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Counter-terrorism and the protection of civilians: Armed non-state actors

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Armed Non-State Actors

COUNTER-TERRORISM AND THE PROTECTION OF CIVILIANS

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ABBREVIATIONS

ANSA	Armed Non-state Actor
CTM	Counter-Terror Measures
EU	European Union
HLP	Humanitarian Law Programme
HPG	People's Defence Forces
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IAC	International Armed Conflict
IED	Improvised Explosive Device
IS	Islamic State
ISIS	Islamic State in Iraq and Syria
KCK	Kurdistan Communities Union
KDP	Iraqi–Kurdish Kurdistan Democratic Party
KRG	Kurdistan Regional Government
NGO	Non-Governmental Organisation
NIAC	Non-International Armed Conflicts
PKK	Kurdistan Workers Party
PUK	Patriotic Union of Kurdistan
PYD	Democratic Union Party/ Partiya Yekîtiya Demokrat
UN	United Nations
UNGA	United Nations General Assembly
UNDPKO	The UN Department of Peacekeeping Operations
UNSC	United Nations Security Council
YPG	Yekîneyên Parastina Gel/ People's Protection Units
YPJ	Women's Defence Force

EXECUTIVE SUMMARY

Recent events in the Middle East present the latest and undoubtedly not the last challenge to international engagement with armed non-state actors. Over the last many years international humanitarian law has increasingly regulated the behaviour of armed non-state actors with regard to the protection of civilians. At the same time, counter-terror measures have increasingly addressed such conduct, as well as controlled the extent to which other actors may interact with armed non-state actors. Yet there is a fundamental contradiction between these regulatory regimes. The report takes a case study approach to examine the conundrum facing policy-makers and, not least, state militaries, when navigating these policy regimes in Iraq and Syria. It analyses two prominent armed non-state actors and their acceptance of these regulatory regimes the People's Protection Units (YPG) and Islamic State. The report concludes that it is time to consider strategic interoperability of international humanitarian law and counter-terror regimes in order to maximise the protection of civilians. Drawing a line in the sand at compliance with international humanitarian law and forcing armed non-state actors to choose whether or not they stand with the 'terrorists' (e.g. IS) can motivate many of them towards compliance (e.g. PKK/YPG and others such as Ahrar al-Sham), as long as counter-terror measures don't undermine the incentives to do so.

INTRODUCTION

In August 2014 up to 40,000 people, most of them Yazidis,¹ were forced to flee to Mount Sinjar to escape the advance of Islamic State (IS). Kurdish fighters from neighbouring Syria reportedly rescued at least 20,000, but the remaining civilians remained trapped. At least 500 Yazidis were killed, some buried alive, according to official sources. Fleeing Yazidis were aided in their escape by US airstrikes combined with humanitarian food drops, and medicine and water supplies. However, observers agree that what proved more essential was the role of myriad Kurdish armed non-state actors (ANSAs) on the ground, who helped establish humanitarian corridors to escape for some of the Yazidis. This involved a constellation of Kurdish ANSAs from Turkey, Syria and Iran. The main armed actors in the rescue action were the PKK Kurdistan Workers Party and its Syrian counterpart, People's Protection Units (YPG), a Syrian Kurdish armed faction.

The Kurdistan Workers Party (PKK) entered Iraq in the summer of 2014 to bolster Kurdish forces battling to repel Islamic State's sudden advance. From the oil rich city of Kirkuk to Mount Sinjar these fighters – equipped with light arms – have been essential to halting the advance of the sectarian fundamentalists who have carried out gruesome atrocities and left mass graves of civilians in their wake. On the front lines facing IS outside the northern Iraqi city of Kirkuk and the strategic town of Mekhmour, American military personnel have been coordinating with the PKK. The front is reinforced by a mix of Peshmerga units affiliated with the Kurdistan Regional Government (KRG) of Iraq, PKK and Kurds who are equipped by the Iraqi army, while the US provides logistical support and airstrikes to keep most of northern Iraq's richest oil region from the clutches of the self-proclaimed Islamic State. More recently in Syria, and aided by US-led air strikes, the YPG seized the town of Tel

Abyad at the Turkish border, cutting a supply route to IS's de facto capital of Raqqa. The operation to capture Tel Abyad built on success in Kobane, a Kurdish enclave in northern Syrian that would have fallen to IS had the US-led coalition not intervened.

The irony of the ongoing events in Iraq and Syria is profound: as one op-ed puts it, the coalition forces are essentially 'aiding an armed actor listed by several of its member states as "terrorist" (PKK/YPG) in order to fight (IS) terrorism' (Zaman 2014). The fight against IS helps PKK gain global legitimacy. This highlights the many conundrums facing policymakers.

The irony of the ongoing events in Iraq and Syria is profound: the coalition forces are essentially aiding an armed actor listed by several of its member states as 'terrorist' (YPG/PKK) in order to fight terrorism (IS).

Armed non-state actors (ANSAs) have gone from being labelled terrorists under the post-9/11 war on terror, to being portrayed as legitimate recipients of foreign support against undemocratic regimes, such as in Libya, Iraq and Syria. These developments, the report argues, create opportunities to influence the impact certain ANSAs have on the protection of civilians.

International humanitarian law (IHL) is also known as the 'law of war' or the 'law of armed conflict'. IHL places obligations on ANSAs to reduce the impact of armed conflict on civilians. It protects persons who are not, or who are no longer, participating in hostilities, and restricts the means and methods of warfare. Armed non-state actors are active in most armed conflicts today and are responsible for many violations of international humanitarian law. And yet the scant evidence that exists shows little difference between states and ANSAs when it comes to IHL compliance. Increasingly states and humanitarian and human rights organisations have had to grapple with how to influence ANSA behaviour and enhance their compliance with international standards. An increasing multiplicity of ANSAs and their growing stake in the strategic interests of states pose significant policy dilemmas on international engagement with these actors.

This report considers how ANSAs comply with the laws of war. It argues that there is a need to understand the motivations of ANSAs, and explores how the use of counter-terror measures, and particularly terrorist labelling, constitute opportunities gained or lost in influencing ANSA behaviour around compliance and thus the effects of war on civilians.

To answer these questions the report takes a case study approach. It looks at two prominent ANSAs: the PKK/YPG and Islamic State. It analyses the interoperability between IHL and counter-terrorism measures (CTM) vis-à-vis these armed groups, and it considers the relative importance of IHL compliance/ protection of civilians compared to broader considerations such as ANSA legitimacy. IS was chosen as it represents an 'extremist', non-compliant, ANSA that is not, at this moment in time, receptive to external engagement. PKK/YPG was chosen as an ANSA with an interest in distinguishing itself from IS in order to improve its international reputation. We argue that the desire of PKK/YPG to distinguish itself from IS provides an incentive to demonstrate commitment to and compliance with IHL and human rights norms. However, if the interplay with CTM is not managed strategically, the opportunity to exploit these incentives towards improved civilian protection will be compromised.

