The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements

by Noelle Higgins*

INTRODUCTION

The regulation of armed non-state actors is a challenge to the state-centric international law paradigm. The vast majority of international legal instruments which impact the regulation of armed actors are open to ratification by states only. This leads to the unfortunate situation in which armed non-state actors often fall outside the remit of international law and their use of force and, indeed, the use of force against them, is left unregulated, which can only be to the detriment of combatants and civilians alike. However, there is an emerging trend, led by the International Committee of the Red Cross (ICRC) and non-governmental organizations (NGOs) such as Geneva Call, to accommodate non-state actors under the international humanitarian law (IHL) framework.

This article seeks to investigate how non-state actors, specifically national liberation movements, are and could be regulated by IHL. It seeks to give an overview of the relevant legal provisions and illustrates the difficulties faced by national liberation movements if they do wish to accede to IHL instruments and apply IHL in their conflicts. As it is the aim of IHL to protect both combatants and civilians in armed conflicts, it is important that this body of law is practically applied and implemented in all conflict situations to the greatest extent possible. However, in the past, national liberation movements have encountered difficulties when seeking to apply IHL to their conflicts due to the nature of the legal framework and, indeed, the nature of international law itself.

International law, the body of law that governs states in their relationships with one another, generally struggles to accommodate non-state actors. The international legal instruments dealing with the laws of war, namely the Geneva Conventions of 1949,1 the Hague Regulations of 1907,2 and more modern international conventions seeking to regulate weapons such as the Ottawa Treaty of 1997 banning landmines,3 were all drafted by states with the regulation of states in mind. These instruments almost exclusively limit ratification to states and do not allow for the accession of non-states. This means that non-state actors, including national liberation movements, face many difficulties when seeking to be bound by and apply IHL provisions in their conflicts, thus limiting the protection available to those fighting and caught up in these conflicts. However, non-state actors are active in various theatres of war and it is therefore vital that a realistic IHL framework that accommodates non-state actors be formulated.

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conflict zone. On a political level, national liberation movements often seek to apply IHL principles in their conflicts to legitimize their organization and cause on the international stage. If they are seen to act in accordance with international legal principles, states may view these movements as genuine and valid actors, rather than as “rebels” or “terrorists.” Such a perceived status change could ameliorate the plight of national liberation movements and the people they represent, for example by helping them to receive international aid.

In recent times, actors in some self-determination conflicts have attempted to apply IHL principles in their conflicts, outside of the formal IHL framework. For example, since its foundation in 2000, an NGO called Geneva Call has promoted the engagement of non-state armed groups with IHL. Through Geneva Call, a number of national liberation movements from all parts of the world, including the Polisario in the Western Sahara, the Sudan People’s Liberation Movement/Army (SPLM/A), the Moro Islamic Liberation Front in the Philippines, the Kurdistan People’s Congress in Turkey, and the Kurdistan Regional Government in Iraq, have agreed to implement IHL principles in relation to the use of landmines.11 This break from the traditional IHL framework is necessary because, as illustrated below, this paradigm is state-centric, sidelining non-state actors.

IHL and Non-State Actors

Geneva Conventions

The Geneva Conventions of 1949, the main IHL instruments, are in principle open to ratification by states only. These instruments have been almost universally ratified and have been deemed to be part of customary law, thus binding on all states.12 They contain two provisions regarding accession or acceptance that could be of use to national liberation movements and allow for the application of the Conventions to wars of national liberation. The first provision is Common Article 60/59/139/155 regarding accession, which states that accession is open to any “Power” rather than to any “State.”13 The second is Article 2(3), which also refers to “Powers” rather than “States” as entities that can be bound by the Geneva Conventions.14 If the terms “Power” or “Powers” in these two provisions can be taken to encompass national liberation movements, then these movements could accede to or accept to be bound by the Geneva Conventions, thus applying the whole corpus of IHL to wars of national liberation. This liberal interpretation is not without its critics, who argue that the drafters originally intended the term “Power” to be restricted to mean states only.15

