Challenges Faced by Non-State Armed Groups as regards the Respect for the Law Governing the Conduct of Hostilities

SASSÖLI, Marco

Abstract

The contribution discusses the general problems armed groups face when they want to respect, as they must, international humanitarian law (IHL) and specific difficulties in the field of the conduct of hostilities: whether the police and government officials may be targeted; how the proportionality of an attack aiming at symbolic political advantages can be assessed; how they can accept the surrender of government soldiers and then detain them; or the feasibility of precautionary measures when the group has only one weapon that is capable of reaching the enemy. The author however recalls that the rules of IHL are flexible and the obligations are situation-dependent. Therefore most rules are capable of being respected by an armed group, if interpreted taking the peculiarities of armed groups into account.

Reference


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My contribution shall be read together with that of Professor Yoram Dinstein: while he is addressing the challenges presented by non-State armed groups for the conduct of hostilities by States, I will be presenting the challenges faced by such groups when confronting States and each other.

Discussing armed groups is similar to discussing armed conflict in general: one does not need to be in favour of armed groups – or in favour of war – to recognize their existence and hence the need to deal with the ensuing humanitarian challenges, in order to meet them with legal rules and mechanisms. Following professor Dinstein’s presentation, we will be discussing the other side of the coin: the various problems faced by non-State armed groups when it comes to their respect for IHL on the conduct of hostilities. As is the case for States, this discussion must equally be had regardless of the groups’ willingness to respect International Humanitarian Law (IHL): understanding the challenges is necessary before engaging with them and an attempt to engage with them must be made even when we have legitimate doubts over whether they are actually willing to respect the rules. Engagement based on realistic rules may be the starting point for a minimum of willingness to respect rules. Finally one should keep in mind that while most of the problems mentioned here are genuine ones, some others are not; but because they are often invoked by armed groups, they are included in this presentation.

1. General problems

The first problem – and one of the most important ones when it comes to the willingness to respect IHL – is that non-State armed groups often regard IHL as a set of rules made by others, and more specifically by States, that also often interpret them liberally in their favour. As a consequence, the groups will usually see such rules as irrelevant or not binding on them. This is reinforced by the perceived double standards in some rules, the best example of which being the legal framework protecting children during armed conflict and in particular the age below which children cannot be recruited into armed forces. Most armed groups know that the rule applicable to them differs from that applicable to States. Such a manifest discrepancy does not increase the
group’s willingness to respect the law.

In addition, compliance is also limited by the frequent lack of knowledge and training. Even when the rules are known, non-State armed groups feel that respecting IHL has no advantage for them. Their conduct remains illegal under domestic law; they are considered criminals, if not terrorists. In that sense, a first step for States to encourage respect of IHL by their enemies would be to refrain from calling attacks terrorist when they are directed at a military objective or combatants.

Another challenge faced by non-State armed groups, and in particular by those willing to respect IHL, is lack of command and control. While an efficient command and control structure is essential for the respect of IHL, it is often the first aim of States to destroy that of an armed group (and this is not contrary to IHL). At any rate, illegality generally leads to the compartmentalization of the group’s structure into small cells, rendering the individual fighter much more independent than a soldier in regular armed forces would be. A fighter in an illegal armed group often does not even know who the commander of his or her commander is, or what the overall plan is.

Their technological inferiority is also a factor: they either have limited, old or self-made technology, or when they possess more sophisticated technology, they do not have the capacity to use it responsibly.