” While engagement with non-state armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts. ”

UN Secretary General Ban Ki Moon

The global policy discourse and the war on terror tend to ignore the wide variety of roles and agendas of ANSAs, viewing them primarily as threats to security and as important spoilers that can undermine successful peacebuilding. This report emphasises the importance of distinguishing different types of ANSA and understanding their motivations, mobilisation, finances and popular support, in order to assess how they can be encouraged to improve their respect for IHL. ANSAs are as much part of the problem in the suffering caused by today's conflicts, as they can be part of the solution. Because ANSAs are very different, the way to deal with them may differ from case to case, with a nuanced understanding of the dynamics, characteristics and contexts under which ANSAs operate. Not all ANSAs will respond to external engagement, but the international community can influence their incentives to do so. This is a key consideration when it comes to influential

ANSAs such as Ahrar al-Sham. What incentives might be utilised strategically in order to bring about improved compliance, and how can the interoperability of the normative frameworks of international humanitarian law and counterterrorism best be exploited?

The report contains three sections. The first provides a brief conceptual introduction to the topic of armed non-state actors. The second section provides a historical review of how international humanitarian and human rights law have come to address ANSA action, and looks at how adaptable these norms – originally conceived for conflicts between states – are for ANSA. This section also provides a discussion on the relevance of counter-terror regimes, and ultimately makes a case that the interoperability between counter-terror measures and IHL/IHRL can either hinder the protection of civilians, or be used strategically to enhance it. The third section provides a case-based description of YPG and IS. The analysis illustrates particular patterns in relation to the protection of civilians and compliance with IHL identified in the case studies. Last, the implications of this research for engagement with ANSAs are discussed and a number of policy recommendations, particularly towards a strategic approach to the interoperability of CTM and IHL, are set out.

The report draws on declarations and statements by members or representatives of armed groups, and on policy positions found in the literature and websites, as well as on other materials. This is supplemented by reports, and by statements submitted to third parties, such as bodies of the United Nations (UN) and non-governmental organisations (NGOs). One of this report's authors visited Erbil, the capital of the KRG, and Makhmour and Zumar sub-districts of the Nineveh governorate whose capital is Mosul in Iraq. With the help of an Arabic and Kurdish interpreter twenty security officials, civilians and local politicians from different Syrian and Iraqi Kurdish Parties were interviewed.² For security reasons these will remain anonymous. The other author has been involved in a series of humanitarian negotiations and IHL training courses with PKK/YPG, as well as over a dozen other ANSAs worldwide. For the purposes of this report, the term 'protection of civilians' is restricted to the IHL definition, and does not refer to broader notions that include the use of force (see Box 1).

ARMED NON-STATE ACTORS

This short introduction to armed non-state actors serves the purpose of illustrating the shift that is taking place in contemporary global politics, away from the predominance of the state towards the rising importance of ANSAs. Definitions of ANSA have proven difficult owing to their many types and characteristics.³ Generally speaking, ANSAs are defined as distinctive organisations that are (i) capable of and willing to use violence to pursue their objectives and (ii) not integrated into formalised state institutions such as regular armies, presidential guards, police, or special forces. They therefore, (iii) possess a certain degree of autonomy with regard to politics, military operations, resources, and infrastructure, and (iv) are shaped through an organisational relationship or structure that exists over a specific period of time (Hofman & Schneckener 2011). To this, one must add that ANSAs possess well-established resource bases, control populations, and have acquired a degree of representativity. They may also, however, be supported by state actors, either secretly or openly, as is often the case with militias, paramilitaries or mercenaries. Moreover, there may also be state officials or state agencies directly or indirectly involved in the activities of non-state armed actors – sometimes for ideological reasons (e.g. secret support for rebels), sometimes because of personal interests (such as political career, corruption, family or clan ties, clientelism, and profit).

An influential study of the formation of armed groups shows that ‘states are deeply involved in the emergence and logic of armed groups’ since it is ‘within state institutions that the core skills needed for armed rebellion are transmitted’. These skills include academic training, military education, imprisonment, membership of the political elite, and so forth (Schlichte 2009: 49). In other words, capacities built by states do, in several regards, enhance the likelihood of ANSAs forming. This

means that states face the challenge of controlling their capacity for violence in the long run. The very means to counter violent challenges thus also nourishes future formations of ANSAs. Many ANSAs mimic the symbols associated with nation-states, such as flags, a currency and national anthems, as a means to foster cohesion and acceptance. This is a logical result of the fact that ANSAs are de facto security providers and control territory and populations (Podder 2013).



States are deeply involved in the emergence and logic of armed groups.

Nevertheless, despite close relationships with state actors, these groups can still be seen as non-state actors – particularly in the legal sense – since they are not under the effective control of these entities. Indeed, they may be attractive for some government agencies precisely because of their non-state character. These actors, ranging from insurgent armies and militias to vigilantes and urban gangs, exercise some degree of control over territory and populations, and they may develop levels of organisation similar to, or even surpassing, those of statutory armies (Munive & Stepputat 2015).

It is clear that the changing political map of the Middle East calls for a new paradigm to classify and understand the changing political realities vis-à-vis ANSAs. Neither Iraq nor Syria come close to meeting Max Weber's definition of the state as an entity that commands a monopoly over the legitimate use of force within its territory. New types of entities are emerging. What we are witnessing is a simple yet profound three-stage dynamic process: (a) decline in state supply of protection, (b) increase in public demand for protection, and (c) increase in armed non-state actors' supply of protection (Mandel 2013). The end situation state is an array of armed groups that increasingly assume state-like roles – at the expense of state actors and their monopoly of violence. In other words, it is possible to identify a shift of authority from states to different ANSAs. These changes have seen the rise of proto-states such as Rojava Kurdistan (YPG) in the northeast of Syria and the Islamic State and its Caliphate in Syria and Iraq (IS).



IS and YPG are not only battling over territory, population and resources, they reflect two competing models of governance where the authority of the central state has collapsed.

Where ANSAs operate the Westphalian state system is not necessarily the rule. Under Westphalian sovereignty, rule or monopoly over the legitimate use of physical force is considered the exclusive domain of the state. The state's ability to provide for the well-being and security of its citizens is derived from its presumed social contract between those who govern and the governed. The common beliefs that central governments are the sole source of a nation's stability, and that ANSAs are major sources of global instability, have to be scrutinised on a case-by-case basis. Recent events in the Middle East only confirm this. There are now, as we will see in the following pages, diverse sources of rule or monopoly over the use of force other than the state. In addition, ANSAs enjoy a degree of legitimacy, since some of them have stepped into power vacuums and provide public services and supply public needs. International law, however, lags behind this reality, remaining state-centric.

Perhaps just as important as the monopoly over the use of force in a given territory is the relationship between ANSAs and populations in conflict settings. David Kilcullen captures this in his 'theory of competitive control'. He posits that an ANSA can be perceived by a population in a conflict area as a normative system of control and that they may come to support it. Irregular warfare will, therefore, in future involve contests between states or armed groups for support from a target population. The state or group that is able to provide that normative system will likely dominate. In irregular conflicts the armed actor that a given population perceives best able to establish a predictable, consistent, wide spectrum normative system, namely a 'set of behavioural rules correlated with a set of predictable consequences' of control, is most likely to dominate that population in its residential area (Kilcullen 2013: 126). The contested population will, in response, adopt various behaviours, from fleeing to hedging or participation.