Attempts have been made by non-universally recognized states, for example the Gouvernement Provisoire de la République Algérienne (Provisional Government of the Republic of Algeria) and the State of Palestine,16 to accede to the Conventions and the Additional Protocols.17 However, these attempts were unsuccessful as the Depositary housed in the Swiss government did not accept the Parties’ notification of accession as they were not recognized states.18 This illustrates that, even though the legal framework could potentially accommodate national liberation movements, political will is also needed in order to implement IHL in wars of national liberation.

Additional Protocol I

IHL was reviewed and revitalized by the adoption of two Additional Protocols at the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974–1977. Additional Protocol I19 deals with international armed conflicts and Additional Protocol II20 deals with non-international armed conflicts. These instruments have not been ratified by every state, but some provisions have been deemed to be part of customary law.21 As a result of international pressure during the decolonization period, wars of national liberation were determined to be international armed conflicts and thus fall under Additional Protocol I.22

Article 1(4) of Additional Protocol I identifies as international armed conflicts situations that “include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . .”23 The terms “colonial domination,” “alien occupation,” and “racist regimes” are not clarified in the instrument or elsewhere, but it is clear that they reflect the politics of the decolonization period. It may therefore be questioned whether Article 1(4) is applicable to modern wars of national liberation.24 Some more recent national liberation movements, however, claim that their conflicts clearly fall within the remit of Article 1(4). One example is the Free Aceh
Movements (Gerakan Aceh Merdeka or GAM) in the Acehnese region of Indonesia, which claimed that Indonesia is a neocolonist. The GAM fought a war for self-determination and independence from Indonesia for 25 years until it finally signed a peace agreement, the Memorandum of Understanding, with the Indonesian government in 2005, thereby giving up its claim to independence. Alien occupation “covers the situation of a territory which was not yet fully developed into a State before it came occupied by another State” and could apply to places such as the Western Sahara and events such as the Polisario’s current war of national liberation. A claim of alien occupation could perhaps also be made by groups representing the Kurdistan People’s Congress and the Kurdistan Regional Government in Turkey and Iraq. The category of “racist regime” is more difficult to satisfy in a current context. This term was originally directed towards the apartheid regimes of South Africa and the former Southern Rhodesia, which are no longer in existence. The General Assembly also commented that Zionism was a form of racism in Resolution 3379 (XXX) of 1957, but this was voided by Resolution 46/86 of 1991.

It is important to note that Article 1(4) states that international armed conflicts “include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . .” However, the Commentary on the Additional Protocol ignores the word “include” and the drafters stated that Article 1(4) “should be interpreted as introducing an exhaustive list of cases which are considered to form part of the situations covered by the preceding paragraph.”

In short, it is clear that Article 1(4) has a restrictive scope, as it only applies to situations of armed struggle by a people against colonial domination, alien occupation, or a racist regime. A second criterion of Article 1(4) is that the struggle of that people must be undertaken in order to exercise its right to self-determination against a Contracting Party to the Protocol. This requirement further limits the scope of the provision, as the vast majority of states faced with such a struggle, such as Indonesia and India, have not ratified Additional Protocol I, thereby rendering the protection offered by the instrument useless for many liberation movements.

Article 96(3) of Additional Protocol I, discussed further below, accommodates national liberation movements and allows for their accession to the instrument, but only when they follow specific procedural requirements which limits the application of the instrument. First, the prerequisites of Article 1(4) of Protocol I must be satisfied. Then the authority representing the people fighting for self-determination must make a Declaration to the Depositary, which then must notify the other Parties to the Geneva Conventions. The Declaration subsequently triggers the application of the Conventions and Protocol.

