

Identification of Non-State Armed Groups in Non-International Armed Conflicts: A Legal Analysis

K Jayasekera

Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
kalyajayasekera@gmail.com

Abstract— *The globe was ravaged with heinous wars during the dawn of the 20th Century with World War I and II having caused millions of people throughout the world death, torture, imprisonment and destruction. Major participants placed their entire economic, industrial and scientific capabilities at the service of the war effort. International Humanitarian law is this regime of laws which originally dealt with armed conflicts. The subject of Non-State Armed Groups in context of armed conflicts is a less explored area of study, while importance of such studies are much pressing today, given the multitude of armed conflicts throughout the world. In this study, attention is given to find out a proper definition for non-state armed groups within non international armed conflicts while removing isolated terrorist attacks that may take place without an armed conflict situation and other non-state actors, within the purview of International Humanitarian law. The purpose of this research is to examine proper criteria to identify non-state armed groups. The study shall be done on basis of available primary sources including relevant legal text of Conventions, Additional Protocols, National policy papers and Codifications of customary international law and international norms and secondary sources will include books, articles and relevant internet sources. However, identification of non state armed groups and finding out proper definition raise several problems, as there are several armed groups called non-state actors, non-state armed groups, belligerents, liberation movements etc. that should be identified distinctly from each other. All written laws apply only to state parties to written laws, whereas non-state armed groups are not party to any treaty or convention or any written law. Therefore unwritten laws are applicable to non-state armed groups. Ultimately, aim of the research in formulating a proper legal definition for non-state armed groups is to make room for them to be brought before justice and make them accountable.*

Keywords *Non-State Armed Groups, Non-International Armed Conflict, International Humanitarian Law*

I. INTRODUCTION

Non-state armed groups fight for different purposes: some fight for their racial freedom, some groups fight for

their security. Some fight to protect their cast, race, religion, language and custom etc. Therefore non-state armed groups are based on ethnic, left-wing, and religious and other motivations. In many countries, there are armed groups fighting especially for separatism and for change of governments. These armed conflicts often lead to brutal massacres, assassinations, rapes, thefts, burglary and many other illegal activities. These conflicts may also take place in land, in sea or very rarely in the air.

First this study examines the definition of armed forces. Armed forces are mostly coming under the state armed groups. Those are defined by the international conventions and by the domestic level statutes. According to the Article 43 of Additional Protocol I (AP I) of Geneva Conventions the “armed forces” are defined as follows:

“43.1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.

43.2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

43.3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.”

However, this Article 43 of AP I of the Geneva conventions is applicable to international armed conflict situations. Therefore the above definition of armed forces is applicable to high contracting parties of international armed conflicts. That means it is applicable to the state armed forces involved in international armed conflicts. According to the applicability of AP I of Geneva

Conventions, this definition of armed forces is not applicable to the non-international armed conflicts. In NIACs state armed groups and non-state armed groups take part. Anyhow, state armed groups will have all the characteristics of the above definition of armed forces. But the difficulty is applicability of this definition to the non-state armed groups. According to the Common Article 3 of the four Geneva Conventions of 1949 and Additional Protocol II (AP II) the non-international armed conflicts are only between states armed groups and non-state armed groups or between non-state armed groups.

Non-state armed groups generally fight against the government armed groups. These groups may have made a *de facto* government within the state and they may control part of the territory or the group of people. Therefore, for the identification of non-state armed groups, this article discusses the nature of the non-state armed groups and the historical development of the concept of non-state armed groups in the context of NIACs. For that purpose this Article gives attention to the difference between non-governmental organizations and NSAG in NIAC situations. Then it discusses the difference between the non-state actors such as rebels groups, insurgents, belligerency and national liberation movements and NSAG in NIAC situations. Further it gives attention to the differences between terrorist groups and NSAG in NIAC situations. Also it discusses the differences between transnational armed groups' attacks and the NSAG in NIAC situations. Finally the evolution of the NSAG in NIAC will be discussed. This includes definitions of the different authors and scholars to identify NSAG in NIAC situations.

The study shall be done on the basis of the available primary sources including the relevant legal text of Conventions, Additional Protocols, National policy papers and Codifications of customary international law and international norms and the secondary sources will include books, articles and relevant internet sources.