The argument that armed non-state actors are a major source of global instability has to be scrutinised on a case-by-case basis. An ANSA can be perceived by a population in a conflict area as a normative system of control, and they may come to support it.

The theory of competitive control captures the fundamental elements of the relationship between armed actors and populations during irregular conflicts. Its main merit is that it does not treat war as a simple, linear, and uniform phenomenon, but allows for a more sophisticated and dynamic understanding of it as an aggregate of multiple conflicts of different natures.

TABLE 1: KEY INSIGHTS

- ANSAs increasingly set the agenda, challenging governments, overthrowing them or prompting them to retrench behind repressive controls.
- These changes in the international setting call for major analytical shifts and significant deviations from standard responses. There is a need for increased engagement and dialogue with ANSAs to increase respect for IHL and to some extent IHRL among such actors.
- Long-standing armed conflicts between states and ANSAs have been recast as domestic wars on terror, throwing principles of international law that govern the use of violence into disarray.

INTERNATIONAL LAW, COUNTER-TERROR MEASURES AND ARMED NON-STATE ACTORS

The reluctance of international law-makers (i.e. states) to address non-state actors of all types –ANSAs, corporations, NGOs etc. – is rooted in the Westphalian system. As the 16th century legal scholar Emmerich de Vattel famously stated, 'A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.' Yet in the arithmetic of international law, even the most giant ANSA has traditionally been denied membership in the exclusive country club.

While IHL does not prohibit an ANSA from attacking enemy military targets, this same internationally lawful behaviour would nonetheless be sanctioned under common definitions of terrorism.

Over the past several years, however, IHL, and to a lesser extent IHRL, have increasingly regulated the behaviour of ANSAs towards the protection of civilians. At the same time counter-terror measures – often in the name of protecting civilians – have increasingly targeted ANSA conduct, as well as the extent to which other actors (such as states, international organisations, military alliances, conflict mediators and humanitarian organisations) may interact with ANSAs. Yet there is a fundamental contradiction between these regulatory regimes. While IHL does not

prohibit an ANSA from attacking enemy military targets, this same internationally lawful behaviour would, nonetheless, not be approved under common definitions of terrorism.

Take one example of a type that has filled countless post-9/11 newspaper pages: a rebel fighter – let's call her Matilda – detonates a remote-controlled IED (Improvised Explosive Device) under a Humvee transporting soldiers of an opposing multilateral intervention force. The vehicle is destroyed, some soldiers maimed and others killed. Let's assume in this case that our rebel fighter had been trained in IHL compliance by a humanitarian organisation. She had done her homework to determine that the blast radius of her explosives was sufficiently contained to ensure no collateral damage, and she was in radio contact with her colleagues along the route to ensure there was no unexpected civilian presence right up to the moment of detonation. This act, which would be lawful according to IHL, could fall foul of international and national counter-terror provisions. Mathilde could be prosecuted as a terrorist. Her rebel organisation could be 'terror-listed', which in turn could trigger other consequences: for example a state being prevented from providing non-lethal aid to her organisation when the tables turn and their interests align; a conflict resolution team rendered unable to take advantage of a window of opportunity to prepare the rebels for peace negotiations; and that same humanitarian organisation also being unable to train Mathilde's younger brother when he too joins the rebel movement on his 18th birthday, and leave him wondering why he should respect civilians when he is going to be labelled a terrorist no matter what he does.

The contradiction is not surprising when one looks to the philosophical underpinnings of the two regimes. The essential component of IHL is that following its rules does not prevent victory on the battlefield for any party, be they state or non-state. It is not concerned with good guys and bad guys. On the other hand, the counter-terror regime does choose sides. In the words of a member of the UN Global Counter-Terrorist Strategy Task Force, '[t]he starting point of counter-terrorist strategy is... doing everything we can to weaken the capacity of extremist groups to cause harm.' (Veness 2009: 2–3). In this paradigm, states are the good guys, and non-state actors opposing them are bad guys.

The essential component of IHL is that following its rules does not prevent victory on the battlefield for any party, be they state or non-state. It is not concerned with good guys and bad guys. On the other hand, the counter-terror regime does choose sides.

That said, IHL and counter-terror regimes overlap somewhat in that they prohibit acts that are intentionally harmful to civilians. These may be labelled war crimes or terrorist acts. Central to the contradiction, however, is the extent to which counter-terror regulations continue to apply to otherwise internationally lawful acts of ANSAs during situations of armed conflict, such as Matilda's attack on a military target. While some CTM arguably do not apply to the acts of ANSAs during situations of armed conflict, there is no overall consistency in this regard. Determining an effective interoperability between these two regimes in situations of armed conflict can have strategic implications for those trying to influence the behaviour of ANSAs to improve the protection of civilians, as well as for stability efforts to support ANSAs in pursuit of common interests.

INTERNATIONAL HUMANITARIAN LAW

IHL seeks, for humanitarian reasons, to limit the effects of armed conflict, but not to stop it. It regulates the conduct of hostilities by prohibiting attacks directed against civilians and civilian objects, restricting collateral damage, and limiting the means (i.e. weapons) and methods (i.e. tactics) of warfare. It also protects persons who do not, or who no longer, participate in hostilities, by requiring their humane treatment and ensuring their basic needs are met.

IHL was traditionally conceived for wars between states. Although almost every armed conflict today involves at least one ANSA, the Westphalian underpinnings of international law resulted in a slow transition towards ANSA regulation. Insurgency, it was believed, was best dealt with through criminalisation in domestic law. The 1949 Geneva Conventions were the first international treaties to place obligations on ANSAs – in fact any non-state actors – albeit applying only a fraction of IHL relating to humane treatment and care for the sick and wounded.⁴ Article 3 common to the Geneva Conventions is a 'convention in miniature', applicable to non-international armed conflicts (NIAC), or in other words, conflicts between ANSAs

and states and/or other ANSAs. In spite of the limited scope, it is not surprising that due to its application to non-state actors, its negotiation was among the most contentious at the 1949 Geneva Conference (Gutteridge 1949: 300).

The 1954 convention protecting cultural property was applied to ANSAs, but it was not until 1977 that IHL began to regulate the conduct of hostilities in NIAC by means of Additional Protocol II to the Geneva Conventions. Yet, with only 28 articles compared to the 102 articles of its companion Protocol I governing conflicts between states, known as 'international armed conflict' (IAC), NIAC remained underregulated.⁵

For many this was unsatisfactory. The Yugoslav Tribunal famously stated, 'What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.' (ICTY, Prosecutor v. Tadić 1995: § 119). This plea spurred on the development of customary international law – a source of international law that has the same force as treaty law and is based on the practice of states – towards greater regulation in NIAC. In 2005 the ICRC published a study where it found that up to 141 out of 161 customary rules of IHL apply to both NIAC and IAC, and therefore create legal obligations for ANSAs. Although the content of the ICRC study has been contested on other grounds by some states, (Bellinger and Haynes 2007: 448), it nevertheless indicates a revolution in the approach to the laws of war since the time of de Vattel.

