THE STATUS OF NON-STATE ARMED GROUPS IN ARMED CONFLICTS

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ABSTRACT

The International Humanitarian Law (IHL) is historically directed towards regulation of armed conflicts by the States. As custodians and primary actors of international law the States decide the rules and laws which will be abided by them in practise. The rules agreed upon by the states are however enforceable upon those entities which come under the jurisdiction of that state. The status of Non State Armed Groups (NSAGs) during a conflict is also regulated by the law which has been agreed upon by the States. The law regulating the armed non-state actors is not extensive and mostly covered by the laws relevant to the NIAC. Threshold of the internal disturbances converting into an armed conflict is narrow. Hence IHL is only applicable when an armed conflict is triggered. The article looks into the complications of application of the IHL upon NSAGs.

Keywords: Non-State Armed Groups, International Humanitarian Law, Non-International Armed Conflicts

1. INTRODUCTION:

Traditionally the law of armed conflicts or humanitarian law was designed to address the rights and obligations of the State actors. The Post-Cold War scenario has driven the war framework out of the realm of the interstate conflicts to intrastate conflicts. In the last 65 years the intrastate conflicts has doubled, as a result around 80 percent of all the conflicts now involve a non-state actor.¹ For

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instance, out of 25 major armed conflicts in 1998 only two of them were inter-state conflicts. In the contemporary realm of affairs there have been two distinguished categories of non-state actors within armed conflicts. Firstly, those actors who take active part in the armed conflicts and secondly those who do not fight. The non-state actors not taking part within the hostilities are given protection as civilians or non-combatants under the International Humanitarian Law (IHL). This paper focuses upon the non-state actors taking active part in the hostilities directly, namely the Non-State Armed Groups (NSAGs). The compliance (or non-compliance) with the law of armed conflict by these NSAGs has remained a contentious issue. The United Nations (UN) Secretary General Ban Ki-moon stressed that “We must [. . .] focus more attention on compliance with International Humanitarian Law by the Non-State Armed Groups. Unpalatable as it may be for some States, engagement with such groups is critical”. The problem of non-compliance with IHL by NSAGs and the applicability of IHL on NSAGs have legal as well as political implications. This article highlights the development of legal system with regard to the NSAGs and IHL. The issues pertaining within the international norms dealing with the problem has been highlighted with the purpose of highlighting ways to make the NSAGs more responsible during conflicts.

2. Non-State Armed Groups Identified:

In common parlance NSAG may be understood as an armed entity which is not working under the control of a state and for the achievement of its objectives the use of force is exercised. This explanation gives a general perspective on armed groups’ i.e. any armed groups taking part or being part of any kind of disturbances within a state. A more detailed definition is given by the UN and NSAGs are defined as a group that:

“[Has] the potential to employ arms in the use of force to achieve political, ideological or economic objectives; [but] are not within the formal military structures of States, State-alliances or
intergovernmental organizations; and are not under the control of the State(s) in which they operate”.

The NSAGs may however take part within armed conflicts in different capacity. The capacity or status of the groups is somehow dependent upon the kind of conflict taking place. The status of the NSAGs as accepted by the States and general principles of International Law is valuable with regard to any liabilities accrued individually and collectively by the members of these NSAGs. The shifting of international responsibility upon these groups also lies upon the question of the status of the groups. The status of these groups is hereby shortly presented for a better understanding of the concept of NSAGs.

a. Rebels:

Rebels are persons taking part in a short-lived insurrection against a legitimate government. The status of the “rebels” under international law is dubious as they are mostly considered by States as subjects coming under the jurisdiction of the domestic criminal law of a State. The ICTY have also agreed with the fact that the rebels are considered subjects under State jurisdiction by regarding it as a subject of state law. Thereby the direct status of rebels under International Law do not exist, they have an exemption from any positive rights and obligation in International Law. The State obligations under International Human Rights regime however will apply as far as the threshold of an armed conflict coming under the purview of IHL is not crossed. Thereby, the rights and obligations of these groups are limited to the criminal law of a state where they operate. In cases where the threshold of an armed conflict under IHL is crossed the status of the rebels will also change.

b. Insurgents:

