

Engaging Non-state Armed Groups on the Protection of Children

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: International Peace Institute and Geneva Call, Engaging Non-state Armed Groups on the Protection of Children: Towards Strategic Complementarity, April 2012, available at http://www.genevacall.org/resources/research/f-research/2001-2010/IPI_E_Pub_ENGAGING_NON-STATE.pdf, footnotes omitted]

Introduction: Child Protection and Non-state Armed Groups

[...]

[1] Multiple sources in international humanitarian law and human rights law acknowledge that children affected by armed conflict require distinct protection. The existing legal framework provides a broad protective regime to ensure children receive the aid and care they need. However, there are three significant challenges when it comes to compliance by Non-State armed groups. First, some norms lack consistency, notably those concerning the prohibition of the use and recruitment of children. The minimum age ranges from fifteen to eighteen, depending on the instrument. For example, although some instruments apply a minimum age of fifteen for recruitment, the Optional Protocol to the Convention on the Rights of the Child (OPAC) allows states to recruit (but not use in hostilities) children aged sixteen years and above. Second, in some cases the standards applied to Non-State armed groups are more restrictive than those applied to states. In the OPAC, Non-State armed groups are precluded not only from using but also from recruiting

children under eighteen. Furthermore, while the prohibition for states is restricted to “direct participation in hostilities,” the scope is expanded to “use in hostilities” for Non-State armed groups. Prejudicial treatment—which is contrary to the principle of equality of belligerents under international humanitarian law—will certainly make it more difficult to convince them to accept standards that do not necessarily apply to their adversaries. Third, to further confuse things, most legal experts agree that the OPAC—by using the word “should” instead of “shall” in reference to Non-State armed groups—does not actually create direct legal obligations on Non-State armed groups, but rather obliges states to enforce these standards.

[2] As a result, for those Non-State armed groups who are willing to comply with their obligations, it is not always apparent what their obligations entail. More generally, existing treaties and their implementation mechanisms remain predominantly focused on states, and even though Non-State armed groups are bound by international humanitarian law, they are not involved in the creation of, nor can they become parties to, international treaties. Therefore, there is little opportunity for Non-State armed groups to express their willingness to abide by humanitarian norms, which may indeed limit the incentive to respect them in practice.

[3] Non-State armed groups are responsible for a significant number of violations committed against civilians and notably against children. Yet, as noted in the last report of the Secretary-General to the Security Council on the protection of civilians, “while armed groups are diverse in their motivations and conduct, there are those which have shown a readiness to establish and implement commitments in conformity with their obligations under international humanitarian law and with human rights law.” These observations prompted the Secretary-General to identify the need to enhance compliance with international law by Non-State armed groups as one of his five core challenges for the protection of civilians. The engagement of Non-State armed groups on the protection of children in armed conflict is one of the most advanced thematic issues to date.

The Monitoring and Reporting Mechanism (MRM)

[4] The UN-led MRM covers six grave violations committed against children in contravention of international law, including recruitment and use of child soldiers, sexual violence against children, killing and maiming, attacks on schools and hospitals, abductions, and denial of humanitarian access. This mechanism was formalized in 2005 by UN Security Council Resolution 1612, which called for its immediate implementation in countries where there were parties listed in the annexes to the annual Secretary-General’s report on children and armed conflict. Once the MRM is activated in a given country, a country task force, chaired by the highest UN authority on the ground and composed of relevant UN agencies, is responsible for collecting information on all six grave violations. Annual country reports are prepared by the task force, reviewed and vetted by the Office of the Special Representative of the Secretary-General on Children and Armed Conflict (OSRSG-CAAC), as convener of the UN system on children and armed conflict, and submitted by the Secretary-General to the Security Council working group. The latter subsequently issues recommendations to relevant stakeholders, including the Security Council, governments concerned, UN actors, and donors.

[5] Another crucial piece of the Children and Armed Conflict architecture involves the preparation and

implementation of action plans, which are concrete time-bound commitments by a listed party to a conflict to halt recruitment and use of child soldiers, sexual violence, killing and maiming, or attacks on schools and hospitals. The completion of an action plan and the subsequent cessation of violations is the only officially defined way to be delisted from the annexes to the Secretary-General's report on children and armed conflict, although factual developments may lead to the same end result (e.g., if a party ceases to exist). [...]

