

Enhancing Compliance with International Law by Armed Non-State Actors¹

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¹ This article builds on a research project conducted by the Geneva Academy of International Humanitarian Law and Human Rights (ADH) since 2009 and based on interviews with humanitarian actors, as well as on the results of a workshop held in Geneva in March 2010. See ADH, 'Armed Non-State Actors and International Norms: Towards a Better Protection of Civilians in Armed Conflicts', Summary of Initial Research and Discussions During an Expert Workshop in Geneva in March 2010, available at <http://www.adh-geneva.ch/docs/reports/armednonstateactors.pdf> (last visited 14 April 2011).

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Abstract

Enhancing compliance with international norms by armed non-state actors is central to efforts to improve the protection of civilians in armed conflict. Limited engagement with such actors, as well as lack of clarity as to the precise nature and extent of the international legal regimes that are applicable to them, constitute significant barriers to achieving better compliance. In this article the authors argue for international human rights law to be more widely seen as imposing direct obligations upon armed non-state actors and for counter-terrorism legislation not to be interpreted so as to preclude engagement on positive respect for humanitarian norms. What is needed is greater engagement with armed non-State actors, not less.

A. Introduction

Today's conflicts are mostly qualified under international humanitarian law as being of a non-international character, i.e. a State against one or several armed non-State actors (ANSAs) or even a conflict among different ANSAs in a failed State.² How, and to what extent, international law is formally binding on these actors is debated. While it is largely uncontested that international humanitarian law imposes certain obligations on ANSAs, the application of other bodies of international law, in particular human rights law, is controversial. Nonetheless, the practice of the United Nations, as well as of other international and regional organizations shows that efforts are increasingly being made to hold ANSAs accountable at the international level for the violation of international

² This paper uses the following working definition of ANSA: *any armed group, distinct from and not operating under the control of the State or States in which it carries out military operations, and which has political, religious, or military objectives*. Thus, it does not ordinarily cover private military companies or criminal gangs. However, as the ICRC has observed: "Amongst armed groups, the distinction between politically-motivated action and organised crime is fading away. All too often, the political objectives are unclear, if not subsidiary to the crimes perpetrated while allegedly waging one's struggle [...] Are we dealing with a liberation army resorting to terrorist acts, or with a criminal ring that tries to give itself political credibility? Are we dealing with a clan-oriented self-defence militia relying heavily on criminal funding, or with a Mafia-like gang whose constituency is strongly intertwined with ethnic communities?" ICRC, *Holding Armed Groups to International Standards: An ICRC Contribution to the Research Project of the ICHRP*, (1999), 2–3.

norms. Furthermore, members of ANSAs can be held individually responsible under international criminal law when they commit certain crimes.

Despite these considerations, many difficulties remain in seeking to ensure compliance with international norms by these actors. The reasons for lack of compliance are diverse: strategic arguments (the nature of warfare in internal armed conflicts that may lead to the use of tactics that violate international law, such as launching attacks from within the civilian population); lack of knowledge of applicable norms; and lack of ‘ownership’³ over these norms. Indeed, since ANSAs are not entitled to ratify the relevant international treaties (as, by definition, they are not a State or other entity with the necessary international legal personality), and are generally precluded from participating as full members of a treaty drafting body, they could—and sometimes do—argue that they should not be bound to respect rules that they have neither put forward nor formally adhered to.

Our article aims at identifying the challenges faced by the international community (e.g. States, international organizations, NGOs working in the field) when dealing with ANSAs. It starts with a brief overview of the legal dimension of the problem, but focuses mainly on the *policy* aspect of this issue and in particular on ways to improve respect for international law by ANSAs.

³ In the context of the present article, by ‘ownership’ is meant the capacity and willingness of actors engaged in armed conflict to set and/or take responsibility for the respect of, norms intended to protect civilians as well as other humanitarian norms applicable in armed conflict.

B. Overview of International Law Applicable to Armed Non-State Actors

There is no comprehensive mapping of armed non-State actors around the world.⁴ The Stockholm International Peace Research Institute has determined that in 2009, 17 ‘major’ armed conflicts were active in 16 locations around the world.⁵ “All of these conflicts were intra-state: for the sixth year running, no major interstate conflict was active in 2009”⁶. Thus, as Sassòli has noted:

“By definition, at least half the belligerents in the most widespread and most victimizing of armed conflicts around the world, *i.e.* non-international armed conflicts, are non-State armed groups.”⁷

However, public international law rarely addresses the obligations of *groups* of individuals other than States. There are, however, a few provisions seeking to bind ANSAs – *qua* groups – in international humanitarian law treaties, even if some doubts persist as to how precisely

⁴ The Graduate Institute of International and Development Studies in Geneva, in cooperation with the Programme on Humanitarian Policy and Conflict Research (HPCR) at Harvard University, has launched an online database on non-state armed groups at www.armed-groups.org (last visited 14 April 2011). Currently the database offers analysis and information resources on 50 transnational and non-state armed groups.