II. DEFINITIONS OF NON-STATE ARMED GROUPS GIVEN BY DIFFERENT SCHOLARS

A. *Nature of Non-State armed Groups*

To apply the characteristics mentioned in Article 43 of AP I to the NSAG in NIAC, sometimes non-state armed groups wear specific uniforms to have specific recognition to their armed group. For an example the Liberation Tigers of Tamil Elam (L.T.T.E.) had a proper uniform/ dress code for their army. But Al-Qaida or Taliban armed groups do not have any specific dress code for their armed groups. Sometimes these non-state armed groups do not wear any specific dress and they roam like civilians but with arms. Therefore, it is hard to identify the non-state

armed groups in the battle field as an armed group who are fighting against the government armed forces.

Not only that, non-state armed groups have commanders and other rank soldiers similar to the government armed groups. For example, the Syrian non-state armed groups and the Yugoslavian non-state armed groups have commanders in the conflicts situations. They also have training programmes for soldiers. Proper maps, targets, capturing areas, medical officers and all the preparations for the battle fields are with the non-state armed groups, as it is with the government armies. They are directly participating in the battle field in hostilities.

However, NSAG do not and cannot sign and ratify any international treaty. All these conventions or agreements or any other treaty have to be signed and ratified by the state and any other group cannot sign and ratify these instruments. Therefore applicability of the existing standards given by law for these non-state armed groups is problematic.

Because Article 43 of AP I is applicable only to the international armed conflict situations, this definition can not be used for the non-international armed conflict situations. But, customary international humanitarian laws are there for the identification of armed forces. This Article says that, the armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. The definition in Article 43 of Additional Protocol I is now generally applied to all forms of armed groups. However, armed groups may be state armed groups or non-state armed groups. They belong to a party to an armed conflict and it must be determined whether they constitute armed forces. According to this argument, it is no longer necessary to distinguish between regular and irregular armed forces (state and non-state armed forces). So, all the armed groups who are fulfilling the conditions in Article 43 of Additional Protocol I can be identified as armed forces. Therefore NSAG also can be identified according to these characteristics.

B. *Non-State Actors and Non-State Armed Groups*

Relationship between non-state armed groups and non-state actors is not always easily distinguishable. All the non-state actors are not non-state armed groups. But some actors can be non-state armed groups. According to Rynaert (C. Rynaert, Non state Actors and International Humanitarian Law) the non-state actors are not fighters under the normal circumstances and remain to be civilians. There are different categories of non-state actors (NSA). Those NSA are rebels, insurgents,

belligerents and national liberation movements. Therefore, now this study examines the relationship and difference between NSA and NSAG, especially in respect of rebels, insurgents and belligerents categories.

1) *Rebels as non-state actor and non-state armed groups in NIAC*

Rebels also resort to violence in the society. However they are typically involved in random and isolated acts of violence and hostilities against governments. Internationally, Al-Qaeda and Jama'at al-Jihad al-Islami are the well known rebels groups. All these groups are prohibited under the domestic law. Their acts come under the domestic law of their respective countries. Therefore rebellions are coming under the non-state actors and they are not coming under the non-state armed groups in non-international armed conflicts/civil war.

There is no proper separation/ distinction between non-state armed groups in NIAC in the name of rebels and non-state actors in the present world. Sometimes non-state actors can also be a non-state armed groups. Identification of non-state armed groups in non-international armed conflict situations in respect of rebel groups is very difficult in the present world. In "Re-thinking violence: States and Non-States Actors in conflict", Chenoweth states that Arab Rebellion is worthwhile due to its historic importance.

2) *Insurgents as a non-state actor and non-state armed groups in NIAC*

Insurgents also keep arms. They often tend to disturb civilians in their day today life. Ranbir Singh in his article "Insurgency and International Law & its legal consequences" discusses the defenses. He says that "Insurgency and International Law & its legal consequences" despite conflicting views as to the exact definition of 'insurgency' there exists consensus that insurgency, can develop onto belligerency. McDougal and Reisman (International Law Essay, New York: Foundation Press Inc, 1981, at P. 522) are of the view that "one distinction lies in on the fact that the insurgent has not yet established a territorial base which involves effective control over the population. Kelson (Recognition in International Law, 35 A.J.I.L.605 (1941) at 616) thinks that insurgency supposes a civil war. Another term for insurgency is insurrection. It has been described as a war of citizens against the state for the purpose of obtaining the power in the whole or in part (Dhokalia, Civil Wars and International Law, 65 A.J.I.L. 219 (1971) at p. 255).

