PHAP

HUMANITARIAN LAW & POLICY IN 2014: PHAP SPEAKERS ON UPCOMING ISSUES AND DEVELOPMENT

Professionals in Humanitarian Assistance and Protection

Disclaimer

Cum, voluptat etur aut aspid maion porum fugit, cus peritio repelli quatur acearuptur moloreped quaesti ostruptat veligni tiberibus, alic te pero volenis quibusda sitintio doloreperio. Nemo iusamusam voluptas as ma dolendae. Vitatqui aut oditatus ese ex et qui rentio temperi si destius molorrunte quis molorunt pos explic tem aperorro coribus atem quosa natiusae commolo rerios destiurerios pero ommolo officto-taqui dolenimus provid et est autet ex et, quis sitatec tatectotat mi, sus eatur, cuptatin re et modiore aut labore conse plandissunt explabo remqui ressini ad etum illia qui tet molesti offic tem rem aut ut exped quatem im aut landit, aut voluptaqui coruntotatis sit id ullaces trumento con porporum aute delessi nvelitate sus si odipsap idebist eatquid ereptatiat quat.

Table of Contents

A word from our Executive Director

Erspe eatur, vendae namet voluptas nobis voluptio iliberibus maio dolesti offic test aditae necae. Ita veles deles dolorerum eum ad mollum volor re re volorescia velicat ioriore doluptaspid exceaquam, qui doloriandis molo qui blam, seri aut debissum quuntiur moluptur?
At quaecte dolorehent que ma sit abo. Nequam et, eaquunt.
Nam fuga. Itaturia volupta tumenem rem ipidunt mint et, iducium ut essi nessi suntium venis reptatum aut ressum aut excero quis re, sit ommo velliquas rem dolupta eperae volum, consed ut liquis et eatem ad quis debitibus sanistiam aut quia dolupta sperupt ionsenis cor sit repudi quatium fuga. Nam eum quo et libeatus eum fugitaq uibus.

What are the most important issues?

Gabor Rona

You might think they flow from the bloodiest conflicts, like Syria. But conflicts that rate high on the scale of carnage generally, and on the scale of humanitarian law violations in particular, don't necessarily present burning IHL issues, with one possible and glaring exception: the gap between law and accountability/ remedies for violations. I'll get back to that shortly.

It's perhaps counterintuitive, but as long as parties to conflict deny alleged violations, they are endorsing, rather than challenging, the rules. The denial of the use of chemical weapons, of human shields, of rape as an instrument of war, pillage, targeting of civilians, torture of detainees, interference with humanitarian action, etc., all serve to confirm the validity of the rules that prohibit these behaviors. (Hypocrisy, it is said, is the homage that vice pays to virtue.) But when instead of denying a violation, parties attempt to legitimize it through, excuse the term, "tortured" interpretations of the rules, you've got a burning IHL debate.

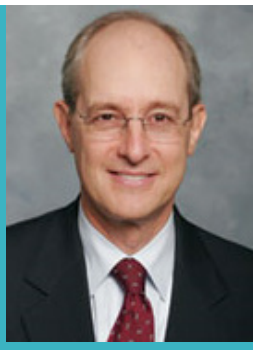
And so, the marquee issues in IHL for 2014 will be the same ones that have been percolating without resolution ever since the United States declared war on terrorism: how does IHL apply, if at all, to counter-terrorism operations? Can there be a global war against a non-State armed group? What are the permissible grounds and required procedures for targeting, whether by drone or otherwise? Is the analogy to the combatant/ civilian distinction in international armed conflict legitimate in non-international armed conflict? Is there a category of person known to IHL as neither combatant nor civilian, but rather, as "enemy combatant," "unlawful enemy combatant" or "unprivileged enemy belligerent?" Is the analogy between "co-belligerency" in international armed conflict and "associated forces" in non-international armed conflict legitimate? What are the grounds and required procedures for detention in non-international armed conflict? How does human rights law apply to non-international armed conflict? How does it apply to a state's extraterritorial conduct? Are military commission trials legitimate in theory? In practice? Have the imperatives of non-refoulement and entitlement to asylum been sacrificed on the altar of national security?

I don't mean to suggest that all of the United States' positions on these issues are a perversion of the law, but many are legacies of the Bush administration's cavalier treatment of international law that rendered, and continue to render, the United States an outlier from the majority of international opinion and jurisprudence. President Obama boldly declared an end to secret CIA detention, an end to torture, and an intent to end Guantanamo detention the moment he took office five years ago. But Guantanamo remains open, the pace of targeted killings has quickened, military commission trials are mortally wounded but refuse to die, and debates on both the legitimacy and efficacy of "enhanced interrogation techniques" (a.k.a. torture) persist.