⁵ In Africa, this was, according to Stockholm International Peace Research Institute (SIPRI), in Rwanda, Somalia, Sudan, and Uganda; in the Americas, in Colombia and Peru; in Asia, in Afghanistan, India (Kashmir), Myanmar (Karen State), Pakistan, the Philippines (against the Communist Party of the Philippines), the Philippines (Mindanao), and Sri Lanka (‘Tamil Eelam’); in Europe, in Russia (Chechnya); and in the Middle East, in Iraq, Israel (Occupied Palestinian territories), and Turkey (Kurdish areas). The US was involved in major armed conflicts abroad. Since then, the conflict in Sri Lanka has ended. See L. Harbon & P. Wallenstein, ‘Appendix 2A. Patterns of major armed conflicts, 2000–2009’, *SIPRI Yearbook 2010*, SIPRI, Stockholm, available at www.sipri.org/yearbook/2010/02/02A (last visited 14 April 2011).

⁶ L. Harbon & P. Wallenstein, *id.*

⁷ M. Sassòli, ‘Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law’, Paper submitted at the Armed Groups Conference, Vancouver, 13–15 November 2003, 1, available at <http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-13nov-sassoli.pdf> (last visited 14 April 2011).

those norms are legally binding on those actors.⁸ Furthermore, contemporary international human rights law has evolved to an extent whereby it can be argued (though not universally agreed) that ANSAs also have human rights obligations.⁹ Let us address each of these bodies of law in turn.

I. International Humanitarian Law

For international humanitarian law (IHL) to apply to an ANSA, two conditions must be fulfilled. First, there must be an armed conflict as defined by IHL, and second, the group must possess a sufficiently developed structure.

1. The Existence of an Armed Conflict

International humanitarian law applies specifically to situations of armed conflict. The existence of such a conflict is a question of fact and does not formally depend on the opinion of concerned states on the matter.¹⁰ International humanitarian law distinguishes between international armed conflicts and non-international armed conflict, although the pertinence of this distinction is now criticized by some scholars.¹¹

⁸ On the binding character of international humanitarian law on armed groups see in particular, S. Sivakumaran, 'Binding Armed Opposition Groups', 55 *International and Comparative Law Quarterly* (2006) 2, 369–394; A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts', 30 *International and Comparative Law Quarterly* (1981) 2, 416–439; A. Clapham, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement' (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636 (last visited 14 April 2011); L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002); S. Zašova, 'L'Applicabilité du Droit International Humanitaire aux Groups Armés Organisés, in J-M. Sorel & C-L. Popescu (eds), *La Protection des Personnes Vulnérables en Temps de Conflits Armés* (2010).

⁹ See generally on that point, A. Clapham, *Human Rights Obligations of Non-State Actors* (2006).

¹⁰ S. Vité, 'Typology of Armed Conflicts in International Law: Legal Concepts and Actual Situations', 91 *International Review of the Red Cross* (2009) 873, 69–94.

¹¹ See, e.g., J. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', 85 *International Review of the Red Cross* (2003) 850, 313–350; see also R. Kolb, *Ius in Bello. Le Droit International des Conflits Armés* (2003), 71–113.

The notion of international armed conflict is defined in Article 2 common to the four Geneva Conventions of 1949 which states that the Conventions:

“shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”.

The level of intensity of violence to trigger the law of international armed conflict is widely understood to be very low and the conflict needs not to be of a long duration.¹² Situations of occupation, i.e. when a territory ‘is actually placed under the authority of the hostile army’¹³ are also qualified as international armed conflicts with specific regulation of the occupier’s actions. Under Article 1, paragraph 4 of the 1977 Additional Protocol I¹⁴ to the Geneva Conventions, application is extended to:

“armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, [...]”

Such a situation is determined to be an international armed conflict also, even if one of the parties involved is an ANSA. Its politically charged language has, though, meant that it has never successfully been invoked in practice by an ANSA.

Armed conflicts of a non-international character are defined by reference to two texts: Article 3 Common to the four 1949 Geneva Conventions and *1977 Additional Protocol II*¹⁵ to the Geneva Conventions. Common Article 3, which is generally agreed to be part of customary international law,¹⁶ applies “in the case of armed conflict not of an

¹² See Vité, *supra* note 10, 72.

¹³ Article 42 of the 1907 Hague Regulations; see on occupation, Y. Dinstein, *The International Law of Belligerent Occupation* (2009); R. Kolb & S. Vité, *Le droit de L’Occupation Militaire: Perspectives Historiques et Enjeux Juridiques Actuels* (2009).

¹⁴ 1125 U.N.T.S. 3.

¹⁵ 1125 U.N.T.S. 609.

¹⁶ Statements reiterating the customary nature of Common Article 3 have been made by the *ad hoc* international criminal tribunals both for the former Yugoslavia and for

international character occurring in the territory of one of the High Contracting Parties” and requires that “each Party to the conflict shall be bound to apply, as a minimum,” a certain number of provisions.¹⁷

It has sometimes been claimed that the term “each Party” does not actually apply to ANSAs, but only to government armed forces.¹⁸ State

Rwanda. See, notably, ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1, para. 98; and ICTR, *Prosecutor v. Akayesu*, Judgment, 2 September 1998, Case No. ICTR-96-4-T, para. 608. According to the International Court of Justice in *Nicaragua v. the United States*:

“Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts.”, *Military and Paramilitary Activities in und against Nicaragua*, (*Nicaragua v. USA*), Merits, Judgment. I.C.J. Reports 1986, 14, para. 218.