For example, I.R.A. in Northern Ireland, the J.K.L.F. in Kashmir, the Hizbul Mujahideen in Afghanistan, the L.T.T.E. in Sri Lanka, the Iranian backed insurgents in Iraq, the Nicaraguan rebels are few such insurgents. After evaluating these facts, it can be concluded that insurgents most often behave like belligerents.

3) *Belligerents as non-state actors and non-state armed groups*

Singh discusses "[b]elligerency, thus, denotes such a state of civil war in which there are two contenders for power who can be placed on a somewhat equal platform and there is a state of war and not just civil strife." An appropriate example of belligerency is the status of L.T.T.E. in Sri Lanka which controlled a significant part of the North and East of Sri Lanka and running a de facto parallel government there with a line of control existing between the L.T.T.E. controlled areas and the rest of Sri Lanka.

According to the nature of belligerency, Ranbir Singh writes, its recognition entails some additional consequences. Those are: the belligerents can have bilateral trade with the recognizing state, belligerents can have diplomatic relations with the recognizing state, belligerents can enter into treaties with the recognizing state and the recognized states become entities to sue in courts of the recognized state. In *U.S. v. Pink* (1942) the U.S Supreme Court laid down that Court shall decide the case of only those states which have been recognized by the U.S.

Therefore belligerents as non-state actors every time can be taken into the category of non-state armed groups in non-international armed conflict.

4) *National Liberation Movements as non-state actors and non-state armed groups*

These national liberation movements display the necessity to recognize national identity. Masses get together to fight against repression by government of their country and against discrimination of their national identities. Finally national liberation movements hope to decide on the secession from the territory. For example, L.T.T.E. behaved like a national liberation movement. They tried to find freedom for Tamils in Sri Lanka in a Tamil Elam. Further, national liberation movements are using transnational help.

Therefore, all national liberation movements are not non-state armed groups in non-international armed conflict. But some National liberation movements behave like non-state armed groups in armed conflict. So it is hard to find the border line between national liberation movements and non-state armed groups in internal

armed conflicts.

The difference between non-state actors and Non-state armed groups in non-international armed conflict is blurred. Sometimes non-state actors are behaving individually. But, at times Non-state armed groups in internal armed conflict employ their unique techniques. Thus Non-state armed groups in non-international armed conflict have to be identified according to the situation and evidence.

5) *Transnational Armed Groups and Non-State Armed Groups in Non-International Armed Conflict*

Marco Sassoli states that “[t]he ‘war’ against the only readily identifiable transnational armed group – Al Qaeda – has met with considerable interest from public opinion, politicians, and scholars. Yet the fact remains that most armed conflicts are either clearly international or clearly internal. Such traditional conflicts continue to cause the overwhelming majority of war victims. International armed conflicts are fought between states (e.g., the United States and Iraq) or between a state and an armed group that can be associated with another state (e.g., the Taliban in 2001 to Afghanistan or, possibly, Hezbollah in 2006 to Lebanon). Internal armed conflicts are fought between a government and rebels, sometimes with the involvement of foreign governments and rebels (e.g., in the Congo), but essentially on the territory of one state (e.g., in the Sudan, Sri Lanka, and Colombia). While armed groups cause more than half of the suffering of war victims (the other half being the result of governmental action), most are not transnational, but traditional anti-governmental rebel groups” (Marco Sassoli, *Transnational Armed Groups and International Law*).

Therefore occasionally Armed Groups with traditional characteristics also act as Non-state armed groups in civil armed conflicts. In spite of that, there are differences too. Thus it is not always easy to find the involvement of Transnational Armed Groups with Non-state armed groups in non-international armed conflict.

III. EVOLUTION OF CONCEPT OF NON-STATE ARMED GROUPS IN NON-INTERNATIONAL ARMED CONFLICT

This part examines the starting point of the identification of NSAG in NIAC and how it came into present discussion. To these end definitions of different scholars, different institutions and different authors for the identification of NSAG in NIAC will be considered.

As discussed in the Introduction of this study, “Military Balance”(The International Institute for Strategic Studies, London in 2001/2002, cited by Gray D. Sosis, *The law of*

Armed Conflict, Cambridge University Press, 2010) introduced the new identification elements to non-state armed groups in NIAC. In the same manner, in the article, Casten Stahn and Mohamed M. El Zeidy also recognized the phenomenon of proceedings carried out by any non-state armed groups. Rome Statute relating to complementarity and their drafting history also mentioned the new attributes of NSAG in NIAC. The International Criminal Tribunal for former Yugoslavia’s (ICTY) jurisprudence developed five broad sets of factors to identify non-state armed groups in NIAC.

