UNIT 2 WHAT ROLE CAN NON-STATE ACTORS PLAY IN THE APPLICATION OF IHL?

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2.1 INTRODUCTION

There is considerable diversity in the way non-governmental organizations and the United Nations use human rights and humanitarian law in their human rights work and how they approach armed conflict situations. An examination of recent reports by several non-governmental organizations and a study of the handling of the Bosnian situation by the United Nations illustrate some of the advantages of relying upon human rights and humanitarian law when analyzing human rights abuses in armed conflict situations.

2.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the role of Non Governmental Actors towards the application of IHL;
- discuss role of the Human Rights Watch in the practical sense; and
- discuss application of IHL by Amnesty International.

2.3 ARMED GROUP OBLIGATIONS

2.3.1 The Binding Character of International Humanitarian Law for Non-state Actors

The rationale for the purported binding character of international humanitarian law, and in particular Common Article 3 of the Geneva Conventions and its Additional Protocol II, for non-state armed groups remains somewhat elusive. Different
explanations of why such groups are bound by those conventions, in spite of their not having signed up to them, have been offered, none of them being fully satisfactory.

In what is seen as the majority view, non-State actors are bound by IHL by reason of their being active on the territory of a Contracting Party (a State Party to the Geneva Conventions and/or its Additional Protocols). This theory is also referred to as the ‘principle of legislative jurisdiction’, pursuant to which the agreements which a State enters into are automatically binding on all (non-State) actors within its jurisdiction. The advantage of this theory is that it may subject all armed groups active on a State territory to IHL, whether or not these groups have consented to be bound. The apparent redundancy of consent is the main flaw of this theory, however. Deconstructing the State by submitting that State governments can bind the people because they represent the people only takes us so far. In reality, there are no groups that feel less represented by the State than armed opposition groups. The theory binds those groups by IHL without their consent, which in turn risks adversely affecting their compliance with IHL. The concept of substantive legitimacy is nevertheless an interesting one, as it may indeed overcome procedural consent problems. Notably in the field of international criminal law has it been put to good use: for a limited number of international crimes, international criminal responsibility attaches irrespective of the capacity of the perpetrator and irrespective of his consent to the relevant rules. Given the heinous character of the crimes, the international community appears to assume that no reasonable person can withhold his consent to be bound by the rules allotting responsibility for the crimes.

It is precisely the argument that non-State actors are also bound by international criminal law that has been resorted to so as to support – in fact, as an alternative argument – the binding character of IHL for armed groups. Surely, members of armed groups can only incur international criminal responsibility if they are bound by the underlying norm of IHL? There is indeed no denying that some more serious violations of international humanitarian law qualify as grave breaches or international crimes to which international criminal responsibility attaches. This responsibility is individual and not collective, however. There are no indications that entities, such as armed opposition groups, incur, qua entities (i.e., separate from their constituent members) international criminal responsibility for violations of IHL. On the contrary, the personal jurisdiction of such international criminal tribunals such as the Nuremberg Tribunal (International Military Tribunal) and the International Criminal Court was/is limited to natural persons, and the grave breaches provisions in the Geneva Conventions only refer to individual perpetrators. Accordingly, the fact that there is individual responsibility under international criminal law cannot be used so as to support an argument that there is such a thing as ‘collective’ criminal responsibility of the entity made up of the individuals. If the hypothesis that entities incur international criminal responsibility proves unsubstantiated, so does the hypothesis that those entities are necessarily bound by the substantive norms of international humanitarian law which underlie any criminalization.

An alternative rationale has it that, because some armed groups exercise de facto control over territory, they behave like States, and thus, any international obligations – including obligations under IHL – incurred by States should also be incurred by those armed groups. This rationale can never fully explain the binding nature of IHL for all armed groups, as not all of them exercise territorial control. Irrespective
of its limited scope, however, it is worth looking at this explanation in respect of those groups that do exercise territorial control. It is noted in this respect that the de facto control argument has also been made so as to justify the binding character of human rights obligations for armed groups. The present author has cautiously supported it in a previous publication, although I preferred using the term ‘legitimate expectations’ rather than ‘binding law’ so as to denote the normative human rights expectations that one can have of armed groups. Even if one accepts the argument that armed groups are indeed bound by human rights law, it is submitted that the human rights analogy only takes us so far as in terms of justifying the binding character of IHL for armed groups. The binding character of human rights obligations for armed groups is based on their being, like governments, in a vertical position of power: those groups, exercising territorial control, serve as (quasi-) governments and rule over their ‘citizens’ (the inhabitants of the territory). The law of armed conflict, in contrast, is not necessarily based on a situation of governments or government-like actors exercising control over other actors. In fact, it merely aims at civilizing the conduct of warfare. Only to the extent that IHL rules relate to the protection of civilians, e.g., in occupied territories, may the analogy with human rights law prove apt. In this respect, the more human rights-oriented provisions of Additional Protocol II to the Geneva Conventions may go some way to buttress the de facto control rationale.