One remaining difference is that the threshold of armed conflict is higher for NIACs than for IACs. In the latter case, IHL applies at the start of hostilities; in the former, it only applies when the ANSA is sufficiently organised and engaged in protracted violence of a sufficient intensity, thereby qualifying as an 'armed group' under IHL. Additional Protocol II requires an even higher threshold, involving territorial control. Another crucial difference is that prisoner of war status does not exist in NIAC. States remain unwilling to grant combatant immunity under domestic law to non-state fighters. This has serious implications for the incentives for ANSAs to respect IHL, if they are just going to be treated as domestic criminals upon capture no matter how compliant their behaviour.

There are three underlying aspects of IHL that are particularly relevant to understanding its inter-operability with counter-terrorism regulation:

i) Balance between military necessity and humanity

IHL is a fallback set of rules which apply when other forms of regulation have broken down. It would be absurd to expect a party to conflict to observe rules that would deprive it of the possibility of victory. Therefore IHL is built on an uncomfortable balance between military necessity and preservation of humanity, wherein '[e]very one of its rules constitutes a dialectical compromise between these two opposing forces.' (Schmitt 2010: 798). The protection of civilians is not absolute, but is subsidiary to the compromise.

ii) Separation of the rules of war from the justifications for waging war

At times in the past, whichever party was deemed just in its cause could use whatever means at its disposal to gain victory. Yet in the words of one commentator, 'history shows that the more the belligerents insist on the sanctity of their reasons for resorting to armed force, the more those same reasons are used to justify the worst excesses.' (Bugnion 2003: 5). Modern international law draws a clear distinction between *jus in bello* (the rules governing conduct in war) and *jus ad bellum* (the justification for war). IHL is only concerned with the former, meaning that it applies without regard to labels such as 'liberation movement/force', 'aggressor', 'terrorist organisation' or 'terrorist state'.⁶ Justness of cause, such as humanitarian intervention, or necessity to overcome a barbaric adversary, can never be used to circumvent IHL. While an insurgency will by its nature be contrary to the domestic law of the concerned state, it cannot by its nature be contrary to IHL.

iii) Equal treatment of ANSAs and states

The principle of equality of belligerents underlies the modern law of war (Meyrowitz 1970: 400). It dictates that all parties to conflict are equal in their rights and obligations. Yet equality is not so clear-cut in conflicts pitting states against ANSAs, as ANSAs are not equal to states in the Westphalian scheme of things. In NIAC it may be more relevant to consider whether the law results in prejudicial treatment of either state or non-state parties. Prejudicial treatment can be explicit. For example, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts allows for the voluntary recruitment of persons above 16 years of age by states, but only 18 years of age by ANSAs.⁷ If the law governing armed conflict were to further develop in such a direction, it would likely have a negative impact on the protection of civilians. The more prejudicial the treatment, the less likely are ANSAs to comply (Decrey-Warner, Somer & Bongard 2012: 83).

INTERNATIONAL HUMAN RIGHTS LAW

IHRL creates a vertical relationship between duty-bearers (traditionally states) and rights-holders (persons under their jurisdiction). The scope of human rights is much broader than that of IHL, addressing a wide array of civil, political, social, cultural and economic rights. It is now generally accepted that human rights obligations continue during armed conflict, although it is not always clear how they coexist with IHL.

The prospect of a duty on ANSAs to protect and fulfil human rights – so-called ‘positive obligations’ – is particularly sensitive as it goes to the heart of the sovereign domain of the state, which is to provide law and order, and services.

The human rights framework entails responsibility to respect, protect and fulfil rights. A controversial matter is the extent to which IHRL places obligations on ANSAs (Bellal, Giacca & Casey-Maslen 2011: 64). The prospect of a duty on ANSAs to protect and fulfil human rights – so-called positive obligations – is particularly sensitive as it goes to the heart of the sovereign domain of the state, which is to provide law and order, and services. Opponents to the application of positive obligations on ANSAs contend that recognising such obligations would undermine the authority of the state (including its monopoly on violence) and aid ANSAs to consolidate their control over territory, providing justification for ANSA governance. Others counter that focus should be on the rights-holders rather than the duty-bearer, so if ANSAs are the de facto authority, then they are the ones who must ensure those rights.

FURTHER LEGAL CHALLENGES WHEN ANSA'S CONTROL TERRITORY

If the state is not in a position to protect and fulfil the rights of its citizens in places like Raqqa (IS) and Rojava (YPG), where does the responsibility lie? In international conflicts an occupying state is granted authority under IHL to administer the territory it occupies, but must do so within stringent boundaries.⁸ If IS and PYD/YPG were occupying states (rather than ANSAs), IHL would require them to provide security, order and services, while restricting their ability to impose changes in daily life of citizens. But international law does not currently have an answer for regulating ANSA governance (Giacca 2014: 241). The result is a legal gap in responsibility for the protection and fulfilment of human rights.

IHL of NIAC does contain a few positive obligations that are applicable to ANSAs, such as ensuring education and healthcare. There is therefore greater legal justification for building ANSA capacity in these sectors than other sectors which are exclusively in the domain of human rights.

COUNTER-TERROR MEASURES

The complex web of international counter-terrorism regulation includes 14 international treaties, regional measures, and a series of UN Security Council resolutions.⁹ International efforts to comprehensively define terrorism have been underway without success since the 1920s (Saul 2005: 58). In the immediate aftermath of the September 11 attacks, lack of definition did not seem to be a problem for some states, as the UK representative to the UN stated, 'What looks, smells, and kills like terrorism is terrorism' (UNGA 2001: 18). Today, a loose consensus has been achieved on the core definition of terrorism as acts that either cause death or injury to persons, or damage to property, combined with a specific intent to intimidate a population, compel a government or international organisation, or (in the case of the European Union), seriously destabilise or destroy the fundamental structures of a country or international organisation (EU Council Framework Decision 2002/475/JHA).

Yet the devil is in the exceptions. Some instruments contain exceptions for acts committed against military personnel or objects – either in the definition of the prohibited act itself or through clauses that generally exclude actions of parties to armed conflicts or national liberation movements – while others do not (O'Donnell 2006: 865–6). Even for those that include exception clauses, there is no consensus as to whether the exclusion of actions by 'armed forces' only refers to state forces or includes ANSAs (Walter 2004: 39; Duffy 2015: 35–6). In fact disagreement over such an exception is the primary reason why negotiations on a comprehensive terrorism convention have been deadlocked for close to ten years. The Danish judiciary has weighed in, with the Supreme Court ruling that 'armed forces' only refers to state armed forces, although this decision has been criticised (Kessing 2009: 156). Some instruments, including the EU framework regulation, also include exceptions for 'armed forces of a state' in the exercise of their official functions. This means that according to some interpretations state armed forces are exempt from committing acts of terror while non-state armed forces are not.

