

RESEARCH BRIEF

FROM WORDS TO DEEDS: A RESEARCH OF ARMED NON-STATE ACTORS' PRACTICE AND INTERPRETATION OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS NORMS

KEY MESSAGES

- Armed Non-State Actors' (ANSAs) practice and interpretation of international humanitarian law (IHL) vary from one armed conflict and from one group to another. While a number of studies have analysed states' views on international law, ANSAs' have generally been neglected from the analysis, despite the fact that they are key actors in contemporary armed conflicts.
- Generally, it is undisputed that IHL rules are binding upon ANSAs. This, however, has largely assumed a 'top-down' approach of the international legal system, employed to impose international obligations on ANSAs without considering their actual views or interpretation of the rules, or their capacity to implement them, which in turn may explain the lack of ownership of, and compliance with, international law by these actors.
- Taking into account this knowledge gap, the Geneva Academy of International Humanitarian Law and Human Rights and Geneva Call have embarked into a research project that aims to increase the understanding of ANSAs' behaviours in conflict settings. The research's specific goals are to: 1) analyse and compile ANSAs' practice and interpretation with respect to international law in order to provide for a better sense of the state of the applicable legal framework in armed conflict; 2) generate useful information for humanitarian actors and contribute to design more effective protection strategies and programming; 3) inform future international law-making processes for the rules applicable to ANSAs.
- From a theoretical point of view, by looking at ANSAs' practice and interpretation of international law, this research does not presuppose that these constitute elements of customary international law, or that their interpretation on a specific provision will have a legal effect on its meaning or content. The present research suggests, however, that reflecting on the practice and interpretation by ANSAs of IHL and human rights norms is not altogether deprived of a certain level of normativity.

DECEMBER 2019 | ANNYSSA BELLAL, PASCAL BONGARD AND EZEQUIEL HEFFES

RESEARCH CONTEXT

This research brief is a summary of the Geneva Academy's and Geneva Call's research project on ANSAs' practice and interpretation of IHL and human rights (IHRL) norms.

The rationale of this research builds on three inter-related trends. First, in recent years, there has been an increase of the occurrence of 'non-international conflicts', i.e. conflicts opposing states to ANSAs, or between ANSAs themselves.¹ In this context – this being the second trend – the international community has called for a more sustained engagement of these non-State actors on IHL and IHRL, pointing at the need of such engagement in order to enhance the protection of civilians.² ANSAs have become key actors in contemporary conflicts and not engaging them may have detrimental impacts on both humanitarian assistance and protection. Lastly, although it is undisputed that ANSAs are bound by IHL, how they understand, interpret or actually implement their international obligations has remained insufficiently explored.³

While a number of studies have analysed states' practice in international law, notably the 2005 ICRC study on customary IHL, ANSAs' views have generally been neglected from the analysis.⁴ A serious analysis of existing IHL of non-international armed conflicts from the perspective of armed groups should be

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made. As such an analysis has not yet taken place, it is not possible to know how the existing rules and possible future development of IHL (...) envisaged by the ICRC would change if they were taking the perspective of non-State armed groups into account'.⁵

This State-centric 'top-down' approach to ANSAs' international obligations, employed without inquiring into their actual practice and interpretation of the rules binding upon them, may explain the lack of ownership of, and compliance with, international law by these actors.⁶ Indeed, there is an increasing sense that ANSAs' compliance with humanitarian norms is likely to improve if they are more actively consulted about the creation and implementation of the rules they are expected to abide by.⁷ Having regard to the practice of ANSAs would provide an indication of which norms are accepted, and which are more disputed.

Their views 'should be studied more carefully than they are at present and taken into account in the creation of the law'.⁸

Drawing on these premises, the overarching research question is the following: How and why do ANSAs view, interpret and act upon IHL and IHRL norms, and what can the humanitarian community learn from these practices to enhance the effectiveness of their protection interventions and thus increase ANSA level of compliance with international law?

SCOPE AND DEFINITIONS

The research examines ANSAs' perspectives on the following core norms: i) protection of civilians from attacks; ii) use of landmines and other explosive devices; iii) humanitarian access (and denial thereof); iv) the prohibition of using and recruiting children in hostilities; v) the prohibition of forced displacement; vi) the special protection of certain ob-

1 A. Bellal (ed.), *The War Report 2018*, Geneva Academy of International Humanitarian Law and Human Rights, 2019, 19; A. Bellal (ed.), *The War Report 2017*, Geneva Academy of International Humanitarian Law and Human Rights, 2018, 17; and ICRC, *The Roots of Restraint in War*, 2018, 13-14.

