

Everyone's Accountable: how non-state armed groups interact with international humanitarian law

Lieutenant Colonel Tim Rutherford, Australian Army

Introduction

Since its inception, there has been a clear separation in international law between the law of war and the law of peace. The divide has been supported by a belief that war was the sole purview of the state. However, following the end of the Cold War, the nature of conflict changed. The move to a unipolar world, coupled with a new wave of democratisation and the increasing globalisation of information and economic power, are credited with triggering a surge in micro-nationalism and sometimes violent claims of self-determination. This has resulted in a shift in the balance of conflict from conventional, interstate wars, predominantly driven by political factors, to low-intensity, intrastate wars, predominantly driven by human factors.¹

Over the past 60 years, the number of intrastate wars has doubled, meaning approximately 80 per cent of all conflict now involves a non-state actor.² As the trend in conflict continues to be dominated by intrastate wars, or more frequently termed 'non-international armed conflict', it is useful to understand the relationship that non-state actors have with international law.

Until the release of Additional Protocols I and II in 1977, the 300 words contained in Common Article 3 to the Geneva Conventions was the sum total of international law applicable to parties engaged in intrastate conflict. Since then, several rulings have provided more detailed interpretations of the laws applicable to non-state actors.³ There have also been a number of treaties concluded (or revised) that seek to regulate non-international armed conflict.⁴ But as Anthea Roberts and Sandesh Sivakumaran have noted, with this growth comes anomaly as only states have the authority to make international law.⁵ Moreover, if the notion that international law is derived from the consent of those it governs remains true, there is a disconnect in whether international law can bind the non-state actor.

As the ADF embarks on Operation OKRA, in support of the international effort to combat the Islamic State terrorist threat, it is timely to review what methods may exist to hold non-state armed groups accountable to humanitarian norms.⁶ To that end, this article will examine which rules of international humanitarian law apply to non-state armed groups and to what extent they are legally capable of contributing to the formation or interpretation of the rules. In doing so, it will highlight the importance of status by reviewing the legal personality of non-state actors, before discussing which rules bind them. It will conclude by discussing the contribution non-state armed groups are capable of making to international law and how this may benefit the conduct of future military operations.

The importance of status

As with all forms of law, understanding the legal personality of those involved is an important first step. That begins with knowing who they are. International humanitarian law is the field of law that governs how wars are fought and it presently recognises two types of armed conflict, namely:

- International armed conflict, where two or more opposing 'high contracting parties' (states) resort to armed force against one another, even if a state of war is not recognised by one of them. This may also include conflicts where people are fighting against colonial domination, alien occupation or racist regimes while exercising their right to self-determination;⁷ and
- Non-international armed conflict, which takes place in the territory of a state between its armed forces and those of a non-state armed group which, under responsible command, exercises control over a part of its territory to enable them to carry out sustained military operations. This does not include internal disturbances, such as riots, isolated and sporadic acts of violence and other acts of a similar nature which are not armed conflict.⁸

Criteria to support the classification of conflict can be derived from Additional Protocol II to the Geneva Conventions [1977] and the ruling of the International Criminal Tribunal Yugoslavia in the *Tadic* case [1999]. Additional Protocol II employs the terms 'sustained' and 'concerted' to describe the nature of operations to be considered when implementing the Protocol. The *Tadic* ruling held that a non-international armed conflict exists when there is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a state'.⁹ Consequently, non-international armed conflict is generally defined by satisfaction of two criteria: intensity and organisation.¹⁰ Where these criteria are unable to be satisfied, human rights law would apply.

Notwithstanding the importance of intensity in declaring a non-international armed conflict, the requirement to demonstrate 'organisation' is perhaps more pertinent to understanding how a non-state armed group may be bound by international law. To that end, the UN defines it 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.¹¹

Membership to a non-state armed group is based on an individual continuously assuming a function for the group involving its direct participation in hostilities.¹² By assuming a continuous combat function, members forfeit their status as civilians and therefore their entitlement to protection against direct attack.¹³ However, as noted by the International Committee of the Red Cross, in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, assuming a continuous combat function 'does not imply *de jure* entitlement to combatant privilege' that would be afforded to a combatant acting on behalf of a state.¹⁴ This correctly infers that a conflict involving a non-state armed group operates on a different set of rules than a conflict between states. So how are non-state armed groups bound by international law and what rules apply?