National and regional terror-listing regimes work to impose sanctions on and limit interaction with listed entities. Many states have implemented such regimes as part of their Chapter VII obligation under UNSC Resolution 1373, whereas separate regimes may exist for the Al-Qaida network and the Taliban in order to implement UNSC Resolution 1267. It may be prohibited for anyone to provide material support, or make resources available for the benefit of listed entities.

A look at a Wikipedia chart – which does not purport to be accurate but is at least indicative – shows that out of approximately 100 organisations that are terror-listed by at least one of 18 states, not one of them is listed by all.

Listing regimes are inconsistent in the way they deal with armed conflict-related exceptions. For example, the EU – contrary to its common definition of terrorism – does not include an armed conflict exception in its definition for the EU terror-listing regime.¹⁰ A recent EU court judgment ruled that the EU terror-listing regime ‘is applicable to terrorist acts, which still constitute unlawful acts of war when committed within the context of armed conflicts.’ (EU 2014, LTTE v. CEU 2014: § 80).¹¹ The US takes a schizophrenic approach. Listing for the purpose of prohibiting material support can be based on two different definitions of terrorism, one which only covers acts committed against ‘non-combatant targets,’ the other with no exceptions.¹² Restrictions on interactions with terror-listed organisations generally do not require intent to further the terrorist act. The US Supreme Court, in the landmark *Holder v. Humanitarian Law Project* case, has ruled that training a listed entity in using IHL and international law to peacefully resolve disputes is prohibited under the US material support law. Under UK law, it is prohibited to attend a place where training in weapons use for terror purposes takes place, regardless of the intentions for being at such place, e.g. to engage such an organisation in IHL compliance (GOV/UK 2006: Art. 8). Finally, terror-listing is extremely inconsistent across states. A look at a Wikipedia chart – which does not purport to be accurate but is at least indicative – shows that out of approximately 100 organisations that are terror-listed by at least one of 18 states, not one of them is listed by all.

Interoperability of IHL, IHRL and CTM

As has been shown, in situations of armed conflict IHL, IHRL and CTM are all aimed at protecting civilians. However, they take radically different approaches. IHL has (almost) transcended the Westphalian order, while counter-terror measures serve it.

By the nature of their armed actions, warring parties, ANSAs as well as states, aim to injure or kill (enemy fighters), and destroy property (military objectives), all with the intent of compelling a government, and/or destabilising or destroying the structures of a country. This is the essence of armed conflict. As we have seen, it is also the very definition of a terrorist act.

BOX 1. PROTECTION OF CIVILIANS: DIFFERENT STROKES FOR DIFFERENT FOLKS

The term 'protection of civilians' is laced with confusion. It is used in fundamentally different ways by humanitarian, UN, state, peacekeeping, legal and other actors.

- Under IHL an armed conflict must exist before the notion of 'civilians' has any relevance, and in fact IHL affords the most restricted definition to the term. It refers to protection from attack for civilians and civilian objects, and humane treatment/provision of basic needs for persons not participating in hostilities. In this context it is limited to the *jus in bello*, and therefore does not address the protection of civilians as a justification for resort to the use of force, nor does it favour any party to the conflict, state or non-state. Each party to a conflict has the obligation to protect civilians.
- Other actors consider the protection of civilians to also be part of the *jus ad bellum*, meaning the definition contemplates the direct use of force by third parties when serious IHL and human rights violations are underway or may occur. The UN Department of Peacekeeping Operations (UNDPKO) recognises 'protection of civilians' to consist of humanitarian and military functions, and the UNSC has also used the term in Chapter VII resolutions to determine the extent to which the use of force may be used, e.g. Resolution 1973 authorises member states 'to take all necessary measures to protect civilians and civilian populated areas under threat of attack...' Protection of civilians also has a broad meaning under the concept of Responsibility to Protect, where it envisions the use of force as a last resort under a Security Council mandate.


In Libya, there have been allegations that the protection of civilians was used to effect regime change, with some arguing that regime change was the only way to protect civilians. This controversy has put the validity of using force to protect civilians into question.

For the purposes of this report, Protection of Civilians is restricted to the first definition.

Under IHL, civilian protection is based on the notion of ‘if you’re gonna fight, fight fair’, while CTM aim to protect civilians by preventing certain parties from fighting altogether. The ICRC has stated, ‘there appears to be a need for greater awareness by states of the necessity to harmonize their policies and legal obligations in the humanitarian and anti-terrorism realms in order to properly achieve the desired aims in both.’ (ICRC 2011: 53). These legal regimes can complement each other towards maximising the protection of civilians from ANSA harm if used strategically. The question becomes how to do so, under the premise that if CTM were fully effective, there would be no need for IHL as there would be no terrorist groups capable of engaging in armed conflict.

Under IHL, civilian protection is based on the notion of ‘if you’re gonna fight, fight fair’, while CTM aim to protect civilians by preventing certain parties from fighting altogether.

There is no indication that ANSAs are less likely than states to comply with IHL (Bangerter 2011: 356). Some ANSAs will be more susceptible to external influence than others (Jo 2015: 56). However, chronic non-compliers can be used to leverage those ANSAs who are more susceptible to external influences. In effect, drawing a line in the sand at IHL compliance and forcing them to choose whether they stand with the ‘terrorists’ or not can motivate many ANSAs towards compliance. As an ANSA representative explained to one of the authors, ‘IHL used to be in the museum. Now we need it to show we are not terrorists.’ We suggest a three-pronged strategy towards this aim: a) exclude acts that are not prohibited by IHL from counter-terror regulation; b) combine the stick of CTM with incentives to respect IHL and, where appropriate, IHRL; and c) encourage ownership of IHL by ANSAs. IHRL remains a wildcard in the mix. As the utility of imposing positive IHRL obligations on ANSAs in particular remains controversial, more caution should be used in promoting ANSA compliance with this body of law. See the recommendation box of this report for an elaboration of the proposed strategy.



As an ANSA representative explained to one of the authors, 'IHL used to be in the museum. Now we need it to show we are not terrorists'.

Underlying this strategy is the need to also question the extent to which the international law regulating NIAC and ANSA behaviour is fit for purpose (Sivakumaran 2011: 237). A law that was originally designed for conflicts between sovereign states will, inevitably, not make perfect sense for conflicts involving non-state actors. More thought needs to be devoted to customising the law of NIAC to better suit the reality it governs. The question of the relevance of IHRL for regulating ANSA behaviour, particularly when they control territory, also needs addressing.

CASE STUDIES

This section looks more closely at two prominent ANSAs: PKK/YPG and Islamic State (IS). It analyses the interoperability between IHL and Counter-Terrorism Measures (CTM) vis-à-vis these armed groups. It considers the relative importance of IHL compliance/protection of civilians compared to broader considerations such as ANSA legitimacy. IS was chosen as it represents an 'extremist,' non-compliant, ANSA that is at this moment in time not receptive to external engagement. PKK/YPG was chosen as an ANSA that has an interest in distinguishing itself from IS. We argue that the desire of PKK/YPG to distinguish itself from IS provides an incentive to demonstrate commitment to and compliance with IHL and human rights norms. However, if the interplay with CTM is not managed strategically, the opportunity to exploit these incentives towards improved civilian protection will be compromised.