¹⁷ Common Article 3 reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

¹⁸ One of the arguments put forward has been that ‘Party’ (with a capital ‘p’) meant ‘High Contracting Party’, i.e. states, and that it was used in a contracted form merely to avoid repetition. See Zašova, *supra* note 8, 58; Zegveld, *supra* note 8, 10.

practice as well as international case law, however, has confirmed that Common Article 3 applies to ANSAs directly.¹⁹

1977 Additional Protocol II, which “develops and supplements” the provisions of Common Article 3 “without modifying its existing conditions of application”, imposes greater restrictions on the conduct of ANSAs. It is, though, applicable in a somewhat narrower set of circumstances as it is meant to apply to “all armed conflicts” not covered by Article 1 of *1977 Additional Protocol I* (which applies to international armed conflicts) as long as they,

“take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has declared that the ‘core’ of *Additional Protocol II* is also part of customary international law.²⁰

Neither Common Article 3 nor *1977 Additional Protocol II* applies in situations of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, [as] not being armed conflicts”²¹. Such situations are, though, covered by international human rights law. It is therefore necessary to establish the threshold of violence to be reached for IHL to apply. Whereas to qualify as an international armed conflict it is said to be enough that there “is a resort to

¹⁹ In *Nicaragua*, the ICJ confirmed that common article 3 was applicable to the *contras*, the non-State armed group fighting the government: “The conflict between the *contras*’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character”, *Nicaragua v. USA*, *supra* note 16, para. 219.

²⁰ *Prosecutor v. Tadić*, Judgment (Appeals Chamber), 15 July 1999, Case No. IT-94-1, para. 98.

²¹ *Additional Protocol II*, Article 1, paragraph 2. See Vité, *supra* note 10, 76; ICRC, *How is the Term ‘Armed Conflict’ Defined in International law*, Opinion Paper, March 2008, 3, underlining that the threshold is also valid for situations covered by Common Article 3.

armed force between States”²², for Common Article 3 and *Additional Protocol II* to apply, jurisprudence holds there must be “protracted armed violence” between the parties.²³ In addition, as both Common Article 3 and *Additional Protocol II* apply in situations of armed conflicts where governmental forces and ANSAs are involved, there are certain requirements as to the level or organization of the group. In that regard, the conditions laid down by *Additional Protocol II* to which we are going to turn now, are more stringent.²⁴

2. Conditions with Regard to the Structure of the Group

Common Article 3 does not explicitly determine the level of organization the ANSA must possess in order for the provision to apply to their behavior. The ICTY’s case law lays down indicators to establish the necessary degree of organization of the group:

“As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the “organization” criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.”²⁵

²² ICTY, *Prosecutor v. Tadić*, *supra* note 20, para 70.

²³ *Id.* By ‘protracted’, is meant a certain intensity of combat rather than of a certain duration, as the ordinary meaning of the word implies.

²⁴ A further restriction is foreseen in *Additional Protocol II*. Whereas Common Article 3 also applies in a situation of armed conflict taking place only between non-State armed groups, *Additional Protocol II* only deals with armed conflicts taking place between, at least, one State and one ANSA. See Vité, *supra* note 10, 80.

²⁵ ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008, para. 60. See also for a useful review of criteria of organization, ICTY, *Prosecutor v. Boskoski*, Case No. IT-04-82, Judgment (Trial Chamber), 10 July 2008, paras 199–203.

As noted above, Article 1, paragraph 1 of *Additional Protocol II* lays down more stringent conditions of application, namely to the requirement for ‘control of territory’ by an ANSA. It is sometimes difficult to identify in practice when this condition has been fulfilled as interpretations vary as to the degree of control of territory necessary (and the nature of warfare is not static, so control may ebb and flow).²⁶ A strict interpretation would cover only situations in which the ANSA exercises a similar control to that of the State. A less rigid position, as set out in the Commentary of the Protocol published by the International Committee of the Red Cross (ICRC), accepts a situation where control of territory is only partial.²⁷

In conclusion, in a situation of armed conflict, armed groups that have reached the appropriate level of organization are bound by international customary law and by a certain number of treaty provisions, provided the State in which the conflict takes place is a party to the relevant treaty. The International Commission of Inquiry on Darfur enumerated a list of norms of customary international law binding on the rebels, which included the following fundamental provisions:

“(i) the distinction between combatants and civilians [...] (ii) the prohibition on deliberate attacks on civilians; [...] (iv) the prohibition on attacks aimed at terrorizing civilians; [...] (xiv) the prohibition of torture and any inhuman or cruel treatment or punishment; [...] (xvii) the prohibition on ill-treatment of enemy combatants *hors de combat* and the obligation to treat captured enemy combatants humanely”²⁸.

²⁶ Vité, *supra* note 10, 79.

²⁷ *Id.*, 78. As the commentary published by the ICRC notes (para. 4467): “In many conflicts there is considerable movement in the theatre of hostilities; it often happens that territorial control changes hands rapidly. Sometimes domination of a territory will be relative, for example, when urban centres remain in government hands while rural areas escape their authority. In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces. However, there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol.” Commentary on 1977 Additional Protocol II, available at <http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument> (last visited 14 April 2011).

²⁸ See the full list in ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General - Pursuant to Security Council Resolution 1564 of 18 September 2004’, Geneva, 25 January 2005, para. 166. For a list of customary

In addition, ANSAs are specifically bound by the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954,²⁹ as well as by 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 as amended on 21 December 2001 (CCW)³⁰.