The application of international law to non-state armed groups

While non-state armed groups have no independent international legal personality, several arguments justify the applicability of international humanitarian law to them. The most favoured argument posits that non-state armed groups are bound by customary international law, which is codified in Common Article 3.¹⁵

A recent study by the International Committee of the Red Cross has also shown that a number of customary rules correspond with the provisions in Protocol I, including the principle of distinction between civilian and combatants; the distinction between civilian objects and military objectives; the prohibition of indiscriminate attacks; the obligation to respect and protect medical and religious personnel and units; the obligation to protect enemy *hors de combat* (outside the fight); and the prohibition on attacking objects that are indispensable to the population.¹⁶ An alternative view holds that the rules of international humanitarian law bind individuals through domestic law and the implementation of these rules into national legislation or their direct applicability of self-executing norms.¹⁷

Common Article 3 to the Geneva Conventions [1949] is the cornerstone of international law applicable to the non-state armed group. It obliges all parties to the conflict to treat those who have laid down their arms, or are *hors de combat*, humanely and without adverse distinction.¹⁸ While it does not deal directly with the conduct of armed conflict, it does imply the principle of civilian immunity, by prohibiting 'violence to the life and persons taking no active part in hostilities'.¹⁹ However, Common Article 3 is a very generic set of rules which, if viewed critically, fails to clearly outline how far protection extends with regard to special protections (for example, to doctors, medical personnel, the emblem etc). It also fails to provide guidance on the treatment of detainees or the means and methods of warfare.

To address some of the deficiencies in Common Article 3, Additional Protocol II was adopted in 1977. This Protocol focuses on the protection of victims in non-international armed conflict and provides guidance on who and what may be protected from direct attack, as well as listing a fundamental set of guarantees. Yet Additional Protocol II falls short on details regarding the permissible means and methods of warfare, and fails to provide a direct prohibition against indiscriminate attacks or establishing a mechanism for criminal enforcement.²⁰

Since the release of Additional Protocol II, there have been a number of other conventions adopted that impact non-state armed groups, including the Convention on Certain Conventional Weapons [1980]; the Chemical Weapons Convention [1993]; the Ottawa Convention banning anti-personnel land mines [1997]; and, the Statute of the International Criminal Court [1998]. Each of these conventions regulates the conduct of armed conflict, ranging from the means of warfare to the permissible methods. However, the applicability of their rules to non-state armed groups is seldom stated clearly. Rather, their texts usually prohibit the state from certain means or methods of war and require it to implement national measures to ensure compliance by persons in its territory or jurisdiction. This raises the question of how accountable a state can be when it does not have effective control over some (or all) of its territory.

Territorial control is a key feature of state-ship. The International Criminal Tribunal Yugoslavia ruling in the *Tadic* case noted that effective control of a non-state armed group over an area can, for the purpose of applying customary international law, de-link it from the sovereign state. This was later referenced in the report of the Darfur Commission.²¹ The result is a layering of law—domestic, treaty and, where necessary, customary international law—that binds a non-state armed group to the humanitarian principles espoused by states.

Non-state armed groups contribution to international law

It is clear from the above that the doctrine underpinning the creation and governing of international law is highly 'statist' (that is, the belief that the state should control either economic or social policy, or both, to some degree). This assertion is reinforced through the definitive reference on the sources of international law, namely Article 38(1) of the Statute of the International Court of Justice. The Article articulates four sources of international law, being international conventions; international customs; general principles of law recognised by civilised nations; and judicial decisions and teachings of the most highly-qualified publicists.²² With three of the four sources residing in the exclusive remit of states, how can non-state armed groups contribute to international law and to what extent are they legally capable of doing so?

First, Common Article 3 encourages 'the parties to the conflict' to enter into special agreement on all or part of the other provisions of the Convention(s). Similarly, the Convention on Certain Conventional Weapons [1980] also offers that the 'high contracting party and the authority' may choose to apply the obligations of Additional Protocol I.²³ These examples demonstrate the ability of non-state armed groups to legally enter into international agreements that would be directly applicable to any conflict they were a party to.

