

Towards engagement, compliance and accountability

Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen

The UN and other international and regional organisations are increasingly trying to hold armed non-state actors accountable at the international level for violations of international norms.

Some of the worst abuses against individuals occur in non-international armed conflicts, in situations where one or more armed non-state actors (ANSAs) fight against the state and/or against each other.¹ How, and to what extent, international law is formally binding on these actors is still debated. While it is largely uncontested that international humanitarian law imposes certain obligations on ANSAs, the application of other bodies of international law – particularly human rights law – is controversial.

Either voluntary or forced displacement is frequently caused by violations of international humanitarian law and of basic human rights. Actions by ANSAs displace civilians directly or indirectly through gender-based violence, enforced disappearances, summary executions, torture, death threats, indiscriminate attacks on civilians and civilian objects (i.e. all areas, buildings and infrastructure that are not military objectives as defined by international humanitarian law), forced recruitment (particularly of children) and forced labour. In addition, blocking relief supplies and assistance and other such acts (including deliberate attacks on humanitarian personnel) impede access to food, health services and education.

Legal framework

Organised ANSAs – i.e. those that meet the criteria set by international humanitarian law to be considered a party to an armed conflict – are bound by international humanitarian law, including Common Article 3 of the Geneva Conventions and 1977 Additional Protocol II, both of which apply specifically to non-international armed conflict. Forced displacement is generally prohibited by international humanitarian law.

More specifically, the 1998 Guiding Principles on Internal Displacement include many references to international humanitarian law norms that are legally binding on both states and ANSAs. In addition, the recently-adopted African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa directly addresses the behaviour of ANSAs.²

Despite these existing obligations, many difficulties remain in seeking to ensure ANSA compliance with international norms. 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' over these norms. 'Ownership' here means 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. Indeed, since ANSAs are not entitled to ratify 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 committed to. This being said, there are reasons to believe that many ANSAs can be influenced to better respect international law and humanitarian norms.

Incentives for compliance

First, one should note that ANSAs which pursue certain military and political objectives are not wholly

indifferent to respecting certain international norms. Positive incentives for compliance often quoted by members of ANSAs are the need for popular support ('winning hearts and minds'), the self-image of the group, the group's own norms, reciprocity, the need or desire to project a good national or international image, and family ties with the concerned population. There are thus military, political, legal and humanitarian reasons why armed groups would want to respect international norms.

The military argument for compliance comprises elements of both reciprocity and strategic choices. Respect for norms by one party to the conflict typically encourages respect for norms by the other; conversely, abuses and violations committed by one party are normally met by a similar response from the other party. Restraint will also ultimately help to retain the support of the civilian population. In terms of strategic choices, focusing on attacking legitimate military targets instead of targeting the civilian population means that an ANSA is more likely to further its military objectives. ANSAs may thus come to understand that certain means and methods of warfare are counterproductive or have excessive humanitarian costs, which lead to a loss in support.

Political arguments for compliance centre on the desire of many ANSAs, and/or the causes they may espouse, to be recognised as legitimate. Members of several ANSAs interviewed during our research project said that, while they understand political recognition may not be possible, the recognition of an organised armed group as a 'party to the conflict' under international humanitarian law may be an important step in encouraging compliance with international norms. In addition, many ANSAs need the support (human, material, financial) of the 'constituency' on behalf of whom they claim to be



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In Muzbat, northern Darfur, ICRC provides first-aid training sessions for fighters from the Sudanese Liberation Army and civilians from the village area. It is also an opportunity to talk about the law of armed conflicts and explain the basic principles of International Humanitarian Law.

fighting. Some seek to overthrow the existing government or at least to form part of a future administration. And, in certain cases, ANSAs may wish to be seen as more respectful of international norms than the state that they are fighting.³ 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 freezing of assets. Fear of prosecution for international crimes is a factor that influences the behaviour of certain ANSAs or of senior individuals within them,⁴ including as a result of the principle of command responsibility.⁵ For instance, the use of forced displacement as a tactic and method

of warfare could qualify as a war crime or a crime against humanity, thereby making its authors as individuals criminally responsible.⁶ Effective command and control by an ANSA over its own fighters is thus in the self-interest of the group's senior officials. In one case, a local commander of an ANSA described to the authors how he kept records of the imposition of internal discipline in accordance with the norms the group had accepted. He later used these records as evidence to defend himself against allegations of war crimes.

Finally, 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 respect for norms which offer greater protection for civilians than that strictly demanded by

international law. Humanitarian agencies may in turn support finding solutions to help the relevant actors to fulfil the commitment to the norm in question – for example, by providing reintegration and education programmes for children formerly associated with armed forces to facilitate their safe release.

Good practice in engagement

There has been considerable experience gathered over the years by members of the international community through engaging with ANSAs on the protection of civilians in armed conflict. Below are some of the key lessons that can be drawn from this experience and which may offer other opportunities to enhance compliance with international norms.

