



The legal implications of non-state armed group alliances and fragmentations in non-international armed conflict

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Abstract

International humanitarian law depends on parties adhering to their obligations to balance military necessity and humanitarian considerations in any armed conflict. Hundreds of non-state armed groups operate in various non-international armed conflicts - the predominant species of armed conflict - with significant humanitarian impact. However, the structural tentativeness and fragility of many of these armed groups complicate their status as conflict parties and, consequently, any expectation of compliance with their obligations under the law of armed conflict, such as granting appropriate requests from impartial humanitarian actors to access civilians in conflict zones for aid delivery. Therefore, this Paper explores a range of scholarly postulations on the implications of armed groups forming alliances or splintering on the applicability of international humanitarian law in a non-international armed conflict. The Paper concludes that theories on whether or when allied forces or splinters qualify as bonafide conflict parties to any intra-state hostilities provide general yet helpful analysis frames. Nevertheless, evaluating the status of any specific entity in issue must also yield to the legal benchmarks regarding organisational structure and ability to conduct coordinated military operations and enforce norms of international humanitarian law within its ranks.

Keywords: Boko Haram, International humanitarian law, Nigeria, non-international armed conflict, non-state armed groups

Introduction

The footprints of foreign non-state actors in Nigeria's non-international armed conflict (NIAC), as a contemporary archetype of this species of armed conflict under international humanitarian law (IHL), were visible from its onset. In 2009, security forces killed Mohammed Yusuf, ^[1] the widely acknowledged ideological founder of Boko Haram, ^[2] one of the main non-state armed groups (NSAGs) participating in the armed conflict, which primarily impacts the Country's northeast region. ^[3] Thereafter, it was foreign NSAGs who offered the remnants of his followers a haven outside Nigeria, where they trained and rearmed before launching a full-scale insurgency in 2010. ^[4]

Similarly, it was to the Islamic State of Iraq and the Levant (ISIL) that Abubakar Shekau, a successor to Mohammed Yusuf, pledged allegiance in 2015 and adopted 'Islamic State West African Province' (ISWAP) as Boko Haram's new formal name to denote its affiliation to ISIL. ^[5] Furthermore, by recognising a splinter group headed by Abu Musab al-Barnawi, ISIL was instrumental in the breakup of Boko Haram in 2016. ^[6] Following the armed group's fragmentation, Abubakar Shekau-led faction reverted to its previous formal name – Jama'atu Ahlis Sunna Lidda'awati wal-Jihad, which in Arabic language means 'People Committed to the Propagation of the Prophet's Teachings and Jihad' - even though this armed group is still better known by its colloquial name, 'Boko Haram' meaning 'Western education is forbidden' in Hausa language. ^[7] At the same time, Abu Musab al-Barnawi's bloc continues to use 'ISWAP'. ^[8] Additionally, given its declining fortunes in Iraq and Syria, ISIL considers ISWAP an important affiliate for its global propaganda drive. ^[9] Following the death of Abubakar Shekau in 2021, during clashes with ISWAP fighters, ^[10] Boko Haram has further splintered, with elements such as the one headed by Ibrahim Bakura Doro, continuing to operate and challenge ISWAP as the dominant

NSAG in Nigeria's northeast region while other factions have moved to different parts of the Country to engage in criminalities such as kidnapping and cattle rustling. ^[11]

This aspect of Nigeria's NIAC involving alliances and fragmentation of non-state conflict actors is not unique amongst the hundreds of significant armed groups operating in contemporary armed conflicts. ^[12] In terms of retaining the same organisational outlook throughout an armed conflict, NSAGs have a relatively short shelf-life. ^[13] From the IHL perspective, coalitions and the breakup of armed groups could have significant legal and, by extension, humanitarian implications. ^[14] As a NIAC arises when there are protracted hostilities between governmental authorities and organised armed groups or between such groups, ^[15] the question arises about the effect of group alliances or fragmentations on legal designations. In other words, when could an allied group or a faction of a splintered NSAG become a party to a NIAC in their own right?

This question is vital for a host of reasons. First, obligations under IHL are addressed primarily to conflict parties. ^[16] Therefore, it is essential to identify the appropriate parties correctly. Secondly, the ability of a conflict party to ensure group compliance with the law of armed conflict, should it wish to operate within the ambit of the law, depends to some degree on a structured organisation that facilitates accountability for infractions. The breakup of NSAGs would invariably dilute command and control mechanisms critical for implementing IHL. Finally, the success of any efforts to bring an armed conflict to a negotiated end depends in part on accurate actor mapping to determine critical individuals and group dynamics, something that alliances and factionalism complicate. ^[17] For conceptual clarification, this Paper adopts McHugh and Bessler's definition of an NSAG as any entity having 'the potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the

formal military structures of States, State-alliances or intergovernmental organisations; and are not under the control of the State(s) in which they operate'.^[18]