However, because the de facto control theory has limited explanatory power, another theory, which has notably been advocated by Cassese, may be put forward. This theory has it that armed groups can be bound by IHL conventions because treaties can create obligations for third parties, an argument that is based on Article 35 of the 1969 Vienna Convention on the Law of Treaties (VCLT). The theory can easily be dismissed on the ground that that the Convention only addresses the situation of treaties between States creating obligations for other (third) States. The major weakness of the theory, however, is that it only explains the binding character of IHL for armed groups provided that these groups consent to be bound. In accordance with Article 35 VCLT, as well as common sense, treaties cannot create obligations for third parties without their consent. In the final analysis, the theory boils down to the basic idea that an armed group is only bound if it wants to be bound. If armed groups refrain from giving their consent – and indeed, not all of them have given their consent – they are not bound by IHL.

The consent problem may finally be overcome by pointing out the binding character of IHL qua customary international law or general principles of law. However, although the ICRC has identified many rules of customary international humanitarian law, not all rules may have customary status or amount to general principles, so that this theory cannot impossibly ground the binding character of the entire corpus of IHL. For non-State actors it shifts the problem of non-State actor consent to another level, and elicits the question of whether it is fair to apply customary law to the acts of non-State actors if these actors have not participated in the formation of this law. Sassoli’s rhetorical question ‘how could armed groups be expected to abide by a special set of laws designed to govern conflicts if they are not, however, involved in the law-making process?’, applies with equal force in both a treaty and a customary law context. So far, in any event, only State practice, as opposed to non-State actor practice, appears to be taken into account for the formation and identification of customary law. This restriction does not particularly encourage compliance of non-State actors with IHL, and may thus reduce the overall effectiveness of IHL. Indeed, the fact that one is formally bound by the
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law does not mean that one will also comply with it. Willingness to comply on the part of an actor is crucially dependent on the perception of its having consented to, or at least of having participated in the formation of the law one is bound by.

An argument in favour of taking non-State actor practice into account for purposes of customary IHL formation could thus be made. If one accepts this argument, one should however also be willing to accept the consequence that the content of the customary rules thus formed may not, as a matter of course, be a humanitarian’s dream. Armed opposition groups, and a fortiori transnational armed groups with a religious-ideological agenda such as Al Qaeda, are not known for their respect for IHL, quite the contrary. Accordingly, including non-State actors in the process of customary law formation may possibly lead to regression (although the practice of humanitarian NGOs may of course contribute to more humane rules). However, if one is in favour of participatory governance, one should not take this for granted. As a caveat though, it is important to remember that more ‘progressive’ and inclusive decision-making structures do not, ipso facto guarantee that the actual content of the norms produced by these structure is also progressive. If we aspire for democracy in global governance, we should accept that a limited-membership club can no longer steer the rules in a supposedly ‘humanitarian’ direction. In this context, it is submitted that the ‘humanizing’ modern custom theory, which the present author has endorsed in a previous publication, may in fact only deliver the good that it promises if the circle of its contributing agents is limited to NGOs, progressive inter-governmental institutions, and (smaller) States that are not, or barely involved in armed conflict.

As has been demonstrated, none of the given explanations to ground the binding character of IHL for non-State armed groups is fully satisfactory: either these theories only partially explain this binding character, e.g., for certain armed groups or in respect of certain norms, or they gloss over the lack of non-State actors’ formal consent to be bound (this applies notably to the principle of legislative jurisdiction). It is the requirement of consent, on which the entire edifice of international law is after all based, that should be addressed head-on, if the legitimacy of IHL and the effective compliance with it by non-State actors is to be secured. Different methods and instruments to express consent, either unilateral or multilateral, could be resorted to.

Firstly, armed groups can unilaterally declare their intent to be bound by (parts of) IHL. It is submitted that such declarations could be characterized as unilateral acts that can create binding obligations under international law for the actors from whom they emanate. As recognized by the International Court of Justice in the Nuclear Tests case, unilateral acts of States can be considered as sources of international law. While this case only addressed acts of States, there is no reason not to extend the binding nature of unilateral acts to other actors whose international legal personality is functionally necessary for the international community to function adequately. As has been expounded, it is imperative for non-State actors to (be able to) express their consent to be bound by IHL for IHL to be effective in armed conflicts involving non-State actors – these are currently in fact, the majority of armed conflicts.