2 United Nations Security Council, Protection of civilians in armed conflict, Report of the Secretary General, 7 May 2019, UN Doc. S/2019/373, 16 (affirming that '[e]nhancing respect for the law requires changing the behaviour and improving the practices of non-State armed groups. Key to this is principled and sustained engagement by humanitarian and other relevant actors that is, moreover, strategic and based on a thorough analysis of the group(s) concerned').

3 Several authors have referred to this knowledge gap. See, among others, M. Sassòli, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019; H. Jo, *Compliant Rebels. Rebel Groups and International Law in World Politics*, Cambridge University Press, Cambridge, 2015; M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law', 1 *Journal of International Humanitarian Legal Studies* (2010); E. Heffes and M. Kotlik, 'Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime', 96 *International Review of the Red Cross* 895/896 (2014) and D. Petrasek, *Ends & means: human rights approaches to armed groups*, International Council on Human Rights Policy, 2000.

4 Geneva Call, *In Their Words: Perceptions of armed non-State actors on humanitarian action*, 2016.

5 M. Sassòli (2010), *supra* note 3, 23.

6 E.-C. Gillard, Briefing, Promoting Compliance with International Humanitarian Law, available at: <https://www.chathamhouse.org/publication/promoting-compliance-international-humanitarian-law/2016-10-05-promoting-compliance-ihl-gillard.pdf>, 2016, 7.

7 A. Bellal and E. Heffes, 'Yes, I do': Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent', 12 *Human Rights & International Law Discourse* 1 (2018); Sassòli (2019), *supra* note 3; Sassòli (2010), *supra* note 3; S. Sivakumaran, 'Implementing humanitarian norms through non-State armed groups' in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region*, Cambridge University Press, Cambridge, 2015, 125; S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012.

8 S. Sivakumaran (2012), *supra* note 7, 152.

jects, such as cultural property and the environment; vii) deprivation of liberty; viii) the prohibition of sexual violence; ix) the protection of health care, with a special focus on the protection of persons with disabilities; x) the protection of education; and xi) fair trial and administration of justice.

The choice of these norms has been dictated by three factors. First, the violation of these rules represents a current challenge identified by various humanitarian actors when dealing with ANSAs. The second factor is related to ANSAs' perceptions of these norms, as some of them represent the most contentious and challenging humanitarian provisions from their perspective. Finally, some of the selected norms, such as the protection of environment, may be part of future legal developments.

ARMED NON-STATE ACTORS

There is no definition of ANSAs under international law. International case-law has referred to 'organized armed groups' for the minimum IHL provisions to be applicable, putting certain conditions that should be fulfilled by an ANSA in order to qualify as a party to an armed conflict. First, it should have a minimum degree of organization – that is, a certain level of organizational coherence and hierarchy, such as a command structure and the capacity to sustain military operations.⁹ Second, with respect to Additional Protocol II to the Geneva Conventions of 1949, ANSAs should exercise control over a part of the opposing state's territory for its provisions to apply.¹⁰ In the context of this research however, a broad definition of ANSAs has been adopted, including any 'autonomous, non-state actors that rely on the threat or use of force to achieve their objectives'.¹¹ ANSAs also differ greatly in terms of their status, size, goals, structure, modus operandi, resources, territorial control and support base. What they all have in common is that they are not formally part of government armed forces; they challenge the state's

9 International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Judgment, IT-04-82, 10 July 2008, 89-92, paras. 197-203.

10 See on the different conditions, International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Haradinaj*, Judgment, 3 April 2008, Case No. IT-04-84-T, para 360.

11 P. G. Thompson, *Armed Groups: The 21st Century Threat*, Rowman and Littlefield, London, 2014, 4. In the OCHA Glossary of Humanitarian Terms, armed groups are defined as "armed non-State actors engaged in conflict and distinct from a governmental force". See United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Glossary of Humanitarian Terms*, 2008.

monopoly of coercive force and lack the legal capacity to become party to relevant international treaties.