Furthermore, Arpita Anant *Non-state Armed Groups in South Asia*, Pentagon Security international press, 2012) refers the above definitions and states that criminal acts of non-international armed conflict situations must also be included in the definition of NSAG and such groups do necessarily act independent of the states. In addition, the author discusses about NSAG in south Asian region, ethnic motivations, left-wing motivations and religious motivations for NSAG. This author has given a social perspective of NSAG and according to that he has analyzed the NSAG in NIAC situations. This study examines the legal perspective of NSAG in NIAC. But to find legal definition for the NSAG, the social aspects must also be analyzed.

Liesbeth Zegveld discusses the accountability of armed opposition groups (NSAG in NIAC) (2002) according to the international law and it argued that according to the Normative Gap and the Accountability Gap NSAG are liable for their violations of IHL. In the concept of Normative gap author recognizes the legal restraint on armed opposition groups and substantive obligation of armed opposition groups. Legal restrains on NSAG are Common Article 3 and Additional Protocol II of Geneva Conventions, other rules of humanitarian law, human rights law and international criminal law. For the substantive obligations of NSAG author discussed the humane treatment of prisoners, protection of civilians and underdevelopment of law.

In the accountability gap concept the author discusses the accountability of group leaders and accountability of armed opposition groups. However the author has identified the NSAG as “operate in internal armed conflicts. These groups generally fight against government in power, in an effect to overthrow the existing government, or alternatively bring about the secession so as to set up a new state. The objective of these groups may also include the achievements of greater autonomy within the state concerned. In other situations, where the existing government has collapsed or is unable to to intervene, armed groups fight among

themselves in pursuit of political power.” Thus, identification of NSAG in NIAC is very suitable to the present situation.

John Gravingholt, Claudia Hofmann and Stephan Klingebiel, discuss, “[n]on-state armed groups are not a new phenomenon in conflicts anywhere in the world. Civil wars and other intrastate violent conflicts, which by their nature are characterized by the participation of NSAGs on at least one side, have dominated warfare since the end of the Second World War, so much so that war between states has increasingly become the exception rather than the rule.” This is a new approach to the issue of NSAGs and these scholars point out the enormous extent of NSAGs growth after the Second World War as a new phenomenon, to the extent that wars between states have become very rare.

Dennis Rodgers and Robert Muggah in “[g]angs as non-state armed groups: the Central America Case” gave attention to non-state armed groups and said that “Gangs are routinely excluded from theoretical and policy debates on “non-state armed groups” or NSAGs. Rather, the acronym tends to be reserved to clusters of individuals who comprise rebel opposition groups, guerrillas, localized militia, or civil defense and paramilitary forces. In other words, discussions of NSAGs are narrowly confined to groups operating in opposition to the state – often impelled to action by “greed” or “grievance” – and generally with a view to taking it over. Conceptualizations are thus embedded in a state-centric framework wherein the state is not just a key referent, but according to Alston, ‘the indispensable and pivotal one around which all other entities revolve’. Consequently, efforts to engage and contain NSAGs tend to focus on their (il)legitimacy and the extent to which they can be made to comply to the prescribed norms and rules of state action.

It can be seen that very often the authors disuses the ground situation and applied the NSAG identification criteria to the situation. But at present, it needs common method to identify the NSAG in NIAC. At the same time, however, as other authors in this make clear, significant ambiguity persists concerning the conceptual parameters of the concept. Interpretations are frequently dependent as much on the circumstances and motivations of the observer as the (actual) interests and characteristics of the observed.

Tellingly, human rights scholars such as Clapham advocate for as broad a definition as possible including “every entity apart from states”. Likewise, Alston (2005) includes “[a] host of entities ranging from rebel groups

and terrorist organizations to religious associations, militant civil society organizations, private corporations and businesses and even some international agencies. Certain researchers have also focused on the environment(s) in which non-state armed groups operate, or else their attributed or imputed motives, in order to articulate coherent forms of classification.” There are lots of identifications by several authors. But still it is unclear to identify the non-state armed groups in non-international armed conflict in present scenario.

After analyzing all the categories of non-state actors, NGOs, terrorist attacks and transnational armed group actors, NSAG in NIAC it can be observed that the scholars differ in this regard considerably, while a unanimity in regard to parameters is not arrived at. Thus, Article 43 of AP I for the definition of armed forces is a proper guidance to define all armed groups and according to that identification of the high contracting parties of armed groups is possible.