Insurgencies are a stretched or sustained form of rebellions. Under traditional International Law the rights and duties of the rebels would emanate at a point they graduate to insurgency. The insurgencies
constitute a more organised and extensive attacks then a rebellion.\textsuperscript{10} The International rights flew from the terms of recognition given by the state to insurgencies.\textsuperscript{11} The criteria for giving recognition by the states or the concept of insurgency at large are unclear.\textsuperscript{12} According to Reidel the insurgents given recognition would assimilate the role of a state actor gaining all the rights and obligations streaming out of the laws of armed conflict.\textsuperscript{13} States however tend to consider the NSAGs as illegitimate and illegal combatants or terrorists, whereby they are dispossessed of any legal standing.\textsuperscript{14} The recognition of insurgency thereby will be considered to rely upon the degree of violence necessary.\textsuperscript{15} However, the question of necessity will be open to interpretation by States.\textsuperscript{16} The relationship of Insurgents after recognition creating rights and duties with outside states are then based upon “convenience, humanity and economic interests”.\textsuperscript{17}

The changing modes of the warfare and the newer form of laws of conflict particularly after the Second World War have changed the necessity of recognition for insurgencies to create international rights and duties for the insurgents.\textsuperscript{18} The contemporary commentators have subsided the notion of the rebellion relying upon recognition for the affirming of international rights and duties.\textsuperscript{19} The contemporary law of International Armed Conflicts rely upon the crossing of certain thresholds, after which the legal regime becomes active.

c. Belligerants:

Insurgents are recognised as belligerents when a specific level of intensity in an armed conflict is achieved. The recognition as belligerents creates rights and duties for both parties to the conflict, as in an international armed conflict. Traditionally, the recognition of belligerency would be identified with the factual existence of a war.\textsuperscript{20} The factual existence of war between two organised parties has been given recognition when it passes the four point test as illustrated by Lauterpacht.\textsuperscript{21} The same has been more or less adopted within the APII article 1(1). The recognition of belligerency is an important factor under IHL and the regulation of the NIAM because all the
protection is extended after the formal recognition of a conflict. According to ICRC the decision of the recognition of the belligerency lies with the State.\textsuperscript{22} That is why the States will only recognise belligerency when it is in its own interest. In case of non-recognition the states will apply its domestic criminal laws on these NSAGs.

The contemporary practice of recognition of an armed conflict or the respect for the laws of armed conflict or granting protection on human rights basis during conflicts has been achieved through different means.\textsuperscript{23} Written agreements among the parties to conflict have served the purpose in some instances.\textsuperscript{24} These newer ways of regulation for the protection of people during armed conflicts and making non-state armed groups more responsible extends the IHL and human rights norms even after the closure of conflicts.\textsuperscript{25}

d. National Liberation Movements

The National Liberation Movements (NLM) as compared with the recognised insurgents or belligerents may claim their rights and will be subjected to the international obligations. This may be true even in the absence of control of territory or express recognition by its adversary. In contrast to the belligerents who only represent themselves the NLM not only characterize themselves or the area they are in control, but they tend to represent those who are denied the right to self-determination.\textsuperscript{26} This capacity to stand for the people makes the NLMs intrinsically independent of any strategic or other geo-military specifications. The application of the IHL to the NLMs is discussed in detail in the next section. The problem with NLMs is that no government is ready to accept the legitimacy of the NLMs. Accepting the legitimacy would end up in the declaration of the state as a racist regime or alien occupation.\textsuperscript{27}

3. The Application of IHL to Non-State Armed Groups:

Rebels, Insurgents and Belligerents as discussed were traditionally subject to the recognition of the state in order for them to come under
the ambit of international law. The modern IHL as pointed out by Clapham discards the traditional approach and the application of IHL in cases of belligerents is only qualified when the conflict reach a specific threshold.\textsuperscript{28} The NSAGs are mostly involved in a NIACs. The exceptions apply in a national liberation movement or involvement in a conflict as part of the armed forces of States involved in an IAC. In IAC if the NSAGs are involved they can fight alongside or directly with the armed forces of a state involved in the conflict. In these circumstances the NSAGs will be considered as lawful combatants and will be given the status of POWs if required under the law. Under Protocol I, the IHL will apply to the NLMs who are involved in a conflict against alien occupation or colonial domination and against racist regimes in their exercise of their right of self-determination.\textsuperscript{29} Under article 96(3) of the Protocol I the armed groups can indicate to the ICRC of the compliance with the Protocol. In cases where the intention and object of the NSAGs changes to a regime change the context of the conflict will also change to a NIAC. Thereby, application of the IHL upon the armed groups may differ according to the factual circumstances of the conflict.\textsuperscript{30}