II. International Human Rights Law

It is generally understood that human rights law is applicable at all times, including in armed conflicts. This has been formally confirmed on several occasions by the International Court of Justice.³¹ Thus, there is no need to assess whether a certain threshold of violence has been reached (although certain situations of emergency may allow a State Party to derogate from full observance of specific rights). When the threshold for the application of IHL has been reached, IHL and international human rights law will apply in a ‘complementary’ way.³²

international law applicable in non-international armed conflicts, see, e.g., the ICRC database available at www.icrc.org/customary-ihl/eng/docs/home (last visited 14 April 2011).

²⁹ 249 U.N.T.S. 240; Article 19 of this Convention reads as follow: “In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property. 2. The parties to the Conflict shall endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. 3. The United Nations Educational, Scientific and Cultural Organization may offer its services to the parties to the conflict. 4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.”.

³⁰ 1342 U.N.T.S. 137.

³¹ See the ICJ Advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996, ICJ Reports 1996, as well as the Advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, ICJ Reports 2004. The applicability of international human rights law in situations in armed conflicts was also confirmed by the ICJ in the *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)*, Judgment of 9 December 2005, ICJ Reports 2005.

³² See H.-J Heintze, ‘On the Relationship Between Human Rights Law Protection and International Humanitarian Law’, 86 *International Review of the Red Cross* (2004) 856, 789-814.

The applicability of human rights *law* to ANSAs (as opposed to the *norms* of behavior espoused by that corpus of international law) is controversial.³³ One of the reasons put forward by scholars refuting the applicability of this body of law is that the rationale of human rights is the regulation of *States*’ and not *‘private actors’* behavior with respect of individuals under their jurisdiction or control.³⁴ Admittedly, in contrast with IHL instruments, few human rights treaties explicitly mention obligations that could be binding on ANSAs, although the situation is evolving.³⁵

A narrow conception of human rights law does not correspond to the basic philosophy of human rights or to the reality of many situations in

³³ See A. Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’, 88 *International Review of the Red Cross* (2006) 863, 491–523.

³⁴ For Zegveld: “Various bodies, including the Inter-American Commission, the special rapporteurs and working groups of the UN Commission on Human Rights, and the UN Secretary-General have answered the question whether human rights treaties can be applied to armed opposition groups negatively. The principal reason is that human rights regulate the relationship between the government and the governed and aim to check the exercise of state power”, Zegveld, *supra* note 8, 40.

³⁵ See Article 7 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted 22 October 2009, available at http://reliefweb.int/sites/reliefweb.int/files/resources/8F2DDD0E8D2ED16B4925765B0007426C-au_oct2009.pdf (last visited 14 April 2011), which stipulates that: Members of armed groups shall be prohibited from:

- a) Carrying out arbitrary displacement
- b) Hampering the provision of protection and assistance to internally displaced persons under any circumstances
- c) Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family
- d) Restricting the freedom of movement of internally displaced persons within and outside their areas of residence
- e) Recruiting children or requiring or permitting them to take part in hostilities under any circumstances
- f) Forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children
- g) Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons
- h) Attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials and
- i) Violating the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not infiltrate such places.

which ANSAs operate. As suggested by one author, “the most promising theoretical basis for human rights obligations for non-state actors is first, to remind ourselves the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s dignity. The implication is that these natural rights should be respected by everyone and every entity”³⁶. From a more legal point of view, there seems to be a broader agreement among scholars that human rights norms could be applicable to ANSAs in specific circumstances, in particular when they exercise element of governmental functions and have *de facto* authority over a population. This will normally be the case when an armed group controls a certain portion of the territory. Indeed, the need to regulate the relationship between those who govern and those who are governed, which characterizes the *raison d’être* of human rights law, would be reproduced and thus would justify the application of that body of law.³⁷ Moreover, ANSAs could also be legally bound by core human rights norms whether or not there is such control over a certain territory or population. Thus in a recent study, the International Law Association reached the conclusion that even though “the consensus appears to be that currently NSAs [non state actors] do *not* incur direct human rights obligations enforceable under international law”, ANSAs would still be bound by *ius cogens* norms³⁸ and insurgents should comply with international humanitarian law.³⁹

³⁶ A. Clapham, *supra* note 9, 24.

³⁷ See N. Rodley, ‘Can Armed Opposition Groups Violate Human Rights’, in K. E. Mahoney & P. Mahoney (eds), *Human Rights in the Twenty-First Century*, (1993), 300; also Zegveld, *supra* note 8, 149.

³⁸ Norms of *ius cogens* – the peremptory norms of international law – are defined by Article 53 of the 1969 *Vienna Convention on the Law of Treaties* (1155 U.N.T.S. 331) as norms “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” The ILC Draft Articles foresee superior means of enforcement for *ius cogens* norms, by including special regulation of both the responsible State and for all other States in the case of violations. Christian J. Tams, ‘Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?’, 13 *European Journal of International Law* (2002) 5, 1161–1180.