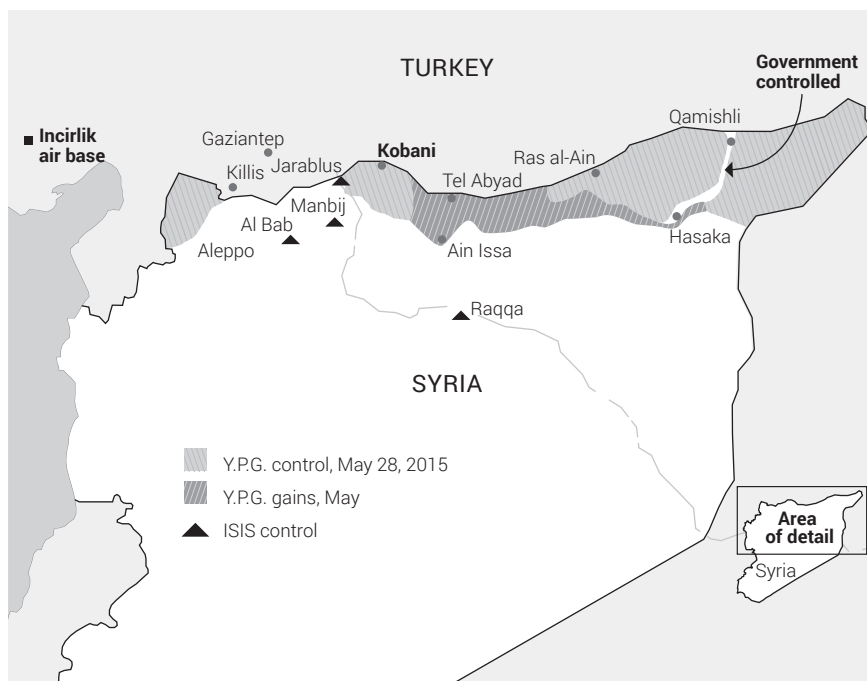
YPG/PKK: SECULAR AND ETHNO-NATIONALIST

The People's Protection Units (Yekîneyên Parastina Gel, YPG) is the military wing of the Democratic Union Party (Partiya Yekîtiya Demokrat, PYD). This armed force has consolidated control over large portions of northern Syria, after the Syrian regime partially withdrew its military from Kurdish areas in July 2011. The regime, however, kept governmental services under its charge: paying salaries to state employees in schools and health centres (ICG 2014). In this sense this ANSA accommodated the Syrian state in limited ways for instrumental purposes. It confirms the previous remarks that states are deeply embedded in the logics of ANSAs, making a clear-cut distinction difficult. In this case, the level of success of the PYD and its militia attained was due to a tacit deal with the Syrian state. The YPG was established in 2012 and it is the dominant armed Kurdish actor in Syria.

The level of success of the PYD and its militia was attained due to a tacit deal with the Syrian state.

The PYD describes itself as a social democratic, secular and cross-communal movement; no longer Kurdish nationalist in orientation but instead favouring the decentralisation of Syria.¹³ The PYD however has made clear that it does not seek to establish an independent state. The YPG dominates three large, non-contiguous, enclaves of Kurdish majority territory along the Turkish border which it has proclaimed a de facto autonomous region called Rojava. These are: Jazira, Afrin, and Kobane (see map). The territory it now controls is the size of Qatar and Kuwait together. Each canton in Rojava therefore has its own constitution, government, education system, social services, parliament, courts, laws and municipalities, as well as its own Asayish (police), People's Protection Units (YPG) and Women's Defence Forces (YPJ). The YPG is the dominant authority on the ground and has now about 40,000 fighters. It sustains a persistent recruitment and training of new soldiers in newly opened military academies.¹⁴

YPG territorial gains



The PYD is an offshoot of the Turkish insurgent group Kurdistan Workers' Party (PKK). The PKK was based in Syria from the 1980s to the late 90s as the Syrian government used the insurgency as a proxy to wage war on Turkey – its regional competitor. However, in 1998 Syria recognised the PKK as a terrorist organisation and expelled its leader Abdullah Ocalan. In October 2003 the PKK in effect reincarnated its Syria branch: the Democratic Union Party (Partiya Yekîtiya Demokrat) PYD. The PYD draws heavily on PKK ideologically, organisationally and militarily. According to one analysis, the newly reformed PKK affiliate played 'the central role' (Tejel 2009: 123) in the Qamishli riots of March 2004, arguably the formative event for the sudden current Syrian Kurdish activism. So close are the ties between the PKK and YPG that one study estimates between 7–10,000 Syrian Kurds have been killed in armed actions between the Turkish army and the PKK (Montgomery 2005: 134). Another study found that 20% of the PKK's troops stationed at its main base in the Qandil mountains came from Syria (Brandon 2007).

Although the PYD denies any organic links to the PKK, the connection is illustrated institutionally by the PYD being one of the constituent members of the Kurdistan Communities Union (KCK). The KCK is an umbrella organisation created by the PKK to unite the PKK with a host of other Kurdish organisations in Turkey, Iran, Iraq and across Europe. The International Crisis Group speaks of PKK and YPG as 'twins' (ICG 2014: 1). In legal terms the difference matters. The US added the PKK to its foreign terrorist organisation list in 1997 and the EU added it to its list in 2002 (see table).

TABLE 2: APPLICATION OF IHL AND CTM TO PKK AND PYD/YPG		
ANSA	Armed Conflicts	Terror-listing
PKK	<ul style="list-style-type: none"> ■ Turkey (NIAC) ■ IS (NIAC) ■ Syria (possible NIAC) 	<ul style="list-style-type: none"> ■ US (Foreign Terrorist Organisation) ■ EU (autonomous list) ■ Many other states
PYD/YPG	<ul style="list-style-type: none"> ■ IS (NIAC) ■ Syria (possible NIAC) ■ Jabhat al Nusra and other Islamic ANSAs (possible NIAC) 	<ul style="list-style-type: none"> ■ Turkey considers YPG 'equal to the PKK', calling it 'a terrorist organisation' ■ US considers YPG 'a different group than the PKK legally' ■ No specific country listings identified

Western diplomats meet with PYD leaders without formally recognising the group. After the US began giving indirect military support to the YPG, a US spokesperson said, 'the PYD is a different group than the PKK legally, under US law'.¹⁵ In February 2015 French President François Hollande received a PYD official in Paris, while EU diplomats met with PYD leader Salih Muslim. In March 2015 the UK Foreign and Commonwealth Office declared, 'it will be very difficult to provide any support to the PYD while they maintain links to the Assad regime and refuse to cooperate fully with the moderate Syrian opposition. We are also concerned that the PYD maintains some links with the PKK'.¹⁶

The YPG refuses to acknowledge any relation to the PKK. They consider their international image a critical component of their struggle. However, the fluidity of fighters between these forces is an open secret along many front lines in Iraq and Syria.