Second, flexibility exists within the Geneva Conventions to enable non-state armed groups to lawfully accede or accept the treaty. The Common Article 60/59/139/155 states that accession is open to any 'power', rather than to any 'state'. Similarly, Article 2(3) also uses the term 'power' to denote who may be bound by the treaty.²⁴ If the term 'power' can be linked to the capacity for effective control, as was the situation in the *Tadic* case, then there is scope for non-state armed groups to accede or accept the Geneva Conventions.²⁵

Third, the inclusion of actions by non-state armed groups when considering customary norms has influenced UN reporting in its work regarding the protection of children, among other projects. The UN's broader approach has also sought to apply these norms prior to the determination of the existence of an armed conflict, and recognising non-state armed groups as parties to the conflict. Some commentators believe this is the first step in a more descriptive and normative framework, where 'the law reflects existing cannons of behavior by all concerned'.²⁶

There are several benefits to military operations by allowing non-state armed groups to contribute to international law—most notably, the increased likelihood that opposing forces will abide by humanitarian norms. A study by the International Council on Human Rights Policy found that armed groups which commit to written codes of conduct are more likely to respect human rights.²⁷ For the military forces participating in the conflict, this means a lower probability of antagonists using inhumane tactics, like torture or the execution of captives as the methods of war.²⁸ It may also support a faster stabilisation effort, with potentially less damage to essential infrastructure, such as hospitals, water and power supplies or other objects protected under the Geneva Conventions.

In addition to the direct benefits of non-state armed groups contributing to international law, there are also some less obvious advantages to future military operations. Anthea Roberts and Sandesh Sivakumaran highlighted one example where the written agreement of the Sudan People's Liberation Movement/Army to prohibit the use of anti-personnel landmines enabled the Government of Sudan to ratify the Ottawa Convention.²⁹

Their example is supported by Martin Barber, former director of the UN's Mine Action Service, who commented that 'it is clear from conversations with senior officials of the Government, that they would not have felt able to ratify the Treaty, if the Sudan People's Liberation Movement/Army had not already made a formal commitment to observe its provisions'.³⁰ The ability to gain a national consensus on this issue, in spite of the ongoing conflict, has no doubt saved lives and made the environment safer for the UN Mission in the Sudan.

However, allowing non-state armed groups to contribute to international law is not without its critics. The principal concern of states is the perceived legitimisation of the group. Consequently, governments tend to refer to these groups as terrorists or criminal organisations. The challenge in progressing the ability of non-state armed groups to influence international law has been neatly summarised by the former director of the Geneva Academy of International Humanitarian Law and Human Rights, Professor Andrew Clapham, who asserted in 2010 that:

As long as governments remain content to allow other governments to self-determine the existence of an opposing party to an armed conflict, the application of customary international law to armed non-state actors will remain problematic.³¹

Conclusion

This article has examined the rules of international humanitarian law applicable to non-state armed groups, and the extent to which the groups are legally capable of contributing to their formation or interpretation. In doing so, it has noted that international humanitarian law is only applicable in times of international armed conflict or non-international armed conflict; outside this, human rights law would govern the actions of the group. The article has also highlighted that members of non-state armed groups are considered to be performing a continuous combat function and therefore forfeit their status as civilians and their entitlement to protection against direct attack.

It has also been noted that while non-state armed groups have no independent international legal personality, they are still bound by treaty law, customary international law and domestic laws ratifying treaty provisions. However, non-state armed groups are capable of influencing these laws. Specifically, Common Article 3 advocates for the parties to a conflict to enter into special agreements to cover other parts of the conventions; a point repeated in the Convention on Certain Conventional Weapons. They may also lawfully accede or accept the Geneva Conventions. Perhaps the most influential way that non-state armed groups are able to influence future law is through the inclusion of their customary norms in general reporting.

Several benefits to future military operations of allowing non-state armed groups to contribute to international law have been highlighted, including the increased likelihood of antagonists complying with humanitarian norms—which has the potential to make a conflict safer through the elimination of inhumane methods of war such as torture. Further, the adoption of protectionist principles found in the Geneva Conventions could also assist in preserving essential infrastructure and therefore reduce reconstruction requirements. It was also demonstrated that entering into written agreements with non-state armed groups can support the broader acceptance of international law, with reference to the Sudanese ratification of the Ottawa Convention.