Alliances of non-state armed groups in non-international armed conflict

Several theories have evolved to lay out conditions under which, for instance, ISIL could be a party in Nigeria's NIAC. The co-belligerency theory draws inspiration from an analogous principle applicable to IACs.^[19] Notwithstanding that its specific contours are left to state practice to determine,^[20] by co-belligerency, States, just by taking specific non-kinetic actions such as seizing the assets of a foreign warring State, could be considered belligerent parties even though they don't take an active part in hostilities.^[21]

In *Adel Hamilily v. Barack Obama and Ors*, one of the issues for determination by the United States District Court for the District of Columbia was the United States' detaining authority under IHL over individuals who were members of allied groups fighting together with the Taliban and al-Qaeda during the Afghan armed conflict. First, the Court extended the application of the principle of co-belligerency to 'non-state actors involved in non-international conflicts.'^[22] After that, the Court determined that 'associated forces', as the equivalent of a co-belligerent, 'do not include terrorist organisations who merely share an abstract philosophy or even a common purpose with al-Qaeda. There must be an actual association in the current conflict'.^[22] Therefore, a third-party NSAG must directly participate in the hostilities of a NIAC to become a party therein. Even so, the extension of the notion of co-belligerency does not preclude the need to determine whether such intervening NSAG is sufficiently organised and conducts hostilities with such intensity as to meet the classification threshold of a NIAC.^[23] Furthermore, as some scholars have rightly opined, States uncritically importing the notion of 'co-belligerency' into NIACs could create a nightmare scenario of 'targeting without clear limits'.^[24]

Conversely, the International Committee of the Red Cross (ICRC) posits a support-based approach to determining when an intervening force would be a party to a pre-existing NIAC. According to the ICRC, providing military or logistical support to a party could render the intervening group offering such support a 'conflict party' if the assistance is of such a nature that it contributes to the 'collective conduct of hostilities'.^[25] Accordingly, an intervening group making decisive contributions such as troop transportation or providing operational intelligence cannot avoid such 'conflict party' designation merely because it is not involved in actual hostilities.^[26] It is important to note that even though the ICRC's analysis framework encompasses only intervening States, individually or collectively, and international organisations like NATO,^[27] there is arguably no logical basis for excluding intervening NSAGs under the support-based approach.^[28] However, crucially, the idea that any external party providing operational support, whether State, international organisation or NSAG, could become a party to a NIAC without referencing the traditional criteria under IHL for determining conflict parties is arguably not reflective of prevailing State practice.^[29] Examples abound in contemporary armed conflicts where foreign state and

non-state actors provide significant contributions without considering themselves as conflict parties.

A third approach is the aggregated intensity theory. According to its proponents, in many of today's armed conflicts, the structures, relationship contours, or extent of support between NSAGs are often too opaque to assess each group's qualification as a conflict party.^[30] Hence, provided each group is sufficiently organised and demonstrates a collective approach to fighting against a common enemy, the aggregate intensity of their inputs to ongoing hostilities will determine their status as parties to an armed conflict.^[31] According to its advocates, the aggregate intensity approach is ideal in situations where the actions of each participating NSAG would not necessarily meet the conventional intensity criterion, for instance, because they only provide logistical support and do not participate in active hostilities.^[32] Hence, to avoid an untenable situation where IHL would regulate engagement between State forces and some NSAGs while the law enforcement paradigm would govern others, it would be prudent to consider the cumulative impact of all participating NSAGs' conduct for classification purposes and designation as conflict parties.^[33]

While it is true that contemporary NSAGs tend to operate in the context of alliances with differing degrees of contribution to military action, the aggregated intensity approach does not reckon with the potential fragility of NSAG alliances.^[34] As mentioned earlier, Abubakar Shekau's pledge of allegiance to ISIL did not last, and the latter group eventually supported a splinter faction of Boko Haram. Hence, some scholars suggest modifications to the aggregate intensity approach to better reflect the realities of contemporary armed conflicts. Kleffner, for instance, recommends applying this theory only when NSAGs operate in the same 'geographical and temporal continuum.'^[35]

Accordingly, affiliated NSAGs conducting hostilities in different conflict theatres, even if the armed attacks are against the same adversary, such as the United States under its so-called global war on terror, could not reasonably be parties to the same armed conflict despite their cooperation. In this case, the qualification of each group under the intensity criterion is decisive in determining its status as a party in a NIAC within a particular national territory. Hence, ISIL does not automatically become a party in Nigeria's NIAC since it concentrates its kinetic actions in the Middle East and only provides financial and logistical support to ISWAP. Moreover, Kleffner's prescription could arguably still dilute the intensity criterion with an overemphasis on a requirement of NSAGs operating in the same space and automatically being considered parties in a NIAC.^[36]

Similarly, Redaelli opines that for the aggregate intensity approach to assessing whether certain NSAGs are all parties to a NIAC, there should not be a requirement that they must be fighting the same enemies as components of the same coalition.^[37] Hence, an NSAG will not cease to be a party to an armed conflict because it is no longer operating as a coalition member but independently. Redaelli's suggestion arguably accords with the realities of many contemporary armed conflicts that only enable tentative actor mappings. However, in the final analysis, these approaches examined above are merely rough guides toward establishing the legal implications of intervention by third-party NSAGs in a NIAC. For intervening NSAGs like ISIL in a pre-existing