IV. CONCLUSION

Jeremy Harrington (2005, *Has a Non-State Armed Group conducted a Revolution in Military Affairs? A case study of Al Qaida*) identifies “[f]our categories of non-state armed groups: insurgents, terrorists, militias, and organized crime. He writes that the authors note several aspects that all armed groups have in common. They seek to challenge the power, authority, and legitimacy of the state, either by overthrowing the state’s government, or by weakening or co-opting it. All armed groups use violence in pursuit of their aims, and this violence can take conventional or unconventional and asymmetric forms. Armed groups operate both locally and globally and, enabled by information age advances, are able to challenge their state opponents at home and abroad. Armed groups are not democratically based organizations and do not rely upon the rule of law to resolve disputes.” These identification characteristics also depend on the situation. Different NSAGs are behaving in their own particular manner. The same incidents are not occurring all the time. Thus, identification of NSAG and make a definition to NSAG are very difficult in these contexts.

This study discussed different forms of non-state armed groups and their evolution. Various forms of non-state armed groups including freedom fighters, terrorist groups and state sponsored paramilitary groups, national liberation movements, insurgents, non-governmental organizations and transnational armed groups were discussed to identify their unique characteristics so that a

test of differentiating between armed groups in the context of internal civil armed conflicts can be found. This article then tried to identify the non-state armed groups in non-international armed conflict separate from the other non-state actors. However, though the internationally recognized definition for armed forces which is included in Article 43 of AP 1 of Geneva Conventions applies to international armed conflicts, a definition closely similar to the said definition can and should be used for the identification of NSAG in NIAC too. Thus, it is appropriate to conclude that even though a group may be armed, it may not be an armed group within the meaning of non-international armed conflict and their identification depends on the material conditions and the background evidence that should be seriously considered. Their liability is a question that completely depends on this identification.

ACKNOWLEDGEMENT

I confer my sincere gratitude to the Librarian of South Asian University, the Librarian of the Law Commission of India, the Librarian of the Colombo University and the Librarian of General Sir John Kotelawala Defence University for the kind support.

REFERENCES

The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (Geneva Convention i)

The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (Geneva Convention ii)

The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention iii)

Protocol I relating to the Protection of Victims of International Armed Conflicts additional to the Geneva Conventions, 1977, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/>

Protocol II relating to the Protection of Victims of Non-International Armed Conflicts additional to the Geneva Conventions, 1977, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/>

Protocol III relating to the Adoption of an Additional Distinctive Emblem additional to the Geneva Conventions, 2005, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/>

The Kampala Convention and obligations armed groups, <<http://www.fmreview.org/non-state/Ridderbos.html> #sthash.UWXbeXB8.dpuf

Bianchi A. and Naqvi Y. (2012), International Humanitarian Law and Terrorism, Hart Publishing
Ryngaert C.(2008), Non-state actors and international Humanitarian Law, Institute for International Law

Schabas W.A. (2010), The International Criminal Court: a commentary on the Rome Statute, Oxford University Press

Sivakumaran S. (2012), The Law of Non-international Armed conflict, Oxford University Press

Segal A. (2001), Punishing Violations of International Humanitarian Law at the national level, Published by International committee of Red Cross

ICRC, <http://www.icrc.org/eng/who-we-are/index.jsp> [June 10, 2015]

Rynaert C., Non state Actors and International Humanitarian Law, <http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP146e.pdf>; [June 10, 2015]

Scheckener U., Engaging Armed Non-State Groups in areas of Limited Statehood, http://www.sfb-governance.de/publikationen/sfbgov_wp/wp21/wp21.pdf?1325771253 ; [June 10, 2015]

Singh R., Insurgency and International Law & its legal consequences, <http://www.manupatra.co.in/newslines/articles/Upload/9E421587-72AB-4936-9CB9-2A9ECA0E93EA.pdf>; [June 10, 2015]

** This Article is an adaptation from the Author's Dissertation submitted for the Author's Masters Degree at the South Asian University, New Delhi.

BIOGRAPHY OF THE AUTHOR



The Author is a lecturer at Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka. She is having LL.M in International Law. She is an Attorney-at-Law of the Supreme Court of Sri Lanka. She has been teaching International Law for both undergraduates and Post-Graduates. She also teaches Jurisprudence, Legal Method, Environmental Law and International Criminal Law. She has published papers in research conferences. She is one of the co-ordinator in Master of Laws programme at the Faculty of Graduate Studies, KDU. She is an editor in "EDU PERFECT" Magazine in India.