medical support for affected civilians. One other area of international law that could be looked to is the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*. The Draft Articles have codified, or attempted to codify, the customary international law of state responsibility.[52] The Draft Articles have identified three instances where a State can be held directly responsible for the acts of another. These three instances are rendering aid or assistance as per Article 16, effective control over the perpetrator as per Article 17, and exercising coercion as per Article 18.

In particular, Article 41 of the Draft Articles imposes three duties on third party observers of serious breaches of peremptory norms, that are in line with the three obligations mentioned above from Chapter IV. States are bound by a duty to cooperate to bring to an end the wrongful situation, a duty to refrain from recognising the wrongful situation, and a duty to refrain from rendering aid or assistance in maintaining that wrongful situation. This third obligation derived from Article 41(2)- which prohibits States from rendering aid or assistance in maintaining a

[49] ICRC, The implementation of rules protecting the provision of health care in armed conflicts and other emergencies: A guidance tool, 28 February 2015, https://www.icrc.org/en/document/implementation-rules-protecting-provision-health-care-armed-conflicts-and-other-emergencies.
[50] OHCHR Factsheet No.31 on The Right to Health, https://www.ohchr.org/Documents/Publications/Factsheet31.pdf.
[51] Geneva Convention I, Article 12(3); Additional Protocol I, Article 10(2); Additional Protocol II, Article 7(2).
[52] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its 53rd Session, 2001.

situation created by a serious breach of peremptory norms- should be read together with Article 16 to determine complicity of a third State. Complicity is present if a third State provides such aid or assistance with the knowledge of the circumstances of the internationally wrongful act, and the act would be international wrongful if committed by that State itself. Therefore, Article 16, read together with Article 41, makes it clear that a State could only be held responsible for aid or assistance for the internationally wrongful act of another only if it has actual and specific knowledge of the circumstances in which the aid or assistance it is providing is intended to be used.[53] This is admittedly a very high standard of proof and has been debated by several scholars.[54]

The question this raises is if the provision of medical care for affected civilians and combatants would be considered such an obligation, in which case it would apply to all States without exception. Extrapolating from this, if there is a commission of an *erga omnes* violation, would rendering assistance in the form of providing medical care, violate the obligation to put an end to such a serious breach? As argued above, it may be a stretch to construe this as such a positive obligation. However, as has been argued in the crisis in Yemen, the Draft Articles provide a possible ground on which the United States could be held liable for the assistance it provided to the Saudi-led coalition, where potential liability would depend on the United States' intent and whether they knew rendering aid would be in facilitation of an internationally wrongful act.[55]

The Draft Articles affirm these negative obligations under general international law as well by attributing responsibility to a state that knowingly aids or assists another State in the commission of an internationally wrongful act. An example of this negative obligation would be the prohibition for a state to undertake the transfer of arms or sale of weapons to a State or other party to an armed conflict who is known to use such arms or weapons to commit violations of international humanitarian law. This prohibition is spelled out in Article 6 of the Arms Trade Treaty[56] and can also be found in IHL. The ICRC has argued that "all national and international standards for arms transfers should include a requirement to assess the recipient's likely respect for international humanitarian law and to not authorise transfers if there is a clear risk that the arms will be used to commit serious violations of this law", in reference to the CA1 obligation to respect and ensure respect for IHL.[57] As highlighted above, the same difficulty arises with having actual and specific knowledge of the circumstances in which the aid or assistance is being provided, setting a high standard of proof. Despite this, it can be argued here that a State found to be undertaking the transfer or arms or sale of weapons to a State or other party to an armed conflict, knowing that those arms or weapons would be used to commit violations of international humanitarian law, should then be responsible (under Article 41, as part of that party's duty to cooperate to bring to an end the wrongful situation) for providing medical care for affected civilians and combatants in conflict settings under international law in general, as well as violating their obligations under CA1.