Another continued manifestation of the American experiment with the "dark side" is the nearly complete failure of accountability for war crimes and other violations of the law committed by Americans in the name of national security. Immunity and impunity are the operative terms applicable to the architects, commanders, and foot soldiers responsible for torture, arbitrary detention, and military commission trials that, in the anachronistic lingo of the Geneva Conventions' Common Article 3, fail to provide the "judicial guarantees recognized as indispensible by civilized peoples." US Courts, the Congress, and the Executive branches - including the President himself - have erected an extensive web of obstacles to accountability and to availability of remedies that are supposed to provide victims of unlawful US policies and practices with recognition and compensation. In this respect, the US experience parallels that of other conflicts, such as Syria, the DRC, and now Mali, the CAR, and South Sudan, in which the rules may not be at issue, but the gap between violations and accountability is considerable.

2014 will see organizations like mine - Human Rights First - continue to litigate these issues in the corridors of power within the Executive and Congressional branches, in the Courts, in international fora and in the media. At stake is nothing less than the fabric of IHL, human rights law, and the very concept of respect for the rule of law, as well as the global credibility of the United States as an advocate for the values these rules represent.

About the author



Gabor Rona is the International Legal Director of Human Rights First. He previously served as a Legal Advisor to the International Committee of the Red Cross (ICRC) in Geneva, where he focused on the application of international humanitarian and human rights law to counter-terrorism policies and practices. He also represented the ICRC in connection with the establishment of the International Criminal Court and other tribunals. He has taught International Humanitarian Law and International Criminal Law at the International Institute of Human Rights in Strasbourg, France and the University Centre for International Humanitarian Law in Geneva, Switzerland and now teaches International Humanitarian Law at Columbia Law School.

Reducing the humanitarian impact of explosive weapons

Annyssa Bellal

Last year, in September, I had the chance to participate in an expert meeting organised by OCHA and Chatham House on "Reducing the Humanitarian Impact of Explosive Weapons in Populated Areas." This issue strikes me as being one of the key concerns for the UN, but also for other organisations such as the ICRC, civil society, and an increasing number of states.

Explosive weapons include air dropped bombs, missiles, rockets, artillery shells, mortars, tank shells, grenades, and improvised explosive devices (IEDs), such as car bombs or roadside bombs. According to the latest research, in 2012, there was a rise of 26 % in the number of civilian casualties from explosive weapons compared to 2011, and when used in populated areas, 91 % of the victims of explosive weapons are reported to be civilians.[1] Apart from directly killing or injuring civilians, explosive weapons have a more pervasive long-term impact on civilian life. They destroy homes and essential infrastructure, incur massive displacement, leave explosive remnants of war, and lead to loss of livelihoods and interruption of health and education services.

From a legal point of view, one should note that there is no ban on the use of explosive weapons under international humanitarian law (IHL), including in populated areas – as long as the principles of distinction and proportionality are respected, they can per se still be used as a method of warfare. Human rights law does remain applicable in times of armed conflict, although some derogations apply.

Furthermore, legal issues concerning of the use of explosive weapons are not limited to situations of armed conflict. In 2011 in Syria, while the conditions for the existence of a non-international armed conflict were arguably not fulfilled (in particular due to the level of organization of the armed groups), and therefore human rights law was the only applicable legal framework, 4000 people reportedly died from March to November that year, notably from the use of explosive weapons. The use of such weapons in situations other than armed conflict raises many questions from a legal point of view and merits further research. There might be a case to say that the use by a state of explosive weapons in populated areas in times of violence and unrest violates the right to life, of course, but also the right to health and education. This could open the door for accountability and individual reparations mechanisms. The use of explosive weapons in populated areas by armed non-state actors also raises interesting questions from a legal perspective (the issue of the appropriate applicable legal regime) and from a humanitarian one (the issue of engagement).

Different humanitarian agencies will continue working on these questions in 2014. OCHA, for instance, plans to mobilize multilateral action to curb the use of explosive weapons with wide-area effects in populated areas through state recognition of the humanitarian impact of such use and commitment to avoid or minimize such use in the future, including by building on existing good practice in this area. As a first step towards the development of a political declaration on that issue by UN member states, a meeting of states will be convened by OCHA and hosted by Norway in the second week of June 2014 to identify existing military policy and practice in that area.

Other initiatives will certainly take place throughout the year and deserve appropriate attention.