³⁹ International Law Association, *Non State Actors*, First Report of the Committee (Non-State Actors in International Law: Aims, Approach and scope of project and Legal issues), The Hague Conference 2010, para. 3.2 (original emphasis). Which human right norms are part of *ius cogens* is not settled. The International Law Commission in its Commentary on the Draft Articles on State Responsibility has identified as peremptory norms of international law the “prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to

In fact, contemporary practice of international institutions shows clearly that there is a political will to hold non-State actors accountable for human rights violations. For example, the UN Security Council has, with respect to Afghanistan, “call[ed] upon all parties to uphold international humanitarian and human rights law and to ensure the protection of civilian life”⁴⁰. In his March 2010 report on the situation in Afghanistan, under the section on human rights, the UN Secretary-General further noted that “closely linked to impunity and the abuse of power are attacks on freedom of expression, carried out by both State and non-State actors”⁴¹. Furthermore, there seems to be no overriding necessity for any given ANSA to reach an equivalent degree of organization as required by IHL to be held accountable for human rights violations.⁴²

Undoubtedly, though, ANSAs do not have the full extent of rights and obligations as States.⁴³ But the rights to life, to freedom from torture and other cruel, inhuman or degrading treatment or punishment, to health, and to education can all be promoted, impeded, or, even violated by ANSAs by the way they act. The practice of international organizations gives further

self-determination”. Commentary on Article 26, in Draft Articles on Responsibility of States for Internationally Wrongful Acts - With Commentaries, 2001, 2 *Yearbook of the International Law Commission* (2001), Part Two, 85. The UN Human Rights Committee has identified the following as acts that would violate *ius cogens* norms: arbitrary deprivations of life, torture and inhuman or degrading treatment, taking hostages, imposing collective punishments, arbitrary deprivations of liberty, or deviating from fundamental principles of fair trial, including the presumption of innocence. Human Rights Committee, ‘General Comment No. 29: States of Emergency (Article 4)’, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, 4–5.

⁴⁰ S/RES/1746 (2007), para. 25.

⁴¹ Report of the Secretary-General, *The Situation in Afghanistan and its Implication for International Peace and Security*, 10 March 2010, UN Doc. A/64/705-S/2010/127, para. 38.

⁴² *Id.*, 26.

⁴³ Clapham notes that “of course not all rights can be simply transposed onto the non-state actor. A number of early applications (at the European Court of Human Rights) ruled out the idea that non-physical entities have a right to freedom of conscience, although churches and religious organizations have a right to manifest religion, and a religious foundation was held unable to claim the right to education. Non-state actors have no right to marry (no fundamental right to merger!). Nor can non-human non-state actors complain of torture or inhuman or degrading treatment under the European Convention. But the key point remains that organizations are capable of bearing some international rights and that this has been accepted with regard to a limited number of human rights more generally.”, Clapham, *supra* note 9, 4.

indications as to what human rights obligations are relevant for ANSAs. For example, in his March 2010 report on the situation in Afghanistan, under the section on human rights, the UN Secretary-General notes that “closely linked to impunity and the abuse of power are attacks on freedom of expression, carried out by both State and non-State actors”⁴⁴. Again in the context of the Afghan conflict, attacks on schools were condemned as an attack on education and led the Human Rights Council to adopt a resolution that urged “*all parties* in Afghanistan to take appropriate measures to protect children and uphold their rights”⁴⁵.

The protection and respect of the rights of children in armed conflicts are also obligations applicable to ANSAs. The UN Security Council has devoted considerable attention to this issue, which was first included on the Council’s agenda in 1999.⁴⁶ Resolution 1612 (2005) is especially noteworthy because it established the UN-led Monitoring and Reporting Mechanism on Children and Armed Conflict (“the Mechanism”) and its operational country-level Task Forces.⁴⁷ The Mechanism and its Task Forces monitor and report on six “grave violations”:

- killing and maiming of children,
- recruiting and using child soldiers,
- attacks against schools or hospitals,
- rape or other grave sexual violence against children,
- abduction of children, and
- denial of humanitarian access for children.

⁴⁴ Report of the Secretary-General, *The Situation in Afghanistan and its Implications for International Peace and Security*, 10 March 2010, A/64/705-S/2010/127, para. 38.

⁴⁵ Human Rights Council, *Addressing Attacks on School Children in Afghanistan*, 23 June 2010, A/HRC/RES/14/15 (emphasis added).

⁴⁶ See, notably, UN SC Res. 1261, 25 August 1999; UN SC Res. 1314, 11 August 2000; UN SC Res. 1379, 20 November 2001; UN SC Res. 1460, 30 January 2003; UN SC Res. 1539, 22 April 2004; UN SC Res. 1612, 26 July 2005; UN SC Res. 1882, 4 August 2009.

⁴⁷ UN SC Res. 1612 Operative Paragraphs 2-3; and see Watch List on Children in Armed Conflict, ‘UN Security Council Resolution 1612 and Beyond: Strengthening Protection for Children in Armed Conflict’, (May 2009), 4, available at http://watchlist.org/reports/pdf/PolicyPaper_09.pdf (last visited 14 April 2011). The establishment of the mechanism had earlier been proposed by the Security Council in Res. 1539, Operative Paragraph 2, 22 April 2004 (adopted unanimously).

In August 2009, the Security Council adopted Resolution 1882, by which the Council asked the Secretary-General to,

“include in the annexes to his reports on children and armed conflict those parties to armed conflict that engage, in contravention of applicable international law, in patterns of killing and maiming of children [...] in situations of armed conflict”⁴⁸.