[53] James Crawford, State Responsibility, Part IV, Chapter X, Ancillary and Secondary Responsibility, Cambridge Studies in International and Comparative Law, p. 406.
[54] Miles Jackson, "Complicity in International Law": An Overview. Book Discussion, 12 April 2017, https://www.ejiltalk.org/complicity-in-international-law-an-overview-book-discussion/.
[55] Just Security, State Responsibility for U.S. Support of the Saudi-led Coalition in Yemen, 25 April 2018, https://www.justsecurity.org/55367/state-responsibility-u-s-support-saudi-led-coalition-yemen/
[56] Arms Trade Treaty, 24 December 2014, United Nations,Treaty Series,vol. 3013, Article 6.
[57] Arms Transfer Decisions, Applying International Humanitarian Law Criteria, Practical Guide, ICRC, May 2007

The Gap for Non-Parties to an Armed Conflict

To determine the responsibilities and obligations to provide medical care for affected civilians and combatants from the perspective of a state or non-state armed group indirectly involved in that conflict, we first need to determine what being indirectly involved in a conflict means. As we have already seen above, both IACs and NIACs are subject to IHL, and as long as a State or actor is found to be a party to the armed conflict, they would bear certain responsibilities and obligations under international humanitarian law. Where there is no active conflict, international human rights law applies. We have also seen that international human rights law can also apply during times of armed conflict. Where IHL fails to explicitly place responsibilities on non-parties, international human rights law may help us address these gaps. However, international human rights laws' relationship with IHL is subject to *lex specialis*, although the extent to which this applies to that relationship is not fully agreed on. The International Court of Justice has provided 3 instances: some rights may be exclusively matters of IHL, others may be exclusively matters of human rights law, and yet others may be matters of both these branches of both.

Responsibility Undertaken by Working in Coalition with Others

When it comes to states acting in coalition with other actors, the question that needs to be determined is when a party in a coalition or multinational force is a party to an armed conflict. Working in conjunction with other actors does not directly equate to that party being a direct party to the conflict. While multinational forces may be involved to various degrees, not every kind of involvement automatically renders a foreign state a party to the conflict. Multinational forces can become a party to a NIAC if they become engaged in a conflict with a non-state armed group that meets the usual requirements for such a classification in terms of the intensity of the conflict and the armed group's degree of organization.[58] On the other hand, in many instances, multinational forces or countries in a coalition may not be directly involved in combat, and provide support to the territorial state that is being engaged in an existing or ongoing NIAC against a non-state armed group.[59]

The ICRC has adopted a support-based approach in determining whether one country or party in a multinational force is a direct party to that armed conflict. The ICRC has determined that multinational forces' contribution to the collective conduct of hostilities determines whether or not they would become a party to a pre-existing NIAC. "Only activities that have a direct impact on the opposing Party's ability to carry out military operations would turn multinational forces into a Party to a pre-existing non-international armed conflict."[60] This can include the

[58] ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.
[59] Rulac Geneva Academy, Contemporary challenges for classification, http://www.rulac.org/classification/contemporary-challenges-for-classification.
[60] L. Cameron, B. Demeyere, J-M. Henckaerts, E. La Haye and I. Müller, with contributions by C. Droege, R. Geiss and L. Gisel, 'Article 3: Conflicts Not of an International Character', ICRC, Commentary on the First Geneva Convention, 2016, at 446.

transportation of troops to the front lines of the armed conflict and the refuelling of planes involved in aerial operations. However, the ICRC finds that other forms of support to sustain military activities or to build up military capacities, such as the delivery of weapons, would not be sufficient to determine whether that party or State becomes a party to a pre-existing NIAC. The rationale for this support-based approach is to link IHL to multinational forces and their actions that form an integral part of the pre-existing conflict. "Multinational forces' support should not be interpreted as a constitutive element of a potential new and independent NIAC. Therefore, because of the nexus with the pre-existing NIAC, the support provided by multinational forces must be distinguished from what is required to establish that they are party to a distinct NIAC."[61] While there are many possibilities to determine what activity would have a direct impact on the opposing Party's ability to carry out armed operations, this author disagrees with the view that the delivery of weapons is not sufficient in having a very direct impact on the armed conflict, and therefore determining whether a country is a party to the armed conflict or not.

The ICRC has also clarified its legal position on the notion of armed conflict that involves foreign intervention and, therefore, on determining the international humanitarian law applicable to such conflict.[62] The legal position is similar to the support-based approach mentioned above. While support can take several forms and be of varying levels of intensity, the ICRC clarifies that situations that involve financial or political support are not included in constituting support (and therefore being a party to the conflict and bearing certain responsibilities) because these types of assistance have no bearing on the application of international humanitarian law, though this may have implications in term of the law of state responsibility. The ICRC has provided some examples in which the support provided would fall within the scope of direct involvement because "they have a bearing on the applicability *ratione personae* and *ratione materiae* of IHL."[63] These include logistical support in the form of transporting troops of one of the belligerents to the front line of the conflict, providing intelligence that is used immediately in the conduct of hostilities, and the involvement of a third party's members in the planning and coordinating of military operations that are then conducted by a supporting party.[64]

As outlined above, the classification of conflict is first determined by whether there is an armed conflict. If it has been determined that there is an armed conflict, it is necessary to determine whether the conflict is an IAC or NIAC. This question is answered by who makes up the parties to this conflict. Consequently, it is crucial to determine parties to a conflict in order to determine the nature of that armed conflict. It is at this juncture that we must acknowledge that this gap in determining who is a party to an armed conflict in multinational forces is one of several contemporary challenges for the classification of armed conflicts. The Rule of Law in Armed Conflicts (RULAC), an initiative supported by the Genevan Academy of International Humanitarian Law and Human Rights, provides guidance on this question, by following the ICRC's support-based approach.