About the author

Annyssa Bellal is a Human Rights Officer in the rule of law and democracy section of the UN Office of the High Commissioner for Human Rights (OHCHR). She is an expert in public international law, in particular in international humanitarian law, human rights law, and criminal law.

1 Henry Todd and Robert Perkins (2013), An Explosive Situation: Monitoring explosive violence in 2012, Action on Armed Violence.

The need for a new forum to address weapons

Stuart Casey-Maslen

Since the failure to regulate specific weapons in the 1977 Additional Protocols, a variety of fora have been used to adopt weapons-specific treaties. As far as conventional weapons are concerned, the Convention on Certain Conventional Weapons (CCW), convened under United Nations (UN) auspices, agreed on three protocols in 1980, but had little discernible impact on weapons use. The amended protocol on landmines, adopted in 1996, was widely perceived to be ineffectual and led to the negotiation outside the UN of the Anti-Personnel Mine Ban Convention, which successfully contained a total prohibition of all anti-personnel mines. Only when a similar stand-alone process resulted in the successful adoption of the Convention on Cluster Munitions, which comprehensively prohibited almost all cluster munitions then in use, did the CCW seek actively to agree on a new protocol – and the intention was then to try and row back from a ban and allow continued use of many cluster munitions. In fact, the last time the CCW delivered a meaningful prohibition on a weapon was 1995 – on the use and transfer of blinding laser weapons. Finally, consensus-based negotiation led to a draft Arms Trade Treaty in March 2013 but its adoption was blocked by three states and it required a vote in the UN General Assembly to get the treaty through.

With respect to atomic, nuclear, biological, or chemical weapons (ABC weapons), in the early 1990s the Conference on Disarmament (CD) agreed by consensus the Chemical Weapons Convention, and since then the Comprehensive Nuclear Test-Ban Treaty (CTBT) was adopted. However, the CTBT has still to enter into force and negotiations within the CD on broader nuclear disarmament have not even begun, the call in the Nuclear Weapons Advisory Opinion of the International Court of Justice (ICJ) notwithstanding.

There are three main weaknesses in the current structure: first, the consensus-based nature of negotiations within UN disarmament bodies; second, the lack of a forum that can consider the use of weapons for law enforcement; and third, the lack of an ad hoc or standing body to review new weapons or weapons whose downstream effects prove to include particularly severe humanitarian consequences.[1]

So, what is the solution? One option would be for the Human Rights Council to set up an ad hoc working group or appoint a special rapporteur to look at weapons generally. The UN Special Rapporteurs on extrajudicial, summary, or arbitrary executions, and on human rights while countering terrorism have submitted reports to the Council (and the General Assembly) on armed drones and robots (fully autonomous lethal systems). These reports have led to some debate, but this has not been sustained.

In general, explosive weapons continue to be widely used in populated areas within and outside armed conflicts. Regrettably, the Gotovina judgment by the Appeals Chamber of the ICTY has left the application to artillery of IHL rules on distinction and proportionality in something of a no-man's land. In addition, outside of armed conflicts, so-called "less-lethal" weapons are being widely used by law enforcement personnel to repress protests without adequate international guidance, let alone oversight, over their use – and with fatalities continuing, albeit infrequently, to occur. In sum, the current disarmament machinery is a mess, failing to deliver even expert discussions. It's time for bold action to address this problem.

About the author

Stuart Casey-Maslen is Head of Research at the Geneva Academy of International Humanitarian Law and Human Rights. He is an international lawyer specialising in weapons law and the international law of law enforcement. Stuart holds a doctorate in international humanitarian law from the University of Tilburg in the Netherlands and a master's degree in international human rights law from the University of Essex in the United Kingdom.

1 Article 36 of the 1977 Additional Protocol I only applies to states parties according to the ICRC, although a case for its customary nature, at least with respect to use of weapons in armed conflict, can be made indirectly on the basis of customary IHL prohibitions on indiscriminate weapons or those of a nature to cause superfluous injury or unnecessary suffering.

Humanitarian space - Expected trends, developments and resources

Antonio Galli

While constraints on humanitarian space will remain, if not intensify, in a number of conflict zones in 2014 – including Sudan, Ethiopia, the Central African Republic, Myanmar, the occupied Palestinian territories (oPt), Pakistan, Mali, Somalia, the Democratic Republic of Congo, and Yemen – there are several contexts that will likely provide important case studies on maintaining and building humanitarian space during armed conflict.