It should be noted however that there are two types of ANSAs that are excluded from the scope of this research. The first are so-called 'criminal organizations' (or armed gangs). Some of these actors, such as the Sinaloa Cartel or the Jalisco Cartel New Generation in Mexico have attained such a heightened level of organization that they openly fight the police and/or the regular armed forces of a state and, accordingly, can arguably be considered a party to an armed conflict to which IHL is applicable.¹² It remains the case that the scarcity of practice and interpretation of IHL and human rights in armed conflict, as well as practical difficulties of accessing these groups, preclude the possibility of including them in the research, although this could change if such documents or access were to become available in the course of the project.

The other category of ANSAs that are not explored in the research are private military and security companies (PMSCs), which are private business entities that provide military and/or security services. While PMSCs are indeed ANSAs, they differ from the actors as they are contracted by states (or other actors such as international organizations or NGOs) to exercise powers that usually fall within the ambit of governmental authority. Acts committed by PMSCs may therefore be attributed to the contracting states and fall under their responsibility.¹³ As such, their contribution to the practice and interpretation of IHL and human rights norms is of a different nature and are not included in the research.

TYPES OF ANSAS

While no categorization or typology is broadly accepted, this research classifies ANSAs in terms of their operational and organizational rationale. The hypothesis behind this typology is that the ANSAs considered in the context of this research are illustrative of the main types of ANSAs active

12 See J. Lambin, 'The Conflict in Mexico' in A. Bellal (ed.), *The War Report 2017*, Geneva Academy of International Humanitarian Law and Human Rights, 2018, 87.

13 See the Swiss Federal Department of Foreign Affairs and International Committee of the Red Cross, *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, 2009, available at: https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

in contemporary armed conflicts (except for armed gangs). Conceptual lines between ANSAs are often blurred as they tend to borrow characteristics from different types of armed actors. Some ANSAs may present characteristics associated with several categories or may shift from one category to another. In this sense, these categories should be understood as ‘ideal types’ rather than an absolute and completely faithful description of what the actors are in reality:

- **Non-recognized or partially internationally recognized states or so-called ‘de facto authorities’**, which can be described as ‘entities, which exercise effective authority over some territory, no matter whether they are engaged in warfare with the sovereign State⁷ or are subsisting in times of peace’.¹⁴
- **Armed opposition movements** that aim to reform or replace a government or a political system. These include rebel groups, separatist movements, revolutionary guerrilla and ‘jihadist’ ANSAs.
- **Movements of National Liberation** that represent peoples fighting against colonial domination, alien occupation and racist regimes in the exercise of their right of self-determination, which are all situations of international armed conflicts that fall under the applicability of the 1977 Additional Protocol I to the 1949 Geneva Conventions;
- **Paramilitary groups or militias** – irregular combat units that usually act on behalf of, or are at least tolerated by, the State authorities;
- **Vigilante groups or self-defence militias** usually composed of armed civilians, that aim to defend themselves against the attacks of enemy armed forces or other ANSAs.¹⁵

PRACTICE AND INTERPRETATION

In this research, the term practice is used by analogy with ‘state practice’ under customary international law. According to the recent International Law Commission Draft Conclusion 6, entitled ‘Forms of Practice’, practice may take a wide range of forms: ‘It includes both physical and verbal acts. It may, under certain circumstances,

¹⁴ M. Schoiswohl, ‘De Facto Regimes and Human Rights Obligations – The Twilight Zone of Public International Law?’, 6 *Austrian Review of International and European Law* 1 (2003), 50.

¹⁵ On typologies of ANSAs, see C. Holmqvist, ‘Engaging Armed Non-State Actors in Post-Conflict Settings’, in A. Bryden and H. Hänggi (eds), *Security Governance in Post-Conflict Peacebuilding*, Geneva Centre for the Democratic Control of the Armed Forces (DCAF), 2005, 46; U. Schneekener, ‘Fragile Statehood, Armed Non-State Actors and Security Governance’, in A. Bryden and M. Caparini (eds), *Private Actors and Security Governance*, DCAF, 2006, 25.

include inaction. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct ‘on the ground’; legislative and administrative acts; and decisions of national courts (...).¹⁶ Applied to ANSAs by analogy, their forms of practice include, but are not limited to, the following: Physical acts – the battlefield behaviour, the use of certain weapons and the treatment afforded to different categories of persons. Verbal acts or policies – codes of conduct, internal legislations, political programmes, decisions of ANSA courts, decrees, unilateral commitments, instructions to armed members, public communiqués, special agreements, memoranda of understanding, peace treaties, statements in international fora, and positions on resolutions adopted by international organizations, particularly the UN. Whether physical or verbal, relevant practices only consist of ‘official’ practice, which means they are sanctioned by the ANSA leadership and represent or engage the ANSAs or the organization as a whole.