[61] Tristan Ferrano, "The applicability and application of international humanitarian law to multinational forces", International Review of the Red Cross (2013), 95(891/892), pg. 583.
[62] Tristan Ferrano, "The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict", International Review of the Red Cross (2015), 97 (900), 1227-1252.
[63] Ibid, pg. 1231.
[64] Ibid, pg. 1231.

RULAC supports this approach and adds that the same support-based approach can be used to determine which state, when contributing troops to a multinational force, would become a party to an armed conflict, or whether the support provided to a coalition force in a NIAC would render that supporting state a party to that NIAC. Adding to this, RULAC states that when multinational forces are operating under the auspices of a regional or international organization, member states place their troops at the disposal of these organisations. So where countries that have contributed troops retain some form of control and authority of their own forces (which are often act on behalf of the state or are organs of that state), they also act on behalf of that regional or international organization (examples include NATO and the African Union).

The issue of international humanitarian law and how it applies to multinational forces has been the subject of debate for a long time, especially in light of several large coalitions that have participated in armed conflicts, such as in Iraq and Afghanistan. When it comes to United Nations (UN) forces, the UN agrees that when peace support operations are actively engaged in combat, the provisions of IHL apply to the extent and for the duration of their engagement.[65] However, there has not been clarification on what constitutes being actively engaged in combat, or what 'applicable to the extent and for the duration of their engagement' means for this application of IHL.[66] It has also been affirmed that "multinational forces, which bear the stamp of international legitimacy, should be considered to be impartial, objective and neutral, because their only interest in any armed conflict is the restoration and preservation of international peace and security."[67] As with any other situation where the Geneva Conventions and other sources of international humanitarian law do not explicitly state so, the applicability of international humanitarian law to multinational forces must be determined solely on the basis of the facts, irrespective of the international mandate assigned to multinational forces by an international, regional or national authority, and of the designation given to the parties potentially opposed to them.

IHL becomes applicable to multinational forces once they become party to an armed conflict, be it international or non-international. When multinational forces are fighting against State armed forces, the legal framework of reference will be IHL applicable to international armed conflicts. When they are opposed by one or more organized non-State armed groups, the legal framework of reference will be IHL applicable to non-international armed conflicts.

Another aspect to consider is that of attribution, to determine responsibilities of parties to a conflict, especially where coalition forces are involved. To assess the attribution of concrete acts to the international organization or the troop-contributing country would depend on the general rules of attribution under international law, which, in turn, revolve around the notion of control.[68] Therefore, responsibility falling on both the individual troop-contributing member, and the organization (or dual attribution) would be possible. The assumption here then is that regional and international organisations in and of themselves, and presumably where they have the capacity to do so, can be responsible for the provision of medical care for affected civilians and combatants in an armed conflict setting.

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[65] Secretary-General's Bulletin, Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/ SGB/1999/13 (Aug. 6, 1999).

[66] **Chapman**, **Peter** F. "**Ensuring Respect**: United Nations Compliance With International Humanitarian Law." Human Rights Brief 17, no. 1 (2009): 3-11, pg. 5.

[67] ICRC, "Who is bound by IHL?", 13 August 2017, https://blogs.icrc.org/ilot/2017/08/13/who-is-bound-by-ihl/.

[68] ICRC, Commentary of 2016, Article 3: Conflicts not of an international character, To assess this, according to the International Committee of the Red Cross, the command and control arrangements need to be assessed.