In Syria, considerable focus will remain on addressing the ongoing humanitarian crisis. While Russia's intransigence will likely continue to thwart action through the United Nations Security Council (UNSC), some humanitarian actors have questioned if a UNSC resolution.[1] However, there is a chance that Moscow and Damascus could be open to additional localized humanitarian pauses as recently happened with Homs, providing a slight improvement in access to some 250 000 civilians trapped in besieged areas. While this will depend on political will, humanitarian actors will also need to maintain rigorous engagement with all parties to the conflict to build the operational foundation – both in terms of support from field level authorities and coordination mechanisms – to ensure future operations can take place effectively and safely.

Developments in South Sudan will provide an interesting example of the ability to maintain principled humanitarian action in the context of both a civil war and the UN Integrated Mission in the country (UNMISS). The humanitarian actors have so far managed to maintain effective access coordination mechanisms with both the government and opposition, and there is strong guidance in place for the use of military (i.e. UNMISS) assistance and armed escorts. However, if the conflict continues, it will be interesting to see if the parties continue to respect humanitarian engagement with all sides and grant access to areas under their opponent's control. Some have also expressed concern that the ongoing reliance on UNMISS bases and assets will have adverse affects on their acceptance as neutral humanitarian actors.

The withdrawal of coalition forces from Afghanistan in 2014 is expected to result in increasing violence, rising humanitarian needs, and declining access. However, with the end of "stabilization operations" and the encroachment on humanitarian space by military actors, there is an opportunity to reinvigorate engagement with armed non-state actors (ANSAs) to gain respect for humanitarian space. This is why it will be important that humanitarian actors maintain their operations in Afghanistan after the withdrawal, and begin devising innovative strategies for structured and sustained engagement with ANSAs. Some will continue to rely on their longstanding presence in Afghanistan and relationships with all parties, while others are already looking at ways of building greater acceptance through community representatives or establishing a new presence in the country that can be seen as disassociated from the coalition presence.

There is hope that 2014 will also see progress towards passage of a new bill introduced in the United States, the Humanitarian Assistance Facilitation Act (HAFA)[2], that aims to create a waiver that will go a long way in decriminalizing humanitarian action in US anti-terror legislation and sanctions. The bill, if passed, would create an exemption allowing humanitarian organizations, under certain conditions, to conduct transactions with foreign terrorist organizations (FTOs) that are incidental to the provision of humanitarian goods and services and engage in communication to "prevent or alleviate the suffering of a civilian population." However, some have raised concerns that the exemption does not go far enough, leaving activities such as providing first-aid training or copies of the Geneva Conventions to FTOs as criminal offenses. For more information, see the

1 Wall Street Journal (4 February 2014), "West Wants U.N. to Press Syria on Allowing Aid Flow".

2 See Govtrack.us, "H.R. 3526: Humanitarian Assistance Facilitation Act of 2013".

Charity & Security Network resource page on HAFA[3] and studies by OCHA/ NRC[4] and ODI[5] highlighting the impact of anti-terror legislation on humanitarian action.

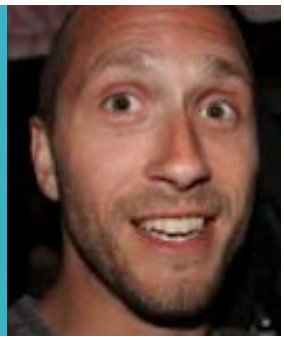
As can be seen from the examples above, insecurity is a major factor affecting humanitarian access. In order to better understand how insecurity affects the provision of humanitarian assistance and in order to identify innovative solutions for maintaining effective humanitarian responses in highly insecure areas, Humanitarian Outcomes, the Global Public Policy Institute and the Center on International Cooperation at New York University are undertaking a three year research project, "Delivering Aid in Highly Insecure Environments," funded by the UK Department of International Development (DFID). Implementation of the project will begin in April 2014, and will include mapping access conditions in comparison to levels of insecurity, analyzing methods for effectively delivering aid in insecure environments, and developing operational tools to enable aid agencies to better monitor and evaluate programmes in insecure settings.

In the spring of 2014, the Geneva Academy will also be launching their new policy brief on the normative policies of armed groups related to the protection of civilians, based on over five years of research on engagement with ANSAs. The policy brief will be launched in partnership with PHAP through a series of workshops scheduled to take place throughout the year.[6]

Finally, this year will also see the launch of the updated second versions of the Field Manual and Normative Framework Handbook on Humanitarian Access, developed by Conflict Dynamics International with support from the Swiss Federal Department of Foreign Affairs. The updated manual and handbook will be launched in Geneva in June, followed by a series of workshops with humanitarian partners in the field.

About the author

Antonio Galli has extensive experience working in the field on issues of humanitarian policy and practice, with a focus on humanitarian access, protection, negotiations with non-state armed groups and civil-military coordination. He is currently working as a consultant for PHAP and UNDP.



