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Detention Standards and Non-State Armed Groups

Summary

- All armed groups capture or detain individuals in a variety of situations, but it is unclear what legal obligations non-state armed groups have when dealing with detainees.
- The international community should consider: (1) studying the extent to which armed non-state actors are able to adhere to extant international humanitarian law and international human rights law; (2) and develop generic detention principles and guidelines that are specifically relevant for non-state armed groups.

Introduction

Armed groups¹ engaged in armed conflicts frequently detain individuals. When such groups capture or detain, two basic questions arise: (1) which international norms and laws, if any, apply to armed groups regarding detention? And (2) having captured or detained, to which standards of treatment must non-state armed groups adhere? From there, however, a deeper question emerges of how to ensure that those detained by non-state armed groups will be treated according to a basic international code of conduct, even if the most minimal standards.

Applicable Laws

Broadly, there are two legal regimes that apply to armed groups: the domestic law of the country in which the armed group operates, and international law. In some cases, pursuant to the application of extra-territorial laws such as those dealing with terrorism, the municipal laws of other states may also apply to armed groups fighting in other countries.

In relation to international law, there are two broad frameworks that apply: international humanitarian law (IHL), which applies during armed conflict, and international criminal law (ICL), which generally applies to war crimes and crimes against humanity. It is accepted that no existing international law regime permits or justifies non-state actors taking detainees. IHL does not justify detention by armed non-state actors but does, to a limited extent, regulate such detention. The applicability of IHL to armed groups is based on the principle of the equality of belligerents. It remains controversial, however, whether IHL regulates the behavior of armed non-state actors in situations where they are not parties to a conflict. The question of whether an armed group is a party to a conflict often rests on factors such as their level of organization and the intensity of the hostilities. For example, there is considerable controversy as to whether IHL applies to all the Syrian armed opposition groups because some of them have little or no command structure. There is some debate as to whether international human rights law (IHRL) applies to armed non-state actors in situations where there is no treaty or customary law obligations for such actors.

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In some cases, armed groups create their own laws to justify their actions and to hold others and themselves accountable. A recent example is the Taliban's so-called "shadow justice system" in Afghanistan, which is said to be based on a mixture of tribal and religious norms. Other rebel groups such as the Nagas in north-east India and the Communist Party of Nepal – Maoists have also developed their own "legislation" and legal procedures. Such cases of rebel groups creating their own laws are generally not recognized as valid exercises of law-making by the international community.

The Treatment of Detainees

One major concern in all cases of detention – by state and non-state actors alike — is ensuring that adequate standards of humane treatment are provided to the detainee. Humane treatment, according to international law, includes the prohibition of torture and violations of personal dignity, as well as caring for the wounded and sick. Regarding armed non-state actors, there are those who argue that they are not bound by IHRL treaty regimes that they have not signed. For example, in relation to the Syrian rebels, the U.N.'s International Commission of Inquiry on the Syrian Arab Republic determined that non-state actors cannot become parties to international human rights treaties. On the other hand, others believe that the application of IHL and IHRL to rebel groups must be founded on a "sliding scale," which acknowledges the limited means that such groups might have in applying the higher standards required of states. For example, what point is there in arguing that every detainee must be given a right to appear before a judge if armed groups do not have the resources to set up a judicial system? Adherents also point to examples in international law where the "sliding scale" approach is recognized as a valid basis of dealing with disadvantaged parties. There are others who argue that to introduce a "sliding scale" of application would undermine the law because it would form a basis of relativism that must not exist if the legal system is to effectively protect detainees.²

Notwithstanding the debates about whether IHL and IHRL apply to armed groups, or whether armed groups have a margin of appreciation in deciding the extent to which they comply with those laws, the international community increasingly expects armed groups to adhere to both legal regimes. The application of criminal law by international tribunals demonstrates that non-state actors may be found guilty of committing war crimes or crimes against humanity. The president of the U.N. Security Council in a statement on February 12, 2013 stated that the "Council reiterates its demand that all parties to a conflict comply strictly with their obligations under international humanitarian, human rights and refugee law."³ Further, although the International Commission of Inquiry on the Syrian Arab Republic acknowledges that non-state actors cannot formally become parties to international human rights treaties, it has also expressed that such groups must respect fundamental rights of persons that are found in customary international law in areas where they exercise de facto control.