Using the notion of control to determine whether international humanitarian law is applicable has legal implications, because a non-State party could then become subordinate to the intervening third party. In international law, members of this non-State armed group can therefore be considered agents of the third party. "In terms of IHL application ratione personae, this means that the intervening power entirely substitutes the non-State party and becomes itself a party to the pre-existing armed conflict instead of the non-State armed group." [69] The International Criminal Court has also dealt with this issue of IHL applicability, as can be seen from the Lubanga case, which specified that "an internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, be international in character alongside an internal armed conflict – if i) another State intervenes in that conflict through its troops (direct intervention) or if ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)".[70]

Precedent

This research will turn to precedent, to determine how previous examples of multinational or coalition forces have dealt with the question of delegation of powers and responsibilities in providing aid or assistance during an armed conflict (in the form of medical care or otherwise). While this section of the paper will look at examples of coalition forces, as has been mentioned above, it will demonstrate that the provision of medical care and services is an obligation to all parties to a conflict. Where coalition members are found to be a party to a conflict, IHL is clear that there is an obligation of means for each party to that conflict to search for, collect and evacuate the wounded, sick and shipwrecked. This obligation of means determines that a party to the conflict takes all possible measures to do so.

From April 2003 to June 2004, Iraq was under the belligerent occupation, *de jure*, of the United States of America (USA) and the United Kingdom (UK), both of whom were acting as occupying powers under unified command. During this occupation, Iraq was governed by the two occupying powers through the Coalition Provisional Authority (CPA). As two parties to the conflict, it is clear here that the UK and USA were parties to this conflict, and therefore were obliged to provide medical care and support as outlined in IHL.

According to Article 4(1) of the Draft Articles on State Responsibility, which also reflects an established rule of customary international law, "the conduct of any State organ shall be considered an act of that State under international law'.[71] Therefore, while the US government has been cautious in domestic proceedings about claiming the CPA as an organ of the state, there is little doubt that such a government enterprise qualifies as an organ of the US for the purposes of State responsibility. The United Kingdom has also stated on various occasions that

[69] Tristan Ferrano, "The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict", International Review of the Red Cross (2015), 97 (900), pg. 1239.
[70] *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo* , ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012, paras 536, 565.
[71] Article 4(1), Draft Articles on State Responsibility (2001)

it also shared responsibility for the actions of the coalition authority, despite their relatively minor role.[72]

As has been demonstrated above, where there are several responsible States in respect of the same internationally wrongful act, an injured State could invoke the responsibility of each State in relation to that act. On the flipside, each occupying power can be held to have responsibility (albeit to varying extents) in a coalition force or authority. Other key documents about the CPA would also indicate that each actor is responsible for the provision of aid or assistance in such a coalition. The draft resolution submitted by both the US and the UK in May 2003 made reference to "recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states [i.e. the United States and the United Kingdom] and others working now or in future with them under unified command as the occupying power ("the authority").[73] As to the obligations of those working with the coalition in the future, the United Nations Security Council, in Resolution 1483, distinguished between these actors and those under unified command, such that coalition partners like Australia where not legally considered an occupying power. This brings it in line with the ICRC's support-based approach, to determine which actor becomes a party to a conflict (and therefore bears the necessary duties and responsibilities that come with that position).

Turning again to Iraq, the battle in Mosul between October 2016 and July 2017 demonstrated again that parties to the conflict had obligations and responsibilities to provide medical care and support affected civilians and combatants. The Iraqi government, with the support of an international coalition led by the United States, Kurdish Peshmerga forces and other militia groups, has been in an armed conflict against the Islamic State (IS) and its associated groups. This armed conflict has been deemed an NIAC[74], and therefore clearly places IHL obligations on all the parties to the conflict as named above.

In a battle that saw more civilian deaths than IS fighters, did all coalition members have an obligation to provide medical care for injured civilians and combatants? As a party to the conflict, the answer here is yes. Where there is room for debate in this case is whether all the members of the coalition were a party to the conflict. This is because the Global Coalition against Daesh, created in 2014 to oppose and ultimately defeat Daesh (the Islamic State), is currently made up of 82 partner states. At the time of the offensive, the U.S.-led coalition included a dozen partner countries, carrying out more than 1,250 airstrikes in Mosul alone.[75] Of these, 18 partner states have military manuals with language consistent with Rules 109 and 110, the obligation of means to provide such medical care and attention with the least possible delay to affected civilians and combatants. Such a large coalition resulted in the inevitable situation where some members participated in combat activities against Daesh, including the United States, the United Kingdom and France who conducted airstrikes, while many other members of the coalition did not. For example, the air forces of Australia, Canada and Germany have conducted aerial reconnaissance flights and have also provided air-to-air refuelling for these airstrikes. The Netherlands, for example, has also at times committed fighter-attack

[72] Stefan Talmon, A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq, in P Shiner & A Williams 9eds), The Iraq War and International Law (Hart, 2008), p.13.
[73] Ibid, p.20.
[74] Non-international armed conflicts in Iraq," last updated January 16, 2020, http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-iraq.
[75] Oakford, Samuel, "Counting the Dead in Mosul," The Atlantic Monthly, April 5, 2018, https://www.defenseone.com/ideas/2018/04/counting-dead-mosul/147226/?oref=d1-related-article

aircraft to the coalition. However, the Netherlands is now more focused on capacity-building, providing training that "highlights the importance of human rights and humanitarian law."[76] These examples show the uncertainty that comes with trying to show whether, for example, Australia, Canada, Germany and The Netherlands, actively participated in combat activities.