**Article 96(3) Declarations**

When Additional Protocol I was adopted, national liberation movements welcomed Article 96(3) in principle as an attempt to allow for their accession to an IHL instrument and for the regulation of their wars as international armed conflicts. Since then, a number of Article 96(3) Declarations have been made by national liberation movements, such as the African National Congress (ANC). However, no such Declarations are listed by the Depositary or have been transmitted to the High Contracting Parties. The Depositary will not accept Declarations made by national liberation movements in states that have not ratified Additional Protocol I, since such Declarations do not fulfill the procedural requirements of Article 96(3). Some Declarations of this kind, specifically mentioning Article 96(3), are nevertheless deposited with the ICRC, indicating that national liberation movements have recognized the difficulties inherent in Article 96(3) and tried to work outside the formal framework. There is uncertainty regarding the legal status of such unilateral Declarations. Verhoeven has commented that “it is accepted that a declaration without deposition suffices” to trigger the application of the Conventions and the Protocol, although this assertion could be questioned in light of inconsistent practice.

The Article 96(3) Declaration system is referred to in Article 7(4) of the 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 of 1980 (Certain Conventional Weapons or CCW). Under this provision, in situations covered by Article 1(4) of Additional Protocol I, an authority can make a Declaration to that Convention’s Depositary, the Secretary General of the United Nations. This would trigger the application of the Weapons Convention and its Protocols as well as the Geneva Conventions, even in cases where the state against which the authority is fighting has not
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ratified Additional Protocol I.45 However, no Declarations of this kind have been made.46 The fact that national liberation movements have not utilized this mechanism may mean that these movements have become disillusioned with the formal IHL framework and the problems associated with accession to other IHL instruments. It may also mean that information on the CCW mechanism has not been widely disseminated among national liberation movements. Dissemination of IHL rules is the first step towards application and is an issue which deserves attention. Engagement with non-state actors is needed for adequate explanation of IHL principles to take place.

**Geneva Call and the Deed of Commitment**

Very important and innovative work to engage with and to accommodate non-state actors and to encourage their willingness to apply IHL has been undertaken by Geneva Call since 2000. Geneva Call is a “neutral and impartial humanitarian organisation dedicated to engaging armed non-State actors towards compliance with the norms of international humanitarian law and human rights law.”47 It has accommodated the desire of non-state actors to bind themselves by IHL rules regarding land mines, through the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 1997 (Ottawa Treaty). This is done by means of signing a Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action,49 formulated and overseen by Geneva Call.

Although landmines are a popular weapon of non-state actors, the Ottawa Treaty limits ratification to states only and the use of these weapons by non-state actors cannot be formally regulated under the current IHL framework. By signing a Deed of Commitment, however, armed non-state actors agree to a number of commitments in relation to the non-use of mines and also agree to the monitoring and verification of these commitments by Geneva Call. Under the Deed, signatories also agree “to treat their commitment as one step or part of a broader commitment in principle to the ideal of humanitarian norms,”50 thus binding themselves in the most formal way possible within the current IHL framework. So far, 39 armed groups51 have signed Deeds of Commitment, a move that a number of states view as a positive development.52

**National Liberation Movements, States, and IHL**

It is obvious that national liberation movements will be met with obstacles to their accession to the Geneva Conventions as they are not states.53 However, that does not stop them from declaring their intention to apply and be bound by these Conventions outside of the formal legal framework.54 For example, the ANC made a statement to the ICRC in 1980 regarding its willingness to apply the Conventions, as did South West Africa People’s Organisation, and the Sahrawi Arab Democratic Republic.55

In addition, since the outbreak of many wars of national liberation in the 1970s, numerous liberation movements have actively implemented IHL principles, especially in relation to prisoners of war. Some national liberation movements have invited the ICRC to visit their prisoner camps and to oversee their implementation of IHL rules. The ICRC has visited prisoners of war held by the various national liberation movements such as the Polisario Front,56 the National Front for the Liberation of Chad,57 and the SPLM/A58 to monitor their treatment of prisoners and application of IHL. The ICRC has also encouraged dialogue between state leaders and national liberation movements. For example, the president of the ICRC has met with President Al Bashir of Sudan and also with the chairman of the SPLM/A, John Garang de Mabior. During these meetings,
the ICRC president made known the ICRC’s readiness to facilitate the release of detainees held by the SPLM/A.59