[6] Various humanitarian and human rights actors also have different philosophies when it comes to engaging parties to a conflict on violations of international law. These approaches, which differ based on the degree of publicity given to violations committed by Non-State armed groups and the type of dialogue with the concerned actors, can all be effective, depending on the context. The “naming and shaming” approach plays on the negative image cast on armed forces or groups to provoke a change in behavior, while the opposite approach favors discreet or confidential bilateral dialogue with perpetrators to build up trust and instill an incremental behavioral change. The former end of the spectrum is best illustrated by the approach put in place within the framework of the MRM, embodied by the Office of the SRSG on Children and Armed Conflict, which consists in publicly denouncing parties responsible for grave violations, and referring to the list of violators as the “list of shame.” The latter end is exemplified by the discreet constructive dialogue with Non-State armed groups favored by the International Committee of the Red Cross (ICRC). Most other humanitarian actors stand somewhere in between these two extremes. For instance, the Swiss-based humanitarian organization Geneva Call engages Non-State armed groups in discreet dialogue towards signing and complying with a formal Deed of Commitment on humanitarian norms related to the protection of children.

Discussion

I. IHL and Human Rights Law

1. Is international human rights law applicable in armed conflicts? How do you understand the principle of “lex specialis”? [See Case , ICJ/Israel, Separation Wall/ Security Fence in the Occupied Palestinian Territory (Part A, paras 101-106 and 127-130)] How do you determine whether IHL or international human rights law takes prevalence in situations of armed conflicts?

II. Enhancing compliance by non-state armed groups

1. What is the status of armed groups under international law? What obligations do they have? Under IHL? Under international human rights law? What is the reasoning behind differentiating them from states? What does IHL say about the legal status of armed groups? (GC I-IV, Art.3; P II, Art.3)
2. Can armed groups be subjects of international law? May they conclude treaties (peace treaties, IHL treaties etc)? Does IHL explicitly contain rules directly applicable to armed groups? Which obligations are binding on armed groups in non-international armed conflicts? What is the importance of customary IHL in terms of the law of non-international armed conflicts? Is it the same for armed groups and states? (GC I-IV, Art.3)
3. Why are armed groups bound by the IHL of non-international armed conflicts? How can an armed group express its intention to comply with the rules of IHL in international or non-international armed conflicts?

Is an expression of their willingness to be bound necessary for them to be bound? If not, why would it nevertheless be useful to obtain their commitment to respect IHL? (GC I-IV, Art.3; P I, Art. 96 (3)) [See Case, UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict)

4. Why do non-state armed groups have additional obligations when it comes to the recruitment of child soldiers? How could this difference in obligations be justified? With which principle of IHL could this difference of treatment conflict?
5. (Para. 1) What is the difference between “direct participation in hostilities” and to be “use[d] in hostilities”? [Document, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

III. Children

1. How are children protected by IHL? What are the relevant provisions about the prohibition of the recruitment of children in armed conflicts? Is their protection different in international and non-international armed conflicts? (P I, Arts. 77-78; P II, Art.4(3); CIHL, Rules 135-137, Optional Protocol on the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict)
2. Are children allowed to voluntarily join military forces under IHL? To serve as fighters? To be spies? To cook in the military camp? Do your answers change for armed groups? Does IHL distinguish between children who willingly took up weapons and those who have been forced? (P I, Art. 77(2) and (3); P II, Art. 4(3)(c) and (d); ICC Statute, Arts 8(2)(b)(xxvi) and 8(2)(e)(vii))
3. What is the age threshold used for child soldiers? How has the Optional Protocol to the Convention on the Rights of the Child affected that threshold? How are children who directly participated in hostilities treated upon capture? (P I, Arts. 77-78; P II, Art.4(3); Optional Protocol on the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict)
4. Would a child participating in hostilities constitute a legitimate military target? May children be targeted when they directly participate in hostilities? How would you answer that question when considering the principle of military necessity? How do you understand the contradiction between affording children special protection and at the same time allowing the targeting of children taking direct part in hostilities? (P I, Art. 77; P II, Art.4(3))