3 Charity & Security Network, "Humanitarian Assistance Facilitation Act (HAFA) Will Remove Barriers to Charity and Peacebuilding".

4 Mackintosh, Kate and Patrick Duplat (July 2013), Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action, Independent study commissioned by OCHA and Norwegian Refugee Council.

5 Pantuliano, Sara et al (October 2011), Counterterrorism and humanitarian action, HPG Policy Brief.

6 International Association of Professionals in Humanitarian Assistance and Protection (21 January 2014), "PHAP and the Geneva Academy: Partnership on armed groups and the protection of civilians".

The Janus moon rising - Why 2014 heralds United States' detention policy on a collision course… with itself

Chris Jenks

2014 will serve as a test of the United States' claims that its detention policy is consistent with the law of armed conflict (LOAC). If, as President Obama has repeatedly stated, U.S. involvement in the armed conflict in Afghanistan will end this year, then any LOAC based detention of belligerents linked solely to that conflict ends as well. That should mean the release or transfer of members of the Taliban currently detained at Guantanamo. It won't.

This note outlines the LOAC rationale for detention in armed conflict and the unsurprising conclusion that if the United States is not a party to the conflict, the conflict cannot serve as the basis for continued detention by the United States of belligerents captured therein. Under the LOAC, the United States must release or transfer the Taliban. Yet, this note predicts that within the next year the United States will simultaneously claim that it is no longer a party to the conflict and that its support of Afghanistan renders continued U.S. detention of the Taliban consistent with the LOAC.

On 28 January 2014, President Obama delivered his State of the Union address to the U.S. Congress.[1] During his speech, he stated that "[w]ith Afghan forces now in the lead for their own security, our troops have moved to a support role. Together with our allies, we will complete our mission there by the end of this year, and America's longest war will finally be over." In that same address, President Obama referenced the war in Afghanistan "ending," "finally be[ing] over," "finally coming to an end," and "draw[ing] to a close." That the head of state of a party to an armed conflict is declaring his country's involvement over triggers, or should anyway, the release of enemy belligerents captured during that conflict.

Detention of belligerents in an armed conflict to incapacitate them and prevent their return to the battlefield is a fundamental incident of waging war, a proposition on which the U.S. Supreme Court claimed "universal agreement and practice".[2] This is not a U.S. view, but a recitation of the widely recognized understanding that both treaty-based and customary LOAC reflect an inherent power to detain.[3]

But the predicate to LOAC detention authority is an armed conflict in which the detaining state is a party. While the ongoing non-international armed conflict (NIAC) in Afghanistan will most likely continue beyond 2014, President Obama is quite clear that U.S. participation will end. There is no basis, under the LOAC, for the continued detention of belligerents captured in a conflict to which the United States is no longer a party.

This does not mean that on 1 January 2015 the U.S. must open the gates of Guantanamo and release any and all detainees. The United States will likely still be able to credibly claim to be engaged in armed conflict (or perhaps a series of conflicts) with al-Qaeda. The pros and cons of this argument are beyond the scope of this missive. Suffice to say, there is at least a potential argument to be made for the continued LOAC based detention of members of al-Qaeda.

But even assuming arguendo that U.S. claims of a global NIAC with al-Qaeda are legitimate, the Taliban remain beyond even that argument's considerable reach. The Taliban exist in Afghanistan and Pakistan, which is where they have engaged in armed conflict and been captured. The Taliban is a party to an armed conflict in Afghanistan (and Pakistan), but not beyond.

1 Washington Post (29 January 2014), "Obama's 2014 State of the Union address".

2 Supreme Court of the United States (28 June 2004), "HAMDI et al. v. RUMSFELD, SECRETARY OF DEFENSE, et al.", No. 03—6696

3 See Pejic, Jelena (31 March 2011), "The protective scope of Common Article 3: more than meets the eye", International Review of the Red Cross, No. 881.

Simply put, if the United States is no longer a party to the armed conflict in Afghanistan, there is no LOAC basis for U.S. detention of the Taliban.

In Guantanamo detainee litigation in U.S. federal courts, the United States has claimed its detention policy derives from, or is informed by, the LOAC.[4] Certainly deriving from or being informed by does not mean full or complete compliance, nor should it. As a matter of law, Geneva Conventions III and IV do not apply to the NIAC in Afghanistan. But the U.S. will not be able to credibly claim any nexus between its detention policy and the LOAC if in 2015 it continues armed conflict based detention while claiming its involvement in that conflict has ended.