As international law is intrinsically linked with a state's sovereignty, it is understood that any change that may impact one will be resisted by the other. Despite the growing trend of intrastate war, the legal framework for the non-state armed group remains immature. As Anne Petitpierre has remarked:

International humanitarian law has always sought to strike the best possible balance between legitimate concern for the security of the State and its citizens on the one hand and the preservation of human life, health and dignity on the other.³²

Lieutenant Colonel Tim Rutherford is a cavalry officer who graduated from the Royal Military College, Duntroon, in 1999. He has held a range of command, planning and instructional appointments in Australia, Europe, the Middle East and Africa. He is a graduate of the Australian Command and Staff College and holds a Bachelor of Professional Studies (Peace Studies) from the University of New England, as well as a Masters of Military Studies and a Masters of International Law from the Australian National University. He is currently employed as the Staff Officer Grade 1 – Surveillance and Reconnaissance within Army Headquarters.

Notes

- 1 P.C. Stern and D. Druckman (eds.), *International Conflict Resolution after the Cold War*, National Academy Press: Washington DC, 2000, pp. 1-2.
- 2 Human Security Research Group, 'Human Security Report – 2012', School for International Studies, Simon Fraser University: Canada, 2012, Figure 5.7; and D. Kilcullen, 'The Future of War? Expect to See Urban, Connected, Irregular, Zombie Conflicts', *Foreign Policy*, 5 February 2014, available at <<http://ricks.foreignpolicy.com/posts/2014/02/05/>> accessed 22 September 2014.
- 3 'Prosecutor v. Dusko Tadic (Appeal Judgment)', IT-94-1-A, *International Criminal Tribunal for the former Yugoslavia* [website], 15 July 1999; available at <<http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>> accessed 26 October 2015; 'Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)', *International Court of Justice* [website], 27 June 1986, available at <<http://www.icj-cij.org/docket/files/70/6503.pdf>> accessed 26 October 2015.
- 4 'Convention on Cluster Munitions', 3 December 2008, available at <<http://www.clusterconvention.org/>> accessed 26 October 2015; 'Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict', 26 March 1999, available at <<http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-2nd-protocol-1999/>> accessed 26 October 2015; 'Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction', 18 September 1997, available at <<http://legal.un.org/avl/ha/cpusptam/cpusptam.html>> accessed 26 October 2015.
- 5 A. Roberts and S. Sivakumaran, 'Lawmaking by Non-state Actors: engaging armed groups in the creation of international humanitarian law', *Yale Journal of International Law*, Vol. 37, Issue 1, 2012, pp. 108-52.
- 6 For more information on Operation OKRA, see Department of Defence, 'OKRA Home', *Department of Defence* [website], available at <<http://www.defence.gov.au/operations/okra/>> accessed 18 October 2015.
- 7 'Article 1 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)', 8 June 1977, available at <<https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>> accessed 26 October 2015.
- 8 'Common Article 3 to the Geneva Conventions', 12 August 1949, available at <<http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html>> accessed 26 October 2015; and 'Article 1 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts'.