From a theoretical point of view, by looking at ANSAs’ practice and interpretation of international law, this research does not presuppose that these constitute elements of customary international law, or that their interpretation on a specific provision will have a legal effect on its meaning or content. Article 38 of the Statute of the International Court of Justice indeed defines customary international law as ‘evidence of a general practice accepted as law’.¹⁷ Considering states are the main subjects of international law, it is their practice as well as their *opinio juris* (the conviction that the practice is required to conform to legal norms), which forms international customary law. The present research suggests, however, that reflecting on the practice and interpretation by ANSAs of IHL and human rights norms is not altogether deprived of a certain level of normativity. ANSAs might indeed feel bound by the norms that they have agreed to rather than by international treaties or international customary norms the elaboration of which they have not participated in. A recent study by Geneva Call on humanitarian action found that according to certain ANSAs, international law is perceived ‘as

¹⁶ International Law Commission, ‘Draft conclusions on identification of customary international law’, available at: https://legal.un.org/docs/?path=/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf&lang=EF, 2018, Draft Conclusion 6.

¹⁷ The Statute of the International Court of Justice is available at: http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf

biased and privileging States'.¹⁸ The study also underlines that including ANSAs in discussions on emerging IHL issues as well as the interpretation and implementation challenges of existing norms are issues that deserve further examination.¹⁹ ANSAs' compliance with IHL is likely to improve if they are more actively consulted about the creation and implementation of the rules they are expected to abide by. This research is thus framed by an approach to international law based on the theory of legal pluralism. As explained by René Provost, '[l]egal pluralism offers a number of insights in this context, finding law to exist in parallel and intersecting spheres beyond the state. Legal norms arise whenever communities of practices can be found, linking actors on the basis of shared interests or practices. What this suggests is that a process for articulating norms relevant and meaningful for insurgents must be centred on the practices of these agents'.²⁰

METHODOLOGY

DOCUMENT ANALYSIS

First, the project will map the different sources used by ANSAs to express their views on and commitments to international law. The research team will look in particular at the Geneva Call database www.theirwords.org, which contains more than 500 commitments made by 230 ANSAs from 60 countries. Documents include unilateral declarations, public statements, codes of conduct, command orders, penal codes, legislations, decrees, memoranda of understanding, special agreements, as well as peace and ceasefire agreements. The goal of this initial research phase is to map ANSAs policy documents and to have a general overview of the norms that different types of ANSAs have (at least theoretically) agreed or committed to respecting and implementing. It will also identify missing documents, thus informing additional research to ensure a wider representativity of ANSAs as far as possible.

The analysis will be notably guided by the following questions:

- How do ANSAs choose to express these commitments and what references (legal, political,

social, religious) are used? Are there any references to international treaties?

- Are they commitments that go beyond existing law (such as the protection of the environment, the use of certain weapons, human rights obligations, etc)?
- Are there any correlations between the types of ANSAs (e.g. armed opposition movements, *de facto* authorities, national liberation movements, paramilitary groups, self-defence militia) and the substance, wording or references of the commitments made?

CASE STUDIES, INTERVIEWS AND FIELD RESEARCH

Because it is beyond the scope of this research to identify and evaluate the situation of respect for, or violations to international law carried out by all ANSAs, the methodology for conducting this research involves a qualitative analysis on the practice of selected ANSAs – in the form of case studies - to understand in more depth their policies and interpretation of norms, and to contrast them with actual behaviour in the field.

The case studies have been selected according to the following criteria: 1) a balanced geographical representation (Africa, Asia, Europe, Middle East and Latin America); 2) they are or have been parties to armed conflict (i.e. IHL is or was applicable); 3) diversity in terms of size, organizational structure, motivations and territorial control; 4) the quality of practices and access to a variety of sources to allow to cross-check the information. The selection considers different types of armed conflicts, contexts and ANSAs.