The high casualty rate and the strain being faced by local medical services[77] points us to a failure on the global coalition's part to ensure adequate medical support during the battle for Mosul. This indicates a failure in the coalition's operational planning, in failing to pay sufficient attention to one of its own self-described lines of effort, addressing humanitarian crises in the region.[78] When discussing the lines of effort, the US government stated that "International contributions, however, are not solely or even primarily military contributions. The effort to degrade and ultimately defeat ISIS will require reinforcing multiple lines of effort… Humanitarian Assistance to those affected by the conflict is equally important to meeting urgent needs and maintaining regional stability."[79] Addressing humanitarian crises as a line of engagement in this coalition indicates that members were aware of the importance of this issue and, in light of IHL obligations, obliged to search for, collect, and evacuate the wounded, sick and shipwrecked and take all possible means to do so. While the coalition did permit medical humanitarian groups to embed with the international coalition during the offensive, how they upheld these obligations has been questioned, with some arguing that the close cooperation that came from embedding medical aid groups in the offensive meant that care may not have been delivered on the basis of need alone.[80] Organising a medical response at the same time as planning a military campaign meant that "a whole chain for medical referral was established alongside the campaign"[81]

Conclusion

The obligations to provide medical support as contained within the Geneva Conventions is clear. However, it is also clear, that at the same time, these obligations are limited to parties to a conflict only. What is missing is how such obligations, if at all, would apply to non-parties, or in this case in particular, those parties indirectly involved in an armed conflict. We have tried to address this by turning to other sources of international law. Where the threshold for an armed conflict has not been reached, States are still obligated under international human rights law. We have discussed the relationship between IHL as *lex specialis* and the three situations as laid out by the International Court of Justice that demonstrate the relationship between IHL and international human rights law. However, international human rights law does not apply to non-State armed groups (as the regime of international human rights law is premised on States as the key rights holders and therefore protectors of these rights). Customary international law has shown us that as far as states are concerned, even those not a

[76] Netherlands, The Global Coalition against Daesh, https://theglobalcoalition.org/en/partner/netherlands/.
[77] Jane Arraf, "More Civilians than ISIS Fighters are Believed Killed in Mosul Battle", NPR, 19 December 2017, https://www.npr.org/sections/parallels/2017/12/19/570483824/more-civilians-than-isis-fighters-are-believed-killed-in-mosul-battle?t=1588522365869.
[78] The Global Coalition against Daesh, https://theglobalcoalition.org/en/.
[79] US Department of State, "About Us – The Global Coalition to Defeat ISIS," https:// www.state.gov/about-us-the-global-coalition-to-defeat-isis/.
[80] Defourny, Isabelle & Christine Jamet, "The bitter taste of Mosul: in the battle to retake Mosul, MSF was forced to witness the expendability of human life," February 5, 2018.
[81] Ibid.

party to an armed conflict can be found to have responsibilities and obligations for the provision of medical care because of the *jus cogens* nature of many of these laws.

Where there remains a gap is with non-State actors that may be a party to the conflict, or third parties or States that are indirectly part of a conflict but are not considered parties to the conflict, all of whom are therefore immune from the obligations under IHL. While we have seen that some of this can be addressed by the GCs, but there are not adequate avenues of responsibility unlike for state actors.

In general, the duties and responsibilities for coalition forces under international law are also relatively clear, but there remains definite room for interpretation and therefore subjectivity. Given the ever-changing nature of warfare and coalition forces, as was demonstrated in the example of the Global Coalition against Daesh, there needs to be clearer guidance on when states or actors would fall clearly under the definition of being a party to the conflict, because then it is clear that they are subject to the responsibilities and obligations for the provision of medical support as laid out in the GCs. If not, State and non-State actors can use the subjectivity of many of these treaties and rules to fall short on their duty to provide aid for conflict-affected civilians at least, given that a moral duty clearly exists.