Where an ANSA is listed in such an Annex, the UN, especially through UNICEF and the support of the Special Representative of the UN Secretary-General for Children and Armed Conflict,⁴⁹ seeks to address the underlying causes through the negotiation and adoption of so-called Action Plans.⁵⁰ Significantly, these plans are signed by the head of the UN country team and/or by the UNICEF Representative as well as the representative of the government or ANSA concerned.⁵¹ The different mechanisms put in place by the UN for the protection of children in armed conflicts (e.g. “naming and shaming”, monitoring, and encouragement for respect for international standards) suggest a more human-rights-based approach than a strictly humanitarian law one.

⁴⁸ UN SC Res. 1882, 4 August 2009, Operative Paragraph 3.

⁴⁹ See www.un.org/children/conflict/english/index.html (last visited 14 April 2011).

⁵⁰ The ANSA can then be de-listed when the necessary action has been taken.

⁵¹ For example, in Sudan, on 11 June 2007, UNICEF signed an action plan with the Minawi faction of the Sudan Liberation Army (SLA), which had pledged to end recruitment and release all children under the age of 18. ‘Annual Report on the Activities of the Security Council Working Group on Children and Armed Conflict, Established Pursuant to Resolution 1612 (2005) (1 July 2007 to 30 June 2008)’, para. 11, attached to Letter from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/455, 11 July 2008. Subsequently, the UN Secretary-General noted that: “After an initial delay in implementation of the action plan owing to a lack of clarity on the mandate and channels of disarmament, demobilization and reintegration in Darfur, SLM/A (Minnawi) reaffirmed its commitment for the release, return and reintegration of children into its ranks in June 2008; so far, 16 children have been registered for demobilization.” In June 2007, a tripartite agreement was signed between the Government of the Central African Republic, the Union des forces démocratiques pour la rassemblement (UFDR), and UNICEF, in which the UFDR agreed to separate and release all children associated with its armed group, and facilitate their reintegration. ‘Children and armed conflict, Report of the Secretary-General’, UN Doc. A/63/785–S/2009/158, 26 March 2009.

Having reviewed the legal framework applicable to ANSAs, let us turn now to the issue of compliance with the applicable norms.

C. Compliance and Ownership

First, it should be noted that it is by no means only ANSAs who violate humanitarian norms. In many armed conflicts, States can and do violate the most fundamental rules of human rights and humanitarian law. But there is a particular problem with respect for humanitarian norms by ANSAs, since the armed group, by virtue of the fact that it is not, or only partially, recognized as a State, is not entitled to ratify international treaties, and is generally precluded from participating as a full member of a treaty drafting body.⁵²

In addition to rejecting laws they had no role in adopting, ANSAs may further assert that they reject the legitimacy of states against which they are fighting and which are parties to those treaties. This argument, however, will not prevent their prosecution for international crimes⁵³ and in recent years relatively few ANSAs have used this argument to oppose the general application of international humanitarian norms.⁵⁴

Lack of ownership—by all parties to a conflict—can also be explained to a certain extent by ignorance of the law applicable to the situation of armed conflicts in which a given ANSA operates. Indeed, while States have a clear obligation to provide instruction in IHL to their armed forces,⁵⁵ the ICRC notes that:

⁵² There were, for example, 11 ANSAs that participated, as observers, in the deliberations of the Diplomatic Conference that adopted the two *1977 Additional Protocols* to the Geneva Conventions. See Sassòli, *supra* note 6, 7, citing Y. Sandoz *et. al.* (eds), *Commentary on the Additional Protocols*, ICRC (1987).

⁵³ Hence individuals can be prosecuted whether or not armed groups accept the jurisdiction of the International Criminal Court as to the *1998 Statute of the International Criminal Court*, as well as the various *ad hoc* international tribunals specifically permits the indictment and prosecution of members of ANSAs for war crimes.

⁵⁴ Anecdotal information based on interviews with key interlocutors.

⁵⁵ See for example Articles 47, 48, 127, and 144 of *1949 Geneva Convention IV*, 75 U.N.T.S. 287; and Article 83 of *1977 Additional Protocol I*, 1125 U.N.T.S. 3.

“in many non-international armed conflicts, bearers of arms with little or no training in IHL are directly involved in the fighting. This ignorance of the law significantly impedes efforts to increase respect for IHL and regulate the behaviour of the parties to the conflicts”,⁵⁶.

Although the term “asymmetry” of parties to an armed conflict arouses strong—mainly negative—reactions from some quarters, the imbalance between a State’s security forces (in size, weaponry and financial resources) and an ANSA may also be used by the latter as a reason for not respecting certain or many humanitarian norms in practice.⁵⁷ They may claim to feel constrained to adopt certain tactics that violate humanitarian norms as to do otherwise would invite military defeat or even annihilation. They may further note that they will likely be prosecuted under domestic legislation for the mere fact of having taken up arms against the state, irrespective of their respect for international legal norms.⁵⁸ In fact, “asymmetric” conflicts are said to be highly problematic for the protection of civilians as they carry the risk of *both* parties disregarding basic principles of IHL.⁵⁹

⁵⁶ ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, February 2008, 12; see also The Armed Group Project, ‘Curbing Human Rights Violations by Non-State Armed Groups’, Conference Summary and Report, 14–15 November 2003, available at <http://www.armedgroups.org/the-armed-groups-project/events/curbing-human-rights-violations-nonstate-armed-groups> (last visited 14 April 2010).