- 9 'Prosecutor v. Dusko Tadic'. 'Protracted' was interpreted in the *Haradinaj* case with particular reference to the intensity of the violence, not just the duration. For more, see 'Prosecutor v. Haradinaj', (Judgment), IT-04-84-84-T, *International Criminal Tribunal for the former Yugoslavia* [website], 3 April 2008, paragraph 49, available at <<http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>> accessed 26 October 2015.
- 10 Exceptions to this view do exist, as noted in the finding of the Inter-American Commission on Human Rights in the *Abella* case [1997]. Here, the court found that a 30 hour clash between the attackers and the Argentine armed forces satisfied the conditions to be classified as a non-international armed conflict. For more, see 'Juan Carlos Abella v. Argentina', Case No. 11.137, *Inter-American Commission on Human Rights* [website], 18 November 1997, available at <<https://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm>> accessed 26 October 2015.
- 11 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>> accessed 26 October 2015. 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'.
- 12 N. Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', *International Committee of the Red Cross*: Geneva, 2009, p. 33, available at <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed 26 October 2015.
- 13 'Article 13 to Additional Protocol II'.
- 14 'Article 13 to Additional Protocol II'. Combatant privilege, namely the right to directly participate in hostilities with immunity from domestic prosecution for lawful acts of war, is afforded only to members of the armed forces of parties to an international armed conflict (except medical and religious personnel), as well as to participants in a *levée en masse*.
- 15 D. Bethlehem, 'The methodological framework of the study', in E. Wilmshurst and S. Breua (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press: Cambridge, 2007, p. 8; and 'Case Concerning Military and Paramilitary Activities in and Against Nicaragua', paragraphs 118-20.
- 16 J-M. Henckarets and L. Doswald-Beck, *Customary International Humanitarian Law - Rules*, Vol. 1, Cambridge University Press: Cambridge, 2009.
- 17 A. Bellal, G. Giacca and S. Casey-Maslen, 'International Law and Armed Non-state Actors in Afghanistan', *International Review of the Red Cross*, Vol. 93, No. 881, 2011, p. 55. For information regarding the process for a state to become party to a convention, see Articles 12, 14 and 24 of the Vienna Convention on the Law of Treaties, 1969.
- 18 'Common Article 3 to the Geneva Conventions'.
- 19 A.P. Rogers, *Law on the Battlefield*, 2nd Edition, Manchester University Press: Manchester, 2004, p. 221.
- 20 Article 35 to Additional Protocol I notes some prohibitions in the methods or means of warfare that are applicable 'in any armed conflict'. Consequently, an argument could be made that this would apply to non-international armed conflict. For more, see 'Article 35 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts'.
- 21 UN, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General', S/2005/60, UN: New York, 2005, paragraph 172, available at <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf> accessed 26 October 2015.
- 22 UN, *Statute of the International Court of Justice*, 18 April 1946, p. 27, available at <<http://www.icj-cij.org/documents/?p1=4&p2=2>> accessed 26 October 2015.
- 23 UN, 'Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (as amended on 21 December 2001)', 10 October 1980, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en> accessed 26 October 2015.
- 24 'Common Article 2 and 60/59/139/155 to the Geneva Conventions', 12 August 1949.
- 25 Not all conventions are so open. For example, Protocol II to the Hague Convention of 1954 [1999] defaults to the use of the term 'State Parties' as opposed to 'parties to the conflict', creating ambiguity regarding its constituency: N. Higgins, 'The Regulation of Armed Non-State Actors: promoting the application of the laws of war to conflicts involving national liberation movements', *Human Rights Brief*, Vol. 17, No. 1, 2009, pp. 12-8,

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- available at <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1101&context=hrbrief>> accessed 26 October 2015.
- 26 A. Clapham, 'The Rights and Responsibilities of Armed Non-State Actors', *Social Science Research Network* [website], 1 February 2010, pp. 42-3, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636> accessed 26 October 2015.
- 27 International Council on Human Rights, 'Ends & Means: human rights approaches to armed groups', *International Council on Human Rights* [website], 2000, available at <<http://www.uthr.org/PDF%20files/End%20&%20Means.pdf>> accessed 26 October 2015.
- 28 H. Cooper, 'Islamic State: militants claim Jordanian pilot burned alive, Jordan to execute would-be bomber', *ABC News* [website], 4 February 2015, available at <<http://www.abc.net.au/news/2015-02-04/islamic-state-claims-to-have-burned-jordanian-pilot-alive/6068170>> accessed 11 October 2015.
- 29 Roberts and Sivakumaran, 'Lawmaking by Non-state Actors', p. 129.
- 30 M. Barber, 'Preface', in *Armed Non-state Actors and Landmines: Volume 1 - A Global Report Profiling NSAs and their Use, Acquisition, Production, Transfer and Stockpiling of Landmines*, Geneva Call and the Program for the Study of International Organisations: Geneva, 2005, abstract available at <<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=15037>> accessed 26 October 2015.
- 31 Clapham, 'The Rights and Responsibilities of Armed Non-State Actors', p. 43.
- 32 A. Petitpierre, 'Relevance of International humanitarian Law to Non-State Actors', Address at the Bruges Colloquium, International Committee of the Red Cross: Geneva, 2002, available at <<https://www.icrc.org/eng/resources/documents/misc/5f8jez.htm>> accessed 20 September 2014.