As a general remark, the first step to be taken by the international community at large is to encourage direct engagement with ANSAs to promote compliance with

international norms. Furthermore, organised ANSAs should be recognised as a party to conflict under international humanitarian law and indiscriminate labelling of groups as 'terrorist' should be avoided, as it runs counter to efforts to promote compliance with humanitarian norms. As former fighters have stated to the researchers, once listed "you are rejected" and "you have nothing to lose". It should be stressed that engagement with an ANSA does not constitute political recognition or recognition of belligerency nor does it affect the status of ANSAs under international law (although some, especially states, fear that engagement can confer on a 'terrorist' or 'criminal' group a semblance of legitimacy). In dialogue with ANSAs, efforts should be made to demonstrate the benefit to the groups themselves in complying with international norms. Culturally appropriate language and methods should be used to promote such compliance.⁷

Second, an important step in enhancing compliance with international norms is to ensure that the relevant ANSAs are aware of their 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 that can result from violation of applicable norms. Those engaged in promoting compliance can do this by disseminating international legal norms to ANSA members; and ANSAs can disseminate them internally.

Indeed, once an ANSA is clear about its obligations and undertakings, it will need to ensure that this is reflected in its practice – for example by 'translating' international norms into codes of conduct to govern actions by the group. All armed groups should therefore be encouraged to adopt and respect such internal codes of conduct in accordance with applicable norms. There may be a need for outside technical assistance in achieving this but it is important to ensure that the relevant ANSA assumes the responsibility for adoption, dissemination and implementation of applicable norms.

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 ANSA at the highest level may help to ensure that a commitment is more likely to be honoured in practice. However, enhancing compliance is made significantly more challenging if the ANSA fragments into different factions which might control different areas. In that regard, former members of other ANSAs may be able to play a helpful role in engagement. For example, a former paramilitary involved in the troubles in Northern Ireland has become a credible interlocutor with ANSAs around the world as he understands the challenges and consequences of involvement in armed violence.⁸ It is also important to consider whether 'constituencies' and foreign patrons can help to secure better compliance with norms.

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

In conclusion, there is a need to move away from traditional state-centred approaches to international law to one that envisages direct application of international law to ANSAs. Direct engagement with ANSAs to encourage better respect for international norms can be a critical contribution to the mitigation of the suffering of civilian populations in contemporary armed conflict.

Annyssa Bellal (Annyssa.Bellal@graduateinstitute.ch), Stuart Casey-Maslen (Stuart.Maslen@graduateinstitute.ch) and Gilles Giacca (Gilles.Giacca@graduateinstitute.ch) are researchers at the Geneva Academy of International Humanitarian Law and Human Rights (<http://www.adh-geneva.ch>).

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of workshops held in Geneva in 2010. See: <http://www.adh-geneva.ch/policy-studies/ongoing/armed-non-state-actors-and-protection-of-civilians>

1. This paper defines ANSA as 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 usually cover private military companies or criminal gangs.

2. See in particular Article 7 of the Convention <http://tinyurl.com/AU-KampalaConvention>

3. For example, many of the ANSAs 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.

4. Compliance with international norms will not, though, prevent their risk of prosecution under domestic criminal law for taking up arms against the state.

5. "Command responsibility extends as high as any officer in the chain of command who knows or has reason to know that his subordinates are committing war crimes and failed to act to stop them." <http://www.crimesofwar.org/thebook/command-respon.html>.

6. For example, many of the ANSAs 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.

7. Nonetheless, organisations that do engage with ANSAs may fall foul of national legislation that criminalises 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. Supreme Court of the United States, Holder, Attorney General, et al. v. Humanitarian Law Project et al., Decision of 21 June 2010. See also, 'the Supreme Court Goes too far in the Name of Fighting Terrorism', *Washington Post* Editorial, 22 June 2010; and 'What Counts as Abetting Terrorists', Editorial, *New York Times*, 21 June 2010. See also article p39.

8. See presentation by Martin Snodden to the Swisspeace Annual Conference 2009, Bern, 3 November 2009: 'Rebels with a Cause? Understanding and dealing with non-state armed groups during and after violent conflicts', author's notes. See forthcoming report to be available at <http://www.swisspeace.ch>.

Global database of states, territories and non-state actors

The Rule of Law in Armed Conflicts (RULAC) Project is an initiative of the Geneva Academy of International Humanitarian Law and Human Rights to support the application and implementation of international law in armed conflict. Through its global database, the Project reports on states and disputed territories around the world, addressing both the legal norms that apply as well as the extent to which they are respected by the relevant actors.

To search the database, go to <http://www.adh-geneva.ch/RULAC/> and enter state/territory name in 'Access to global territory by state or territory' box. Use the left-hand column to search for information on, for example, non-state actors operating there, current conflicts, and international legislation compliance.