⁵⁷ Equally, the State may argue that it is difficult in practice to make a distinction between civilians and ANSA fighters, as international law demands.

⁵⁸ Thus, there is no ‘combatant’s privilege’ in non-international armed conflict, whereby combatants in an international armed conflict are entitled to prisoner of war status under certain circumstances. A prisoner of war benefits from the privilege of immunity of prosecution for the mere fact of having participated in hostilities against another state. Conversely, a fighter who is not recognized as a combatant under IHL faces prosecution under the national law of the State capturing him for simply taking up arms. See, *inter alia*, Articles 4 and 118 of *1949 Geneva Convention III*, 75 U.N.T.S. 135 and for example, A. Bellal & V. Chetail, ‘The Concept of Combatant under International Humanitarian Law’, in J. Bhuiyan *et. al.* (eds), *International Humanitarian Law, An Anthology*, (2009), 57.

⁵⁹ As underlined by Robin Geiss: “over time there is a considerable risk that in view of the aforesaid practices, international humanitarian law itself, with its clear-cut categorizations and differentiations between military and civil, may be perceived by a belligerent confronted with repeated violations by its opponent as opening the doors to a kind of war which intentionally does away with such clear demarcations. However, the more immediate risk is that the adversary, faced with such a misuse of the

Finally, the designation of certain ANSAs as ‘terrorists’⁶⁰ may even, in certain instances, encourage the violation of humanitarian norms. Since it is typically far easier to be included on a list of terrorist organizations than it is to be removed from one, practical incentives to improve respect for humanitarian norms may be limited once an armed group has been so designated. Moreover, efforts to promote ownership of humanitarian norms by individuals or organizations may themselves fall foul of broad national legislation that criminalizes material support to any entity designated as terrorist. A recent US Supreme Court decision on the scope of activities with ANSAs listed as terrorist groups that could trigger criminal responsibility is one example of a worrying trend.⁶¹ Criminalizing humanitarian organizations or individuals that seek to engage ANSAs in enhanced respect for international norms is not the way forward. It may have serious consequences for humanitarian negotiators (and more generally anyone) seeking to negotiate peace treaties or other agreements for the promotion of international law.

principle of distinction, could feel compelled gradually to lower the proportionality barrier.” R. Geiss, ‘Asymmetric conflict structures’, 88 *International Review of the Red Cross* (2006) 864, 766.

⁶⁰ Notwithstanding the plethora of widely differing definitions of the term under relevant national legislation. For instance, a 2003 study for the US Army quoted a source that counted 109 definitions of terrorism that covered a total of 22 different definitional elements. See J. Record, *Bounding the Global War on Terrorism* (2003), 6, citing A. P. Schmid, et al. (eds), *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (1988), 5–6.

⁶¹ See Supreme Court of the United States, *Holder, Attorney General, et al. v. Humanitarian Law Project et al.*, Decision of 21 June 2010. In this controversial decision, the Court held that the training in international law for PKK members planned to be given by a US NGO (the Humanitarian Law Project) could be used by the PKK “as a part of a broader strategy to promote terrorism, and to threaten, manipulate, and disrupt”. According to the Court, the planned training would thus rightly fall under the *Anti-terrorism and Effective Death Penalty Act of 1996* which criminalizes any material support given to terrorist groups. The fact that in the circumstances of the case, such a training was prohibited by the law was not found to be a violation of the First Amendment (freedom of expression) enjoyed by the NGO. See also, ‘The Supreme Court Goes too far in the Name of Fighting Terrorism’, *Washington Post Editorial*, 22 June 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/21/AR2010062104267.html> (last visited 14 April 2011); and ‘What Counts as Abetting Terrorists’, Editorial, *New York Times*, 21 June 2010, available at <http://roomfordebate.blogs.nytimes.com/2010/06/21/what-counts-as-abetting-terrorists/> (last visited 14 April 2011).

There are, though, still reasons to believe that ANSAs can be influenced to better respect international law. Indeed, the practice of international organizations shows that a number of “incentives”, also termed “resources and rewards”⁶², may have a significant role to play.

I. Incentives for Compliance

The first and primary reason for compliance is the group’s own self-interest. This has military, political, and legal aspects.

The *military* arguments for compliance comprise both an element of reciprocity and strategic choices. There is an obvious temptation – and often also pressure from within the armed group or the concerned communities – to respond to abuses by government forces or other non-state armed actors. Responding with abuses of their own will merely risk an increasing spiral of violence. It may be the case that better compliance by the state armed forces may lead to better compliance by non-state armed forces, too, but so far the evidence is largely anecdotal. In any case, restraint will ultimately help to retain the support of the civilian population. In terms of strategic choices, focusing on attacking legitimate military targets instead of unlawfully targeting civilians means that the armed non-state actor is more likely to further its military objectives.⁶³ Furthermore, an ANSA that treats captured soldiers with humanity encourages soldiers to surrender. Mistreatment or summary execution, on the other hand, is more likely to lead to soldiers fighting on to the death.