Approaches Taken by Armed Groups

Without adopting a definitive understanding of how IHL and IHRL apply to armed groups, such groups have a number of possible approaches to adhere to the law. Common Article 3 to the four Geneva Conventions permits armed groups to enter into special agreements concerning such matters as the treatment of detainees, access by international organisations to detainees, and the rights of detainees. Armed groups also have the option of making unilateral statements that they will adhere to IHL and IHRL rules concerning detention; or they will issue codes of conduct to their members stipulating rules, principles and standards of detention. There are a number of examples of the codes of conduct being issued by armed groups, such as those issued by the National Liberation Army (ELN) in Colombia, the Revolutionary United Front (RUF) in Sierra Leone, and de facto authorities such as the National Transition Council (NTC) in Libya.

ABOUT THIS BRIEF

This Peace Brief, based on the author's research on armed groups in Afghanistan, the Democratic Republic of the Congo, and other conflict zones, considers some issues relevant to the development of principles and guidelines governing the treatment of detainees taken by armed groups. Bruce 'Ossie' Oswald is an associate professor of law at Melbourne Law School and a Jennings Randolph senior fellow (2012-2013). Ossie's interest in armed groups stems from his military service in places such as Rwanda, East Timor, Iraq, and Afghanistan. His academic research is focused on international humanitarian law, international human rights law, and post-conflict state-building. Ossie would like to thank Pamela Aall, Vivienne O'Connor and Beth Wellington for their very helpful comments on earlier drafts of this Brief. Ossie is also grateful to Maria Glenna for her research assistance.



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One criticism of such approaches is that they have been ad hoc and lack specificity concerning treatment standards. While ad hoc approaches offer a degree of flexibility to armed non-state actors, the problem is that such standards lack uniformity and might lack general international community acceptance.

Establishing Principles and Guidelines

In the interest of better protecting the rights of detainees, the international community should develop a document with principles and guidelines as a legal basis for armed non-state actors to take detainees. Such a document could note the minimum standards of detention and could also consider how to raise standards by taking into account general principles of IHL and IHRL, and the resources that armed groups might reasonably be expected to call upon.

Some states might object to the development of a minimum principles and guidelines document because it could give these groups a level of legitimacy. While the issue of legitimacy is of fundamental importance, it should be weighed against the need to develop detention treatment obligations and standards that permit greater certainty for both those detaining and those detained that basic standards will be respected. This is particularly important given that there are concerns that some of the current detention treatment standards cannot be applied to non-state actors, because they do not have the means to meet those standards.

There are also pragmatic issues to consider. Given that developing detention principles and guidelines requires engaging with armed groups, it might be difficult to achieve this in circumstances when contact with such groups is considered to violate a state law or international norm. While it is possible to draft principles and guidelines without engaging with armed groups, it is unlikely that the provisions would be sufficiently nuanced to reflect the needs or resources of such groups. Furthermore, engaging with armed groups might also help determine how best to monitor and enforce principles and standards that are adopted by such group.

Conclusion

The reality is that armed groups detain individuals. While the debates concerning the potential lawfulness of this practice remain relevant, the more important and pragmatic issue is the standards of treatment, if any, that armed actors are required or expected to provide to detainees. The international community should consider: (1) studying the extent to which armed non-state actors are able to adhere to IHL and where IHRL principles, rules and standards could apply; and (2) engaging with armed groups to consider whether there is any value in clarifying existing IHL and IHRL norms by developing generic detention principles and guidelines that reflects the particular circumstances of armed groups.

Notes

1. The term armed group as used here refers to civilians who are both armed and organized, and have the capacity to carry out sustained violence within a state so as to further a political, religious or cultural agenda. They act outside a state's formal military and police structures. Armed groups therefore might include pro-government militia, civil defense groups (sometimes also referred to as village self-defense forces), and armed opposition groups. The terms militias, armed non-state actors, and paramilitary are often used to refer to the category of armed groups that is the focus of this paper.
2. For a more detailed discussion concerning the different approaches see Marco Sassoli and Yuval Shany, 'Debate: Should the obligations of states and armed groups under international humanitarian law really be equal' 93 (882) *International Review of the Red Cross* (2011), pp. 425-436.
3. U.N. Doc. SC 10913, available at <http://www.un.org/News/Press/docs/2013/sc10913.doc.htm> (last accessed 18 May 2013).