To this one must add that the YPG refuses to acknowledge any relation to the PKK. Some sources interviewed by the authors in Erbil stated clearly that the YPG did not coordinate with the PKK.¹⁷ More recently and in light of the renewed engagement by Turkey against the PKK, the YPG was clear that it was not part of the events and clashes inside the Turkish border, accusing the Turkish military of targeting their units inside Syria.¹⁸ However other military sources from the KRG Peshmerga, on the condition of anonymity, point to the clear fluidity of fighters between YPG and PKK. A high-ranking commander in the city of Makhmour put it like this: 'you have a situation where you have PKK combatants who are called "terrorists" if they are based in Turkey, Iran, or here in Iraq, but once they cross the border to Syria to engage the IS, they are a worthy ally for the coalition'.¹⁹

'You have a situation where you have PKK combatants who are called "terrorists" if they are based on Turkey, Iran, or here in Iraq but once they cross the border to Syria to engage the IS, they are a worthy ally for the coalition.'

BOX 2. DOCTRINE

Doctrine has been defined both as 'a set of beliefs' and 'that which is taught'. ANSA doctrine is expressed inter alia through constitutions, codes of conduct, military orders, and programmes of action. Some ANSAs have well-defined and disseminated doctrine, while others do not. Understanding the set of beliefs which are taught by ANSAs, including the extent to which they exist, the means of dissemination and the surrounding context, is important for engagement actors and others trying to influence ANSA behaviour.²⁰ Yet doctrine should not be mistaken for practice. The ultimate judge is what ANSAs do rather than what they say they do.

The report analyses the case study ANSA's doctrine with particular focus on the protection of civilians. It will determine the consistency of doctrine with IHL and, for those who control territory, IHRL. The analysis will note when ANSA standards surpass or fall short of international standards. While analysing the actual practice of the case study ANSA is beyond the scope of this report, a brief summary is provided.

YPG doctrine and its consistency with international standards

The YPG internal rules do not address IHL-related issues. The list of 'war crimes' includes cruelty and violence outside the concept of 'legitimate protection', but this term is not defined (the term is often used by PKK to relate to IHL-type standards). YPG reports that its General Command has adopted the Geneva Conventions and related protocols. The Rojava administration, under the control of YPG, has also issued a 'constitution' that contains guarantees of a wide array of human rights and has incorporated international human rights treaties. PYD/YPG is signatory to the Geneva Call Deed of Commitment on children and armed conflict, the anti-personnel landmine ban, and sexual violence/gender discrimination.

Compliant

- Sexual violence is not permitted
- Use of children under 16 in hostilities is not permitted
- Ban on internationally prohibited weapons

Beyond Compliant

- Anti-personnel landmines are prohibited
- Bans use of death penalty

Practice: PYD and its armed elements have been accused of arbitrary arrests, abuse in detention and due process violations. Human Rights Watch reports that PYD prisons conform with international standards, but prisoner abuse allegations have been levelled against the Asayish, the PYD-affiliated security forces (HRW 2007). The latest report of the Syria Commission of Inquiry does not implicate PYD/YPG in abuses beyond systematic child use and recruitment.

PYD/YPG response: PYD accepts that the Rojava administration has difficulty in living up to all human rights standards due to both the newness of the administration and to the extraordinary situation of the IS conflict. Nevertheless, it invites investigations and pledges to cooperate in efforts to improve human rights standards. PYD admits that some mistakes have been made, but that they are not systematic, and that implementation of child protection standards in the IS conflict is extremely challenging. YPG admits to some child recruitment in violation of its internal provisions, and notes that it has penalised seven of its officials for underage recruitment. Asayish admits to some prisoner abuse, and reports that five members have been sentenced to between four–six months in prison and have been dismissed from the forces.

The Syrian Kurds are the real novelty of the Syrian civil war. The YPG has proved to be the only force capable of real success on the ground against IS, at least when provided with close air support from the United States. The PYD, through its armed wing the YPG, have established themselves as a political and military force to be reckoned with in any future political agreement around Syria.

ISLAMIC STATE: JUST 'ANOTHER' ARMED ACTOR?

The group calling itself Islamic State (IS) appeared massively in the Western media when it took control of the Iraqi city of Mosul. However it has been present in Iraq for a more than a decade. A militant Sunni Muslim extremist group, it emerged from the ashes of Al-Qaeda in Iraq (AQI) under the name Islamic State of Iraq (ISI) following the death of AQI's former leader Abu Musab al-Zarqawi in a US airstrike in 2006. In 2013 ISI announced that it had merged with the Islamist group Jabhat al-Nusra in Syria to form Islamic State in Iraq and the Levant (ISIL/ISIS). Although Jabhat al-Nusra has never publicly stated its allegiance to IS, and although its ideological ally al-Qaeda even severed ties with it, Jabhat al-Nusra and IS have moved closer together in an effort to strengthen their military capabilities in the face of the air campaign by the United States and its allies that began in June 2014. IS has

exploited Iraq's sectarian divisions and poor governance to mobilise domestic support, and has used sophisticated media techniques to attract a global following and encourage young Muslim men and women to join its ranks.

It is difficult to say how much genuine popular support IS enjoys among the civilian population, especially in Iraq; while some Sunnis welcomed its rise as a counter to the Shia-led government in Baghdad, media reports from inside Mosul appear to show growing resentment towards the group and its methods. IS did not suddenly emerge unheralded from underground, but rather were the product of the state collapse and civil strife that followed the 2003 Iraq war and the 2011 Syrian conflict.

The expansion of IS can be explained by their harsh justice and rigid security apparatus that helped bring a sense of order, especially to areas in Syria that have known little but the chaos of war and competing factions for the past four years (Al-Tamimi 2015). The strategy was the same as in Iraq: setting up an Islamic Court in the city, and eventually establishing complete control through assassinations of rivals, seizure of weapons caches and a tremendous effort at reaching out to locals (ibid).

The United Nations estimates that 3.6 million people are living under IS in Iraq (UN/OCHA 2015). Other estimates are higher, between 6 and 8 million for both Iraq and Syria (Barrett 2014). The true figure is not known since the frontlines are continuously shifting. Violations of human rights and international humanitarian law by all parties and against civilians of all ethnic and religious backgrounds continue to be committed. While the presence of IS is a major reason for lack of access, general insecurity had already meant that large swathes of Iraq and Syria had already been off limits to international aid workers and organisations for several years. Fear of falling foul of counter-terrorism legislation in the United States and Europe is also keeping international organisations out of territory deemed to be under the control of IS or other Jihadist organisations (like the Nusra Front). Yet despite the perception that IS areas are no-go zones for direct delivery, some international support is getting through via UN agencies, and other international organisations are working with local partners to deliver humanitarian aid to vulnerable populations (Svoboda & Redvers 2014). However, images shown on IS media show IS members distributing UN food aid with the group's logo on top and taking credit for the food aid.²¹ Again, a well-documented action by armed actors: see, for instance, the example of the Sudan's Peoples Liberation Army and the humanitarian Operation Lifeline Sudan.