In NIAC the Common article 3 to four Geneva Conventions of 1949 binds “each Party to the conflict” i.e. both state and non-state actors.\textsuperscript{31} The notion of “each Party” has been approached differently whereby some argue that it only apply to the state parties.\textsuperscript{32} However, the state practise and international judicial practise have confirmed the applicability of the Common Article 3 to the NSAGs.\textsuperscript{33} The International Law Commission also have stated that the NSAGs should comply with the IHL as of \textit{jus cogens} norms.\textsuperscript{34} The \textit{jus cogens} test do not include other qualifications required as mentioned in AP II, for instance, the degree of control of a territory or a level of \textit{defacto} authority over a population.\textsuperscript{35} Moreover, the applicability of the IHL has been attached with the “prevailing circumstances” by different international tribunals rather than with the acceptability of the parties to the conflict.\textsuperscript{36} For instance in \textit{Boškovski} the ICTY
determined the question of the presence of an armed conflict by factual circumstances which are to be determined by the court itself after reviewing evidence.\textsuperscript{37} The notion of the views of the party was also discarded in \textit{Milutinovic} by the ICTY whereby the determination by the parties to a conflict regarding the status or existence of the conflict was not accepted.\textsuperscript{38} Also, the ICTR in \textit{Akayesu} stated that parties to a conflict cannot be given powers to decide the application of the laws of the armed conflict.\textsuperscript{39} The parties to a conflict however may agree on applying some or all of the provisions of the conventions which are only applicable in IACs through “special agreements”.\textsuperscript{40}

Practically, the enforcement and acceptability of IHL during NIAC by the NSAGs will only suffice when the rights of the members of these groups are secured.\textsuperscript{41} Thereby, if the status of the members of these groups is not defined during conflicts they will have little incentives to comply with the laws.\textsuperscript{42} This will only be possible if the status of the groups is recognised by the opposing parties (which are the states). Without this recognition the members of these groups will always fear prosecution even if they comply with IHL.\textsuperscript{43} Moreover, the compliance of the IHL by these groups will work in reciprocity with the compliance by the state party to the conflict. States are found hesitant in giving recognition to the NSAGs because of the fear of gaining political legitimacy by these groups.\textsuperscript{44} The application of relevant IHL norms (mainly common article 3) do not explicitly affect the legal status of the parties, however the political repercussions of the application of the IHL norms as perceived by the states prevent them from its legal application.\textsuperscript{45} The non-application of relevant IHL norms and not giving recognition to the NSAGs also reduces the liability of the states from such norms.\textsuperscript{46}

4. **Conclusion:**

The status of the NSAGs under the traditional international law depends upon the recognition given by the state parties. However, the obligations and rights of the NSAGs in contemporary laws of armed
conflict are not based upon the recognition provided by the state. The application of the IHL depends upon the completion of a certain threshold. In an IAC the NSAGs fighting alongside a state military would incur the rights and obligations accordingly. The application of IHL within the NIAC on NSAGs has been dealt with on a case by case basis. The recognition of a conflict by the state has not been taken as the only threshold for applying the laws applicable during the NIAC. The practical implementation of IHL on the NSAGs will only depend upon the reciprocity principle i.e. the same amount of respect for the law has to be shown by the opposite part (mostly States).

Notes and References

5 UN, ‘Guidelines on Humanitarian Negotiations with Armed Groups’, Office for the Coordination of Humanitarian Affairs: New York, 2006, p. 1, available at <https://docs.unocha.org/sites/dms/Documents/HumanitarianNegotiationswArmedGroupsManual.pdf> last access 11 June 2018. The term ‘non-state armed group’ is one of several terms used in formal or academic literature on armed conflict to distinguish a particular group of actors. Other terms include ‘dissident armed forces’ and ‘other organised armed groups’.

7 Prosecutor v. Dusko Tadić, 2 October 1995 ICTY, Case No. IT-94-1-AR72, para. 96 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).


10 Cullen, supra note 6, p. 71.


13 Riedel, supra note 11, p. 47-50.

14 In fact, however, those groups may be more legitimate than the State they are fighting against. E.g., C. Burderlein, A. Clapham, K. Krause, M.-M. Ould Mohamedou, Program on Humanitarian Policy and Conflict Research, Harvard University, ‘Transnational and Non-State Actors: Issues and Challenges’, Concept Note, 2007, p. 2 (‘The ability of NSAs to deploy state-like infrastructure in terms of public services (…) and to the legitimacy they come to gain from these activities challenge directly the relevance of the state concerned as the quasi-exclusive legitimate international actor.’).