The *political* arguments for compliance center on the desire of many armed non-State actors and/or the causes they may espouse, to be recognized as legitimate. In addition, many armed non-state actors need the support (e.g. human, material, and financial) of the “constituency” on behalf of whom they claim to be fighting. Further, in certain cases ANSAs may wish to be seen as more respectful of international norms than the state that

⁶² H. Slim, *Killing Civilians—Method, Madness and Morality in War* (2007), 279–282.

⁶³ ANSAs may thus understand that certain means and methods of warfare are counterproductive or have excessive humanitarian costs, which lead to a loss in support.

they are fighting.⁶⁴ Finally, some armed groups are sensitive to the argument that better respect for norms applicable in armed conflicts facilitates peace efforts and strengthens the chance of a lasting peace.

The *legal* arguments for compliance are primarily the avoidance of international criminal sanction and other coercive measures, such as arms embargoes, travel bans, and asset freezes. Effective command and control by an ANSA over its own fighters is in the self-interest of the group's senior officials.⁶⁵ Fear of prosecution for international crimes is a factor that influences the behavior of certain ANSAs or of senior individuals within that group. Compliance with international norms will not prevent their risk of prosecution under domestic criminal law for taking up arms against the state, but in some instances governments have offered amnesties to those who have taken up arms against them.⁶⁶ Such amnesties should not, though, confer immunity for international crimes.⁶⁷

The *humanitarian* arguments for compliance relate to the fundamental desire of certain ANSAs to respect human dignity. Such a desire should not be underestimated and may allow for opportunities to go beyond actual international obligations and engage ANSAs on norms which provide a higher level of protection for civilians than that strictly demanded by international law. Humanitarian agencies may in turn provide assistance for activities, such as mine clearance, which benefit the communities on whose

⁶⁴ For example, many of the armed non-state actors that have signed Geneva Call's Deed of Commitment whereby they renounce the use of anti-personnel mines have done so in states that are not party to the 1997 Anti-Personnel Mine Ban Convention, 2056 U.N.T.S. 211.

⁶⁵ This will also have implications for the attribution of command responsibility under international criminal law.

⁶⁶ Certain humanitarian actors, for example, have stressed that it may be worth encouraging states to treat captured fighters from ANSAs who respect international humanitarian law in accordance with the protection accorded to prisoners of war under applicable international law.

⁶⁷ Amnesties granted in case of violations of international crimes violate the right of individuals to an effective remedy which is protected by international human rights law. See the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2005, C.H.R. Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005); see also C. A. Bakker, 'A Full Stop to Amnesty in Argentina, the Simoó Case', 3 *Journal of International Criminal Justice* (2005) 5, 1106-1120.

behalf the armed non-state actors claim to be fighting in addition to finding solutions to help the armed non-state actor to fulfill the commitment to the norm in question. So, for example, agencies may provide reintegration and education programmes for children formerly associated with armed forces to enable their safe release.

II. Good Practice in Engagement with Armed Non-State Actors

There has been considerable experience over the years in engagement with ANSAs on the protection of civilians in armed conflict. Below are included some of the key lessons that have been learnt and which may offer other opportunities to enhance compliance with international norms.

First, even if it is not realistic for ANSAs to participate formally in the drafting of multilateral treaties nor that such actors formally adhere to those treaties, their views could, for example, be discerned by analyzing relevant agreements or unilateral declarations. It may be easier to include former members of ANSAs in such processes. In addition, greater efforts can be made to ensure that relevant international treaties address directly the behavior of ANSAs.

Second, an important step in enhancing compliance with international norms is to ensure that the relevant ANSA is aware of its obligations under international law. In some cases, for example, such groups have not been aware of the prohibition on child recruitment and the potential individual liability. This can be done through dissemination efforts at a senior level or below by those engaged in promoting compliance, or by the ANSA itself.

Furthermore, engagement with an ANSA should typically occur at the highest level within the group, but may also demand engagement with influential individuals outside the group. Engaging an armed non-State actor at the highest level helps, in theory at least, to ensure that a commitment is more likely to be honored in practice. However, enhancing compliance is made significantly more challenging by the fragmentation of ANSAs into different factions. In that regard, former members of other ANSAs may be able to play a helpful role in engagement. It is also important to consider whether constituencies and foreign patrons can help to secure better compliance with norms.

Once an ANSA is clear about its obligations and undertakings, it will be necessary for it to ensure that this is reflected in its practice. It should therefore internalize its international obligations and other commitments, for example by ‘translating’ norms into internal codes of conduct. There may be a need for outside technical assistance in achieving this, but care should be taken to ensure that the relevant ANSA assumes the responsibility for adoption, dissemination, and implementation of applicable norms.

Finally, the practice of international organizations and NGOs shows that monitoring is a critical element in promoting compliance with norms, both in identifying norms whose respect needs to be specifically enhanced and in promoting successful implementation with relevant agreements or declarations.

D. Conclusion

This article has sought to identify key elements in the international legal framework applicable to armed non-state actors, and to suggest ways that better compliance may be achieved. One thing is certain, however: dialogue, through sustained, coherent, and focused engagement, is needed to influence behavior. In this respect, the June 2010 US Supreme Court decision in the *Holder* case is most unwelcome. It flies in the face of logic and reality, placing dogma over the promotion of humanitarian norms. What is needed is greater engagement with armed non-State actors, not less.