NIAC like Nigeria's, assessing the bilateral relationship between each armed group and State forces in light of the traditional criteria for determining conflict parties would seem prudent.^[38] In other words, to be a bonafide party to a NIAC, any NSAG, whether domestic or foreign, must reflect sufficient organisational structure by which it conducts sustained and coordinated military operations against adversaries and could enforce IHL.^[39]

Fragmentations of non-state armed groups in non-international armed conflict

As mentioned earlier, NSAGs in many of today's armed conflicts often have a short shelf-life regarding their organisational structures.^[40] The breakups of NSAGs into factions magnifies humanitarian challenges emanating from an armed conflict in many respects. First, an armed group's break into splinters invariably affects its ability to enforce IHL obligations amongst members. Similarly, humanitarian actors must constantly renegotiate access to civilian populations as relevant non-state conflict actors evolve.^[41] Where an NSAG has splintered, as Boko Haram arguably has, the bilateral relationship between each faction and State forces is pertinent to determine whether it is a conflict party.^[42] Where hostilities between a faction and an adversary do not reach the classification threshold regarding organisation and intensity, the law enforcement paradigm will govern the relationship.^[43] However, a challenge emerges when the primary armed group ceases to operate as a unitary force, for instance, due to leadership decapitation. At the same time, violence by splinters of the dormant armed group remains below the intensity threshold for an armed conflict classification. The question becomes whether the dormancy of the primary armed group, notwithstanding the continuing existence of 'runt' elements, means the end of the relevant NIAC.^[44]

Against an extensive academic output and caselaw of international courts regarding the starting point of a NIAC, determining its termination point often does not receive commensurate attention in the literature.^[45] There is virtually no guidance in treaty IHL. Article 3, common to the four 1949 Geneva Conventions, does not address when an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' ends.^[46] Similarly, Additional Protocol II's reference to the 'end of the conflict'^[47] or 'end of hostilities'^[48] does not provide helpful insight into the temporal scope of a NIAC. In the seminal case of *Prosecutor v Dusko Tadic*, the ICTY opined that a NIAC exists until a 'peaceful settlement.'^[49] Given the asymmetrical subtext of many contemporary intra-state armed conflicts, this yardstick for temporal scope is arguably not always a reasonable standard for determining the end of a NIAC.^[50] It undeniably has no basis in treaty IHL.^[51]

An 'armed conflict' is primarily a creature of facts, not law.^[52] Hence, given the scant treaty and caselaw guidance, the ICRC has suggested some factual signposts to indicate the temporal scope of a NIAC.^[53] Amongst other indicators, the ICRC posits that a NIAC ends with the dissolution of a Party, for instance, through outright defeat, even though elements of the dissolved Party continue to exert sporadic violence.^[54] Conversely, where the Party is in disarray after suffering a setback militarily, and remnants of the Party continue to operate albeit below the threshold of a NIAC, with a possibility of regrouping, the relevant armed conflict

has not ended.^[55] ICRC's submission arguably reflects a sound, logical position. The essence of determining the end of a NIAC connects with the continuing applicability of IHL.^[56] Therefore, the fact that an armed group has lost some potency as a monolithic fighting force through fragmentation should not result in the premature termination of the governing IHL framework. Moreover, creating a 'revolving door between applicability and non-applicability'^[57] of IHL, depending on the strength of conflict parties for the time being, could arguably lead to significant legal confusion.

Indeed, many of today's NIACs follow an 'oscillating intensity'^[58] pattern without losing their classification status. Hence, prolonged lulls in the fighting, not resulting from a peaceful settlement or complete defeat of a Party, do not indicate an end to hostilities without reference to other indicators, such as the lifting of a state of emergency, disarmament, and demobilisation of fighters and return of refugees/internally displaced persons to their homes.^[59] Even if ISWAP were not in the picture, it is prudent to consider that the death of Abubakar Shekau and the resultant splintering of Boko Haram, without more, does not mean the end of Nigeria's NIAC and, consequently, the end of the applicability of IHL.

Conclusion

With the onset of hostilities, the trajectory of any armed conflict is hardly predictable. For NIACs, the uncertainties of warfare further encompass the continued operations of NSAGs as monoliths. As Nigeria's NIAC has aptly shown, armed groups might form alliances or splinter as the expediency of the hostilities dictates. Yet, it is essential to ascertain what entities continue to qualify as conflict parties and are thus addressees of IHL obligations. While each of the discussed approaches to the legal implications of group alliances presents attractive arguments, the legal benchmarks for an organisational structure that enables enforcement of the law of armed conflict and a capacity for coordinated military operations remain essential to qualification as parties to NIACs. Additionally, unduly tethering the temporal scope for the applicability of IHL in any intra-state hostilities to the splintering of participating armed groups without taking a holistic view of the entire conflict could create adverse humanitarian consequences. In the final analysis, every NIAC requires a context-specific evaluation of the legal implications of armed group alliances or fragmentations.

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