15 Cassese A., International law, 2nd ed. (Oxford University Press, Oxford, 2005), p. 125; arguing that the minimum conditions for recognition of an insurgency are effective control of part of the territory and civil commotion should reach a certain degree of intensity and duration (it may not simply consist of riots or sporadic and short-lived acts of violence)


18 Clapham, supra note 8, p. 492.


21 Lauterpacht, supra note 17, p. 176; The first criterion was the existence within a State of widely spread armed conflict. Second, a substantial portion of the territory should be occupied and administered by the insurgent group. Third, hostilities should be conducted in accordance with the rules of war and by armed forces that are responsible to an identifiable authority. Finally, circumstances should dictate the necessity for third parties to define their attitude by acknowledging the status of belligerency.


23 Clapham, supra note 8, p. 493.

24 See for example the San Jose´ agreement between El Salvador and the Frente Farabundo Marti´ para la Liberacio´n Nacional (FMLN) signed by both sides on 26 July 1990. UN Doc. A/44/971-S/21541 of 16 August 1990

25 Clapham, supra note 8, p. 493-494.


27 Clapham, supra note 8, 495.

28 Clapham, ibid, p. 492.

29 Article 1(4) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Confl icts (1977), 1125 UNTS 3 (entered into force 7 December 1978) [AP I];

30 For example, the conflict in the former Yugoslavia, particularly in Bosnia, was characterized in part as a conflict of an international character and in part, as a conflict of a non-international character. See Prosecutor v. Tadic, Case No. IT-94-l-A, Judgement (July 15, 1999). Another example is the legal status of Hezbollah in Lebanon. In its attack on Lebanon, which commenced on July 12, 2006, the Israeli government claimed that Hezbollah was a group that acted either with the consent of the government or as a result of the complacency of the government of Lebanon. This was said to “justify” the government of Israel in carrying out an incursion into that country that would otherwise be labeled as aggression and the destruction of infrastructure in Lebanon far beyond what may have been required to carry out a simple retaliation against a non-state actor carrying military operations outside the


32 One of the arguments put forward has been that ‘Party’ (with a capital ‘P’) meant ‘High Contracting Party’, i.e. states, and that it was used in a contracted form merely to avoid repetition. See, e.g., Svetlana Zas’ova, ‘L’applicabilité du droit international humanitaire aux groupes armés organisé’s’, in J. M. Sorel and Corneliu-Liviu Popescu (eds.), La protection des personnes vulnérables en temps de conflits armés, Bruylant, Brussels, 2010, p. 58.

33 In Nicaragua v. United States of America, for example, the ICJ confirmed that Common Article 3 was applicable to the Contras, the non-state armed group fighting the government: ‘The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character’; para. 219. See also Sassoli M., ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, 1 (2010) Journal of International Humanitarian Legal Studies, p. 12.


35 See, for example, ICTR, The Prosecutor v. Rutaganda, Case No. ICTR-96–3-T, Judgment (Trial Chamber I), 6 December 1999, para. 92: ‘the definition of an armed conflict per se is termèd in the abstract, and whether or not a situation can be described as an “armed conflict”, meeting the criteria of common Article 3, is to be decided upon on a case-by-case basis’; ICTY, The Prosecutor v. Limaj et al., Case No. IT-03–66-T, Judgment (Trial Chamber II), 30 November 2005, para. 90: ‘the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis’; Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11:137, Juan Carlos Abella v. Argentina, 18 November 1997, para. 153: ‘The line separating an especially violent situation of internal disturbances from the “lowest” level Article 3-armed conflict may sometimes be blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.’ As far as the International Criminal Court is concerned, in Lubanga and Bemba, the Trial and Pre-Trial Chambers each looked at the test established by the ICTY in Tadić in order to determine the existence of an armed conflict and then
applied this test to the facts in the case. The ICC therefore implicitly accepts that the existence of an armed conflict has to be determined on the basis of the facts at the time. See ICC, The Prosecutor v. Thomas Lubanga Dyilo, Trial Judgment (Trial Chamber), 14 March 2012, paras 533 ff.; ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Art. 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor (Pre-Trial Chamber), 15 June 2009, paras 220 ff.

40 Para. 3 of Common Article 3 to the Geneva Conventions reads as follows: ‘The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention’.
41 Clapham, supra note 8, P. 492.
45 Bassiouni supra note 42, p. 782.