At the end of 2014 and the end of U.S. involvement in the armed conflict in Afghanistan, the United States could act consistently with the LOAC. This would entail either releasing the members of the Taliban detained at Guantanamo or transferring them to the only remaining party to that conflict – Afghanistan.

Given U.S. detention policy over the last decade, combined with political dysfunction in Washington, neither of those outcomes is likely. Instead, the United States will likely employ yet another "heads I win, tails you lose" interpretation that has so undermined its standing in the international community and called into question its commitment to the rule of law.

Under this approach, President Obama will, unfortunately, resemble the two faced Roman god Janus. For domestic purposes, the President will claim that for the United States, the war in Afghanistan is over. But in terms of the Taliban at Guantanamo, the United States will continue to claim detention authority based on the armed conflict in which the President said the U.S. is no longer involved. The U.S. will support this contention by citing the continued presence of U.S. service members in Afghanistan, albeit in a support role. Depending on the amount of U.S. troops and their function in Afghanistan, that could have the makings of a credible argument. But it would mean that the U.S. was still a party to the conflict, which flies in the face of President Obama's pronouncements to the contrary.

President Obama's pronouncements of war's end, combined with political realities in the United States, juxtaposed against LOAC release requirements create a tautological "do loop" akin to Joseph Heller's Catch-22 – you would think a state would stop detaining individuals held to prevent their return to a conflict in which the State is no longer a party.

Don't be too sure.

About the author

Chris Jenks is an assistant professor of law and directs the criminal justice clinic at the SMU Dedman School of Law in Dallas, Texas. He has published articles on drones, child soldiers, extraordinary rendition, law of war based detention, targeting and government contractors. He has also spoken on those same topics at universities and institutes in Australia, Brazil, Italy, South Africa and the United States, and with the militaries of the Republic of Yemen and several different European and African countries. Chris has served for over 20 years in the U.S. military, including as the primary international and operational law advisor near the demilitarized zone between North and South Korea.

4 United States District Court for the District of Columbia, "Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay", Misc. No. 08-442 (TFH).

Peacekeeping missions as parties to conflicts

Mona Khalil

In the realm of UN peacekeeping operations, several legal issues and challenges, once primarily theoretical, are increasingly real and require transparent discussion and a clear understanding of the possible consequences.

While any military component of any peacekeeping mission may, in the course of defending itself or in carrying out its protection of civilians (POC) mandate, become engaged in sustained or intensive armed hostilities in the context of an ongoing non-international armed conflict in the host country, and thereby become a party to the conflict, the likelihood of that eventuality has exponentially increased. We have seen this happening with the undertaking of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO) of mandated enforcement tasks against armed groups, including the explicit authorization given to its Force Intervention Brigade (FIB) to conduct targeted offensive operations against such groups.

One issue that may arise in the coming year is the possible reconsideration of the continuing "penalization" of attacks on MONUSCO military personnel under the Chapter VII Security Council sanctions regime, even when such attacks may be lawful under international humanitarian law (IHL). Thus far, the Security Council continues to condemn such attacks as violations of the Democratic Republic of the Congo sanctions regime. There is of course nothing to preclude the Security Council from continuing to impose sanctions against those responsible for attacks against MONUSCO military personnel even when such attacks may be otherwise legal under IHL, any more than there is anything to preclude Member States from continuing to criminalize attacks by armed groups on their own armed forces – not as "war crimes" under IHL but as ordinary crimes under their national laws.

While the legal implications of MONUSCO's and its FIB's mandate have been extensively discussed both inside and outside the United Nations in the recent past, more attention is likely to be drawn in the coming year to the high-threat operating environment facing the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) in northern Mali, which similarly increases the likelihood of it also potentially becoming a party to the conflict in that country. For, while MINUSMA forces are not intended to engage in counter-terrorism or counter-insurgency operations, they are highly likely to be compelled to militarily engage terrorists and/or insurgents in sustained and/or intense hostilities in the course of defending themselves against targeted attacks by such terrorists and/or insurgents as well as in carrying out their POC mandate. In the event MINUSMA is deemed to be a party to the conflict, MINUSMA military personnel would lose their protected status and thereby become lawful targets under IHL with the following additional consequences:

- Attacks on MINUSMA military personnel would no longer constitute crimes under IHL or the Rome Statute of the International Criminal Court.

- Any member of the MINUSMA civilian components who takes a direct part in the hostilities by providing operational information and/or supplies to a particular military operation would lose their protected status for as long as they are taking a direct part in the hostilities.

- In the event that MINUSMA is deemed to be a party to the conflict, the killing of any civilians incidental to an attack on MINUSMA military personnel would not necessarily be unlawful under IHL – unless such civilians were killed intentionally or in a manner that is disproportionate in relation to the anticipated military advantage – and would also cease to be a crime under the above-mentioned instruments.