When it comes to the law itself and its adaptation to non-State armed groups, several problems must be mentioned. First, while the IHL applicable to non-international armed conflict (NIAC) was developed for situations similar to that of the Spanish Civil War, today’s non-State armed groups do not always aim to control territory. This can of course never be seen as an argument to disregard common Article 3 of the Geneva Conventions in all NIACs, even when an armed group does not control territory. However, it makes the principle that the only legitimate aim of warfare is to weaken the military potential of the adversary appear to be beside the point. Several contemporary non-State armed groups will never have the military capacity to defeat the States they are fighting against, inter alia because of efficient measures of force protection on the opposing side. In addition, weakening the military potential of the enemy may sometimes not even be the aim of the group; or rather, they may have a wide variety of end goals, such as hindering the State’s construction of a dam in the area where the population they are defending lives. Finally, the rules of IHL have been made neither by nor for armed groups, and this fact is worsened by the tendency to draw analogies between NIACs and the IHL of international armed conflict (IAC), in particular through alleged customary rules. This trend voluntarily ignores that the IHL of IAC was made for States and cannot necessarily be applied in the same way by armed groups.
2. Specific problems raised by IHL on the conduct of hostilities

In addition to the general problems mentioned above, non-State armed groups also face problems specific to the rules governing the conduct of hostilities.

The first question is how to define legitimate targets for their attacks. With respect to persons who may be attacked, the ICRC developed and published its approach in its Interpretive Guidance on the Notion of Direct Participation in Hostilities, but this Guidance does not answer all operational questions and it remains subject to controversy. An important issue for every armed group is the status of police forces. In IAC, they are considered civilians, while in NIAC they are usually involved, as law enforcement officials, in the search for and arrest of armed group members: in that sense, the rule cannot be the same in NIACs, because it must be legitimate (from an IHL point of view) to attack those who try to arrest its members. A similar challenge arises when we consider government officials: just as States often consider the political leadership of armed groups as legitimate targets without making the distinction between them and the armed wing, armed groups tend to reciprocate and to consider that government officials are always legitimate targets. As this is obviously not the case, IHL is perceived as protecting “kings” but not “pawns”. Furthermore, what about those who finance the conflict, or those who collaborate with the government, e.g. by providing information? In law, they are not legitimate targets, but many groups consider it more legitimate to attack them than simple government soldiers. How should we respond to the claim made by armed groups that civilians have to defend themselves if governmental forces attack them? Where do we draw the line between self-defence and direct participation in hostilities? May an armed group train civilians in self-defence and even form self-defence groups, without making their members legitimate targets? Ultimately, the principle of distinction will be the first victim.

IHL also protects those who are hors-de-combat, who shall no longer be seen as legitimate targets. But how can an armed group realistically accept the surrender and intern a government soldier? This is not only a factual problem but also a legal one: such captured soldiers will generally be referred to as hostages – and the taking of hostages is a war crime – leaving armed groups with no alternative but to kill their prisoners, which is evidently also a war crime.

As for objects which may be attacked, the notion of military objective poses similar questions. The concept of “military” itself is often lacking in the strategies of non-State armed groups: they often proceed with destructions out of political – rather than military – necessity. The example of destroying a dam under construction is again telling.

Furthermore, the application of the principle of proportionality entails additional

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considerations when applied by non-State armed groups: one should balance the risks to civilians with the expected military advantage, but how may the latter be evaluated when those who launch the attack are unaware of the overall plan? Or when the advantage to be gained is not a military one, or is not to weaken the military potential of the enemy, but instead follows a political or propaganda agenda? The military advantage of capturing one government soldier or of destroying one tank in terms of reducing the military potential of the State may be minimal, but both have a significant impact for propaganda purposes, by promoting the cause and the visibility of the group. Can this absence of a real military advantage mean that IHL prohibits the capture of government soldiers and the destruction of tanks as soon as the slightest risk of incidental effects for civilians exists?

Turning to precautionary measures, non-State armed groups will face greater difficulties of collecting information, of verifying its veracity when they do and of verifying the legality of their targets. Even if willing to respect IHL, the range of feasible measures is relatively limited. For instance, how can they choose the means causing the least damage when they have only one weapon capable of reaching the enemy at their disposal? Respecting passive precautionary measures is another challenge: the obligation to avoid locating military objectives within or near densely populated areas is often equated, in the case of armed groups, with the prohibition to use human shields, which is wrong. At the same time it is rare to see States themselves implementing the separation of civilian objects and military objectives.