The case studies will be elaborated through desk and field research as well as semi-structured interviews with members (or former members) of the ANSA leadership (Chairman, Commander in Chief, Secretary General, Secretary for External Affairs, Chief of Military Staff or individuals with similar stature) and 'technical' officials (legal/policy/military advisors, humanitarian coordinators, human rights officers, thematic focal persons, spokespersons, etc) to understand their practice and interpretation of selected norms. Sometimes ANSAs have special bodies or branches in charge of relief, education, health, antiquities, etc.

Key external sources (humanitarian and human rights organizations, enquiry commissions, thematic monitoring mechanisms, victims' associations, etc) will be consulted. This important step allows for a critical evaluation of what ANSAs have stated to the researchers and provide a more comprehensive picture of events on the ground.

¹⁸ Geneva Call, *supra* note 4, 25.

¹⁹ See also S. Rondeau, 'Participation of armed groups in the development of the law applicable to armed conflicts' 93 *International Review of the Red Cross* 883 (2011), 649-672.

²⁰ R. Provost, 'The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassoli and Yuval Shany', 93 *International Review of the Red Cross* 882 (2011), 441. See also, Y. Leroy, 'La notion d'effectivité du droit', 3 *Droit et société* 79 (2011), 715-732.

KEY RESEARCH QUESTIONS DEVELOPED TO SUPPORT THE ANALYSIS OF EACH CASE STUDY

1) Knowledge and understanding: Are ANSAs familiar with the international rules applicable upon them in armed conflicts? Do they have different degrees of knowledge according to the rule under analysis? How do they understand these rules? Do they share the same interpretations States or other ANSAs have?

2) Ownership and internalization: Do ANSAs agree with the international rules applicable upon them in armed conflict? Are these rules reflected in their internal policies or codes of conduct? What factors contribute to their acceptance or rejection of specific humanitarian norms (e.g. local values, influence of different stakeholders)? If they disagree, why and on what rule or aspect of the rule?

3) Capacity: What are the practical challenges ANSAs face in complying with the international rules applicable to them? Are some of these difficulties linked to their organizational structure, the way norms are drafted (e.g. fair trial procedures based on states' infrastructure and capacity), or the lack of technical assistance?

4) Situational: What are the reasons why ANSAs follow certain rules while, at the same time, disregarding others? What are the situational factors that influence both scenarios? What conclusions can be drawn from these scenarios of respect or lack thereof?

5) Reflective: What are the issues ANSAs would be willing to regulate in the future (e.g. protection of the environment, ban on anti-vehicle mines, etc.)? How would they regulate these (e.g. through an agreement with the other parties to conflict, an internal regulation of the group, elaboration of new international norms)?



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CONCLUSION

By compiling and analysing ANSAs' views and understanding of international humanitarian norms, the research will shed light on the causes of violations or, a contrario, on the factors that are conducive to compliance. These findings will generate useful information for humanitarian actors, contributing to the design of more effective protection strategies and programming. In particular, guidelines for humanitarian engagement with ANSAs will be developed as part of this project and disseminated to relevant stakeholders in the countries where the research will take place.

The research project is currently funded by the Swiss Federal Department of Foreign Affairs, European Civil Protection and Humanitarian Aid Operations (ECHO) and the UK Department for International Development (DFID).

OUTPUTS OF THE RESEARCH PROJECT

- 1) The publications of case studies and the comparative thematic analysis of ANSA practice and interpretation of selected IHL norms (in open-access format);
- 2) An expert meeting and the development of guidelines for humanitarian organizations on ANSA engagement, based on the findings of the research and interviews with ANSAs in the field;
- 3) An open-access and user-friendly database containing essential information on selected ANSAs' practice, case studies, and other resources;
- 4) The establishment of an interdisciplinary network of practitioners and experts who will further engage in peer-exchange and support, thereby maximising the impact of the research.

FURTHER READING

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**The Geneva Academy
of International Humanitarian Law
and Human Rights**

Villa Moynier
Rue de Lausanne 120B
CP 1063 - 1211 Geneva 1 - Switzerland
Phone: +41 (22) 908 44 83
Email: info@geneva-academy.ch
www.geneva-academy.ch

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