Based on the foregoing, it is important for all concerned to understand that if and when MINUSMA becomes a party to the conflict, in addition to their own obligations under IHL, its military personnel would lose their protected status

and become lawful targets under IHL and, to the extent that civilian lives could be lost as a result of such lawful attacks, the presence of MINUSMA peacekeepers, could thus pose a clear and present threat to the very civilians they are meant to protect. MINUSMA's military presence, while intended to deter, prevent, and protect civilians against imminent threats of physical violence would instead not only pose an inherent threat to civilians but would also potentially impede MINUSMA's ability to efficiently and effectively carry out other aspects of its mandate, including facilitating humanitarian assistance.

Again, there is nothing new in these eventualities since they are theoretically possible in the context of any and every peacekeeping mission with a military component and have even been dealt with by MONUSCO and the United Nations Operation in Côte d'Ivoire (UNOCI). The challenge lies in the recent targeted attacks against MINUSMA personnel and installations by terrorist and other armed groups in northern Mali and the likelihood that such attacks will continue to grow in frequency and scale in the year ahead. It may be said that certain terrorist or other armed groups will not hesitate to attack MINUSMA or civilians regardless of their protected status under IHL. It is nonetheless worth noting that, once MINUSMA engages these groups, even in self-defense, at a certain level of intensity or scale, it will likely be deemed to be a party to the conflict and therefore a lawful target not only in northern Mali but ostensibly throughout the territory of Mali. The IHL implications for MINUSMA and its mandate should be discussed and understood by all of its components in light of the heightened possibility that these eventualities may soon become a reality.

About the author

Mona Khalil is a Senior Legal Officer in the Office of the Legal Counsel, UN Office of Legal Affairs, where she deals with issues arising from the Security Council mandated peacekeeping, sanctions, and counter-terrorism regimes. The statements above are expressed in her personal capacity and do not necessarily represent the views of the UN or the UN Office of Legal Affairs.

Detention by non-state armed groups

Marina Mattirolo

As has been the case systematically over the past few years, the great majority of armed conflicts taking place in the world are of a non-international character. This situation is not likely to change in 2014, considering the crises we are witnessing in the Central African Republic, South Sudan, Syria, and renewed tensions in the Democratic Republic of the Congo, just to mention a few. This means that, as Marco Sassòli has pointed out, "by definition, at least half the belligerents […] are non-State armed groups."[1] In fact, the number of non-state armed groups that are parties to armed conflicts is significantly higher than the number of state armed forces, posing great challenges to efforts to ensure respect for applicable rules of international law. One of the challenges that may be of particular relevance in 2014 is detention by non-state armed groups (NSAGs) of members of state armed forces or of civilians.

The normative framework applicable, directly or indirectly, to NSAGs remains an uncertain, though evolving, area of the law. While it is undisputed that non-state parties to an armed conflict are bound by international humanitarian law (IHL), the application of other bodies of law to NSAGs, such as international human rights law (IHRL), remains controversial. In order to be able to enhance non-state armed groups' compliance with international law, especially on matters regarding the protection of civilians, there is an evident need for clarification of their international legal obligations.

IHL provisions governing non-international armed conflicts (NIACs) – binding for armed groups parties to a NIAC – as contained in Common Article 3 of the four 1949 Geneva Conventions, are fewer, less detailed, and, in certain instances, provides less protection than those regulating international armed conflicts. As a result, these provisions do not provide sufficiently detailed rules for NSAGs to deal with certain specific situations such as detention of state armed forces or civilians. Yet, this is something regularly occurring in the battlefield, since most armed groups capture or detain individuals in multiple occasions. Nonetheless, it is somewhat unclear what precise legal obligations they have when dealing with persons deprived of their liberty.

International humanitarian law applicable to non-international armed conflicts contains an inherent power to detain.[2] However, it does not provide the grounds and procedural safeguards needed in order for detention not to be arbitrary.[3] Such legal grounds do not exist for detention by armed non-state actors. States involved in a non-international armed conflict can overcome this lack of provisions by applying domestic law and international human rights law, which regulate the matter of detention in an extremely detailed way. However, domestic law does not allow NSAGs to detain members of a state's armed forces or civilians in the first place, and international human rights law likewise does not explicitly provide a legal basis for detention by NSAGs. Nevertheless, detention is a necessity when conducting warfare, otherwise the only options would be the release of captured enemies, or, which sadly occurs all too frequently, for instance in Syria, killing them. Releasing captured fighters could render effective warfare difficult, while killing persons deprived of their liberty is generally prohibited under IHL and may amount to a war crime.[4]

To sum up, the need to clarify the international legal obligations of NSAGs in relation to detention of members of state armed forces or of civilians appears to be a central issue of concern for the year to come. On the one hand, NSAGs are expected to respect and comply with international norms and standards and are liable for criminal

1 Sassòli, Marco (2010), "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", International Humanitarian Legal Studies, vol. 1, no. 1, p. 5.