Other traditional provisions of IHL are respected with difficulty: for instance, IHL prohibits perfidy, while it is the essence of guerrilla fighting.

Finally, humanitarian action also suffers from the specificities of NIACs: it is often not only perceived but also openly declared by the government and third States supporting it as an inherent part of peace-building efforts. Hence it is not perceived as neutral by armed groups. Sometimes it is even used as a cover by States to defeat armed groups.

All this being said, one should keep in mind that the rules regulating the conduct of hostilities are flexible and most obligations situation-dependent.

3. The existing IHL rules are, may and must to a certain extent be adapted to the realities of armed groups

First of all, the treaty rules are rare but clear: it is true that only common Article 3 and Article 13 of Additional Protocol I (when applicable) apply, but both are unambiguous: civilians may not be attacked. The only problem is that the definition of civilians is controversial, in particular in NIACs, both among States and among armed groups. Customary law also applies; and because it is derived from practice, it should by definition be realistic. Nowadays, there is however an increasing
tendency to derive it from lofty statements and from treaty rules applicable in IAC. Another problem, which necessarily has an impact on the respect for IHL by armed groups, is that such practice creating customary law unfortunately is not considered as including that of armed groups.

Moreover, most obligations other than the prohibition to target civilians are obligations of means, not of result. Anyway, only intentional violations are prohibited by IHL, but unintentional violations of the prohibition to attack civilians may reveal an intentional disregard of the proportionality principle and of the obligation to take precautions in attack.

In general, IHL concepts must be interpreted by adapting them mutatis mutandis to the realities of an armed group. For instance, looking at our preceding remarks, the concept of “military” can be understood as including all that enables a party to harm the enemy through acts of violence. The problem however becomes one of defining “violent”: for instance, is the construction of a dam an act of violence? Other concepts can be interpreted taking into account the specificities of armed groups. When it comes to precautionary measures for instance, one should keep in mind the key concept of feasibility. The obligation to take passive precautionary measures is also a soft one. As for the possibility to capture and to intern, it must be made realistic for armed groups if we want them to respect those who surrender.

All these considerations lead us to one essential question: does the existing law already provide for a sliding scale or should it be introduced? In other words, should the applicable law depend on the capacity of the armed group, in the sense that the more organized it is, the more rules it shall be bound to respect? This would certainly make the law more realistic for - and therefore core prohibitions more often respected by - armed groups. However, there are risks of fragmentation of the law and endless controversies over which rules are realistic in a given case. In addition, with such a sliding scale, the question arises of whether the resulting rules apply equally to both sides. Are well-organized governmental armed forces fighting against a poorly organized armed group only bound by rudimentary IHL rules (but, contrary to the armed group, also by Human Rights), or should the principle that both sides of an armed conflict are always equal before IHL be abandoned? If the law is not the same for both parties, will governmental forces nevertheless respect rules which are not only – as currently – not respected by the enemy but not even binding upon the enemy?

4. Conclusion

There remains an inevitable tension between the need to have rules preserving a minimum of humanity in war and the desire to have rules that allow belligerents to overcome the enemy. Indeed, only few groups will respect rules under which they have no chance to win. Unrealistic rules don’t protect anyone and undermine the willingness to respect even those rules of IHL which
are realistic. However, where do the limits to realism and flexibility lie? To answer that question, I would refer to a remark made by a former assistant of mine: if one pushes the logic of the sliding scales to the extreme, what would happen if the group is so weak that it can only attack civilians? Of course, as is true of all proposals, that of introducing a sliding scale has its limits, but where those limits should be drawn is precisely the question that we should discuss more thoroughly, instead of ignoring the differences between States and armed groups, which is also inherent in the tendency to apply the same law to IAC and to NIAC.