It is observed that some non-governmental organizations may systematically solicit declarations in relation to specific instruments. The organization Geneva Call, for instance, encourages non-State armed groups to sign up to a ‘Deed of Commitment’ outlawing the use of antipersonnel landmines. One can alternatively
argue that such a deed should not solely be seen as a vehicle for attracting unilateral non-State actor declarations, but that it could in fact morph into an international convention or treaty. The international law instrument of a convention, like the unilateral act, should not be reserved for States only. If it is functionally necessary, for purposes of advancing the interests of the international community, for non-State actors to be able to enter into conventions which they intend to produce consequences under international law, they should be given this legal capacity. Arguably, in order to cast the IHL net as widely as possible, no armed group should be excluded from enjoying this capacity on the basis of moral conflicts; even armed groups with goals to which the majority of the international community may not agree should qualify.

In factual terms, most IHL conventions involving non-State actors are likely to be bilateral in nature: they will be concluded between a State government and an armed opposition group seeking to overthrow the government or to engineer the secession of part of the State’s territory. Interestingly, Common Article 3 of the Geneva Conventions (which contains a minimum set of rules which governments and insurgents have to comply with) contemplates such ‘conventions’ where it urges ‘Parties to the conflict ... to bring into force, by means of special agreements, all or part of the other provisions of the present Convention’.

Ideally, non-State actors are also, one way or the other, involved in negotiating processes in relation to multilateral IHL conventions. This will defuse armed groups’ argument that they should not comply with IHL on the ground that they have not been involved in designing its rules. As we write, it may not yet be possible to invite insurgent groups to fully participate, on an equal footing with States, in the negotiation process, and to allow them to sign the ensuing conventions. Yet at least some non-State actor involvement in the drafting process is desirable, in the interests of creating a sense of IHL ownership for non-State actors and thereby enhancing the legitimacy of IHL and encouraging non-State actors’ compliance with IHL. Involvement of insurgent groups in treaty-making processes is bound to stoke fears of legitimating insurgent activity in governments’ minds, however. A fair-minded observer should indeed concede that it is far from obvious that an armed group and the very government which it is fighting against will be able and willing to draft IHL rules in a constructive manner. Undeniably, one should condition the participation of non-State actors in a multilateral treaty-making process on the consent of States. Nonetheless, the hard edges of State centrality in the process could be blunted by devising a participation principle pursuant to which State consent with the participation of armed groups is presumed, and pursuant to which this presumption of consent could only be refuted by a government whose interests are directly implicated by the activity of the insurgent which is seeking inclusion in the process (ordinarily, the government the overthrow or destruction of which the armed group is seeking). In spite of the theoretical appeal of such an inclusive model, however, as soon as one starts thinking practically, one will inevitably face tough questions as to whether the request for inclusion of any armed group, however small, should be deemed eligible, and as to whether the expansion of participants in the negotiating process will not threaten its effectiveness. In any event, as Sassoli has pointed out, even ‘progressive’ IHL initiatives, such as the one sponsored by the Swiss Government and the Program on Humanitarian Policy and Conflict Research of Harvard University do not include representatives of non-State actors.
2.4 ROLE OF NGOs

2.4.1 Human Rights Watch: Report on Violence against Women in Peru

A recent report by Americas Watch and the Women's Rights Project, Untold terror: Violence against women in Peru's armed conflict, provides a second example of the role which humanitarian law can play in human rights reports on armed conflict situations. The report's chapter on international law begins with a discussion of common Article 3. Without addressing the basis for concluding that common Article 3 is applicable to the conflict in Peru, the report turns directly to an analysis of violations of common Article 3 by the Shining Path and the Peruvian government. The authors' findings are forthrightly presented:

"There can be no doubt that the Shining Path violates with remarkable cruelty and abandon the prohibition of common Article 3 against violence to life and person, murder and the assignment of sentences and carrying out of executions without previous judgment by a regularly constituted court".

The report's conclusions concerning conduct by the Peruvian government are somewhat more tempered. While noting that research for the report had not revealed murder by security forces of women "with anywhere near the frequency or specific intent of the Shining Path", the report recognizes that "even when a state does not itself perpetrate the abuse" it is accountable under the International Covenant on Civil and Political Rights for failing to protect its citizens from arbitrary deprivation of life.

The most useful aspect of Human Rights Watch's report is its explicit recognition that rape constitutes a violation of common Article 3, despite the omission of rape from the list of abuses expressly prohibited by the article. The authors' conclusion that rape is "commonly understood to constitute both cruel treatment and an outrage on personal dignity" - violations which are explicitly included within the scope of common Article 3 - may seem obvious. Recent events in Bosnia, confirm the need to reiterate that rape is, and has been a violation of the laws of war. Additionally, the report's discussion of rape as a method of torture which violates common Article 3 is equally compelling.