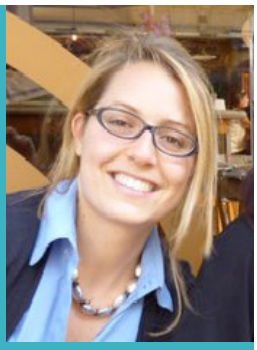
2 See Article 5 of the 1977 Additional Protocol II to the four Geneva Conventions of 1949.

3 Arbitrary detention is prohibited in Rule 99 of the International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law from 2005.

4 See van Amstel, Nelleke (2012), "In Search of Legal Grounds to Detain for Armed Groups", Journal of International Humanitarian Legal Studies, vol. 3, pp. 160-191.

prosecution, both at the national and international level, if they fail to do so. On the other hand, a clear set of rules on the issue of detention that applies to NSAGs is missing and the legislative capacity necessary to create and implement new provisions is not granted to armed groups. A possible way to overcome this gap would be to encourage engagement with NSAGs with the view of developing generic detention principles and guidelines able to regulate the particular question of detention by non-state armed groups.

About the author



Marina Mattirolo is a researcher with the Geneva Academy of International Humanitarian Law and Human Rights. Her main research area concerns armed non-state actors' obligations under international law as well as their reaction with respect to selected international norms. Prior to joining the Academy she worked for the International Commission of Jurists as an associate legal adviser for the Global Security and Rule of Law Initiative.

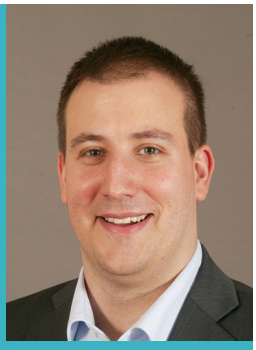
Developments to watch for on the legal front

Marko Milanovic

The big issue on the humanitarian legal front in 2014 will remain the many uncertainties regarding the relationship between international humanitarian law (IHL) and international human rights law (IHRL). These two bodies of law developed independently of each other, with their drafters giving little, if any, thought to how they would interact. Their interface is becoming ever more frequent, with IHRL arguments in particular used more and more often by humanitarian activists in various settings that were until recently looked at solely from an IHL perspective. This is done not only to fill gaps in IHL – for example, on how the exercise of the freedom of expression would be implemented in an occupied territory – but also in order to introduce IHRL standards that are more restrictive when compared to those of IHL, for instance with regard to detention. The interface between these two bodies of law impacts a huge variety of issues, ranging from states' obligation to allow humanitarian access to afflicted areas to the use of drones for targeted killing.

A number of cases implicating these issues are pending before both domestic and international courts. A case to watch for in particular before the Grand Chamber of the European Court of Human Rights is Hassan v. United Kingdom, dealing with the detention of an Iraqi by British forces in southern Iraq and his subsequent release and death under unclear circumstances. The case raises many complex jurisdictional and substantive questions, arising from the joint UK and US occupation of Iraq, including the permissibility and effect of derogations from human rights treaties in extraterritorial situations. Also pending before the Grand Chamber is the interstate case between Georgia and Russia dealing with the 2008 conflict. The two cases will provide the Court with an opportunity to articulate a clear and systematic approach to the interaction between IHL and IHRL – it remains to be seen whether this will be an opportunity that the Court will take up.

About the author



Dr Marko Milanovic is lecturer in law at the University of Nottingham School of Law. Marko is Secretary-General and member of the Executive Board of the European Society of International Law, an Associate of the Belgrade Centre for Human Rights, and co-editor of EJIL: Talk!, the blog of the European Journal of International Law, as well as a member of the EJIL's Editorial Board. He was Law Clerk to Judge Thomas Buergenthal of the International Court of Justice in 2006/2007. His expertise includes general international law, especially issues of state responsibility and treaty interpretation; human rights law, particularly the question of extraterritorial application of human rights treaties; international criminal law and international humanitarian law.

Professionals in
Humanitarian Assistance
and Protection

www.phap.org **info@phap.org**

This document was designed in collaboration with Inês Mendes, an online volunteer mobilized through onlinevolunteering.org