While national liberation movements have been willing to apply and to declare their intentions to apply IHL in an effort to “internationalize” and legitimize their struggles, states generally refrain from applying any IHL provisions for fear that they may be in some way legitimizing the national liberation movement and thus the challenge to their sovereignty and territorial integrity.60 States almost always refuse to recognize the existence of national liberation movements and prefer to refer to groups who use force to challenge their authority as “rebels” or “terrorists” who fall outside the remit of IHL. Members of the Irish Republican Army who fought for the independence of Ireland from the United Kingdom called for many years for their members who had been imprisoned to be granted prisoner of war status; however, they were viewed only as “terrorists” and dealt with under domestic legislation.61 Similarly, the Indonesian government insisted for many years on officially calling the GAM a “peace disturbing gang” (gerombolan pengacau keamanan),62 thereby denying its national liberation movement status, and applied domestic criminal law when dealing with GAM members.

Only very rarely, when violence and fighting have reached high levels, have states accepted that IHL applied to a war of national liberation and affirmatively applied Common Article 3, the most basic of all IHL provisions. For example, beginning in 1974, Portugal applied Common Article 3 to the conflicts in its colonies in Guinea-Bissau, Angola, and Mozambique and invited the ICRC to visit its prisoners of war.63 France also applied the provision to the Algerian War in 1956, “partially because the FLN [National Liberation Front of Algeria] threatened reprisals if executions of captured FLN members con-


Verhoeven, supra note 21, at 13.

Wilson, supra note 17, at 168.

Additional Protocol I, supra note 17, at 13.

Additional Protocol I, supra note 17, art. 1(4).

Commentary on the Additional Protocols of 8 June to the Geneva Conventions of 12 August 1949 54(Sandoz et al eds., Martinus Nijhoff 1987).

Greenwood, supra note 22, at 194-95.

Currently there are 168 High Contracting Parties to Additional Protocol I. International Committee of the Red Cross, http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMC7 (last visited Nov. 12, 2009).


Additional Protocol I, supra note 19, art. 100(d).

Wilson, supra note 17, at 169.


Additional Protocol I, supra note 19, art. 1(4).


13 Convention I, supra note 1, art. 60; Convention II, supra note 1, art. 59; Convention III, supra note 1, art. 139; Convention IV, supra note 1, art. 155.

14 Convention I, supra note 1, art. 2(3), Convention II, supra note 1, art. 2(3); Convention III, supra note 1, art. 2(3); Convention IV, supra note 1, art. 2(3).

15 In the opinion of the drafters of the Conventions of 1949, wars which today are characterized as wars of liberation were considered as non-international conflicts. The territory of the colonies was looked upon as part of the territory of the mother country. Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War, Volume III 36-37 (Jean S. Pictet, ed. 1960).

16 In June 1989, the Permanent Observer of Palestine sent a letter to the United Nations Office in Geneva, stating “that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto.” However, the Depositary stated that it was not in a position to decide if this constituted accession because of the uncertainty surrounding the status of the State of Palestine. International Committee of the Red Cross, Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, accessions and successions as at 31 December 1994, http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMC7 (last visited Nov. 14, 2009).


18 Wilson, supra note 17, at 195; see also Hillier, supra note 17.


23 Additional Protocol I, supra note 19, art. 1(4).


Id.

Geneva Call, Home Page, supra note 47.


Clapham, supra note 39, at 494.

Id.


Wilson, supra note 17, at 157.

Ewumbue-Monono, supra note 56, at 913.

Id.


Ewumbue-Monono, supra note 56, at 921.


Wilson, supra note 17, at 156.

Id. at 153.