The report stops short of finding that Peru's internal conflict meets the conditions necessary for application of Additional Protocol II. In a brief footnote discussion, the authors assert that "the objective conditions which must be satisfied to trigger Protocol II's application contemplate a situation of classic civil war, essentially comparable to a state of belligerency under customary international law". The conclusion that Protocol II is not applicable to the Peruvian situation is certainly arguable, but the report mitigates the impact of this finding by concluding that Protocol II is "a pertinent authority for interpreting common Article 3's prohibition on outrages against personal dignity". Given this conclusion, however, one wonders whether the report's fleeting foray into the applicability of Protocol II to the Peruvian conflict was either necessary or advisable.

The report calls for both sides to observe the prohibition in common Article 3 against murder, torture, and ill-treatment of non-combatants without any adverse distinction founded on, among other criteria, sex. Accordingly, both parties are charged with "ensuring that all their members abide by the laws of internal armed conflict and that equal protection against abuse is guaranteed to all civilians and combatants who are hors de combat".
2.4.2 Amnesty International: A Policy Concerning Abuse by Non-governmental Entities

In 1991, the International Council of Amnesty International (AI) considered whether the mandate of the organization should be extended to questions concerning abuses by political non-governmental entities or armed opposition groups, such as the Shining Path in Peru. While recognizing that AI should continue to regard human rights as “the individual’s rights in relation to governmental authority”, the Council took its first step towards addressing abuses by armed opposition groups by including within the scope of AI’s concerns the taking of hostages and deliberate and arbitrary killings by non-governmental entities. The decision to include certain abuses by non-governmental entities within the scope of AI’s mandate was explicitly based upon recognition that the principles of international humanitarian law can support AI’s work in armed conflict situations.

AI’s recent resolution also addressed some of the difficult questions which non-governmental organizations face when confronting human rights abuse in armed conflict situations, including who can be considered responsible for human rights abuses, which abuses should be targeted, and what course of action is recommended for the non-governmental organizations. Addressing each of these concerns in order, AI first acknowledged that there is “a continuum of political non-governmental organizations which ranges from those which are very similar to governments to those organizations with little in common with governments”. Given this fact, AI chose to focus its resources on “those entities having greater control over people, territory and the use of force”. Additionally, the Council called for the development of criteria by which political non-governmental entities could be distinguished from groups failing outside AI’s work, such as common criminal organizations. Secondly, recognizing that “there are many unclear areas in armed conflict situations”, AI decided to concentrate its attention on “patterns of abuse by non-governmental entities” which are contrary to principles of international humanitarian law. Thirdly, the organization expressly endorsed opposing the taking of hostages or deliberate and arbitrary killings by non-governmental entities whenever such opposition is practical “using any appropriate technique, including directly addressing the entity”.

A sampling of AI’s recent reports reflects concern over human rights abuses by both governmental and non-governmental entities in armed conflict situations. For example, in December 1992, Amnesty published a report on South Africa which specifically addressed torture, ill-treatment, and executions in African National Congress camps. In addition, AI updates on conditions in Angola, Sudan, and Liberia have addressed human rights abuses by armed opposition movements in those countries.

**Self Assessment Questions**

1) Explain Role of Amnesty International in the Protection of International Humanitarian Law.

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2) Explain the role of the Human Rights Watch for the non-state actor in the implementation of the IHL

2.5 SUMMARY

- In this unit, we discussed the application of the IHL. The binding character of international humanitarian law for non-State actors.
  - Role of the Amnesty International
  - Role of the Human Rights Watch

- In this unit, we discussed the application of the IHL. The binding character of international humanitarian law for non-State actors. In what is seen as the majority view, non-State actors are bound by IHL by reason of their being active on the territory of a Contracting Party (a State Party to the Geneva Conventions and/or its Additional Protocols). This theory is also referred to as the 'principle of legislative jurisdiction', pursuant to which the agreements which a State enters into are automatically binding on all (non-State) actors within its jurisdiction.

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2.6 TERMINAL QUESTIONS

1) State the binding character of international humanitarian law for non-State actors. Are they liable under International Criminal Law as well?

2.7 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Sub-section 2.4.2.

2) Refer to Sub-section 2.4.1.

Terminal Questions

1) Non-State actors are also bound by international criminal law that has been resorted to so as to support – in fact as an alternative argument – the binding character of IHL for armed groups. Surely, members of armed groups can only incur international criminal responsibility if they are bound by the underlying norm of IHL?

2.8 REFERENCES AND SUGGESTED READINGS

1) Cedric Ryngaert, Non State Actors and International Humanitarian Law, Institute for International Law, Katholieke Universiteit Leuven.