IS also possesses a sophisticated military apparatus to bolster its ideological and political statebuilding components. Analyses of IS's known internal organisation have said that IS's military is not so dissimilar from an actual state army (Lister & Rashid 2015). In the battlefield, units rotate between 'active frontline duty, days off in "liberated" areas, and other deployments "on base" ' (ibid). Moreover, much like some states, it has enforced drafting. IS is thought to have anywhere from 10,000 to 100,000 fighters according to the International Center for the Study of Radicalization (Neumann 2015). Low economic prospects for young men, coupled with an effective communications system, are likely to increase the mobilisation of men and women into the rank and file of IS in the short-term (Lister & Rashid 2015).

It is difficult to say how much legitimacy and genuine popular support IS enjoys. IS resembles other armed actors in other contexts and is a prominent example of 'rebel governance': it controls populations and territory, and provides services. Knowledge of these other contexts can inform improved policy responses.

Most of its core leadership, many of whom are ex Ba'athists, have been involved in clandestine and violent opposition to the Iraqi state since 2003. Several were held at various times in US-run detention camps, and some escaped from Iraqi prisons during the 'Breaking the Walls' campaign of the predecessor group, The Islamic State of Iraq, from July 2012 to July 2013. Their combined knowledge and experience have made IS first and foremost a fighting force, but, at least in its main urban centres, IS has also attempted to consolidate its territorial gains by developing an administrative capacity. This has meant that as well as attracting fighters to its ranks, it has also set out to build a cadre of civilian technocrats. It is in this area that the long-term weaknesses of IS are most evident. Unless it can maintain existing public infrastructure and meet demands for food, water, healthcare, sanitation and energy, and build and sustain a functioning economy, it will not survive (Barrett 2014).

IS appears to have set up an administration that is a very sophisticated form of rebel governance; as far as rebel groups go, one that is capable of enduring for years unless subjected to direct military attack. At the same time, it is difficult to see how this bureaucracy can develop much further in Iraq and Syria given the many pressures and constraints on its resources and communications. There is some

potential for bureaucratic development in IS's provinces outside of Iraq and Syria, but challenges remain there too. At the moment, then, it would seem that IS bureaucracy is enduring but not expanding.

TABLE 3: APPLICATION OF IHL AND CTM TO IS		
ANSA	Armed Conflicts	Terror-listing
IS	<ul style="list-style-type: none"> ■ PKK (NIAC) ■ YPG (NIAC) ■ International Coalition forces (NIAC) ■ Syria (NIAC) 	<ul style="list-style-type: none"> ■ US (Foreign Terrorist Organisation) ■ EU (1267 list as al-Qaida affiliate) ■ Many other states

IS's doctrine and its consistency with international standards

IS claims to follow Islamic laws of armed conflict.²² Courts exist to deal with military discipline and grievances against IS fighters. The Caliph is required to ensure respect for the laws of war which ‘Allah has made obligatory and the limits he has set’ (March & Revkin 2015). In terms of human rights, there are different rights and obligations for Muslims and non-Muslims. Many laws are discriminatory and fall foul of human rights, but in some cases, such as prohibition on using poison to kill fish meant for human consumption, they protect human rights.

Non-compliant

- Yazidi civilians, who are considered polytheist, are given an ultimatum to repent or face the sword.
- Enemy fighters may be tortured and mutilated under certain conditions.
- Non-Muslim hostages may be held for ransom.
- War booty may be taken, but only as necessary to advance the objectives of jihad (this would be compliant in terms of enemy military equipment, but not if it refers to civilian property).
- Sexual slavery is permitted under certain conditions, but mothers may not be separated from young children.

Practice: IS deliberately terrorises civilian populations, and commits a vast range of gross violations of IHL and human rights. It is difficult to assess the extent to which IS practice follows its own doctrine, but many IS fighters have been punished by IS courts following complaints by civilians. Some judges have been dismissed for censoring acts that amount to IHL violations.

The UN has expressed outrage about the recruitment and use of children by IS and about the Iraqis and other nationals who have been 'killed, kidnapped, raped or tortured' by IS. It emphasised in the statement the need for accountability of those responsible for violations of international humanitarian law or human rights abuses in Iraq. The statement welcomed efforts by the government to combat terrorism against all Iraqis, 'including against ethnic and religious minorities, notably Yezidis and Christians, and women from all communities who have been particularly targeted by ISIL'. The Security Council has been at the forefront, urging international support for Iraq's fight against ISIS and related groups and the need to hold accountable those responsible for crimes against humanity. Perhaps more importantly the Security Council recognises IS as an armed group (beyond the terrorist label) party to a conflict, and has demanded that they adhere to international humanitarian law, including with regard to protecting civilians (UN 2014, S/PRST/2014/20).

Going beyond the terrorist label and recognising IS as an 'ordinary' armed group will be necessary to the future of humanitarian and development work in Iraq and Syria. In the words of a Kurdish Peshmerga commander at the frontline of Kirkuk: 'It is an open secret, but this is a war with no end. We can fight them back, but the problem will still be there'. The policy challenge is therefore not to seek the destruction of IS so much as to promote its transformation – an idea that is winning followers in international circles.²³

The argument here is that IS poses a serious threat, but at some point in time the military track should be complemented with diplomacy and humanitarian engagement. Recent peace talks with the Taliban in Pakistan emphasise this. A few years ago engaging with the Taliban would have been unthinkable. Recently The ICRC developed a new training programme for Hamas fighters to discuss how the Geneva conventions governing armed conflict dovetail with Islamic principles. Engagement with IS presents numerous challenges and obvious dangers, but a structured and informed approach to dialogue will be critical for organisations working in Iraq and Syria.

In the next and concluding section we examine what incentives might be utilised strategically in order to bring about improved compliance by ANSAs, and how the interoperability of the international humanitarian and counter-terror normative frameworks can best be exploited.

RECOMMENDATIONS

We suggest below a three-pronged strategy towards improving the operability of IHL, IHRL and CTM. Note that as the utility of imposing positive IHRL obligations on ANSAs remains controversial, more caution should be used in promoting ANSA compliance with this body of law, particularly as it may be confused with promoting ANSA state-building efforts.

■ **Exclude acts permitted by IHL from counter-terror regulation**

ANSAs involved in armed conflict should be shown a clear line in the sand, so that if they comply with IHL they will not be labelled terrorists. It is not necessary to exempt all actions in armed conflict from terror regulation. For example, a deliberate attack on a civilian market could be both a war crime and an act of terror, but an attack on a military base should be neither – although it may still be punishable under domestic law as an act of insurgency (see below).

■ **Combine the stick of CTM with incentives to respect IHL and, where appropriate, IHRL**

The line in the sand should have implications. All ANSAs, to the extent possible, should be engaged towards understanding the incentives of IHL compliance. Engagement efforts do not necessarily need to invoke international law, but rather may also appeal to the religious, ideological or other orientation of any particular ANSA. Those which make concerted efforts towards compliance should be given positive reinforcement through public acknowledgment in international processes such as commissions of inquiry and protection of civilian reports. Their internal capacities to implement IHL should be supported. Amnesties under domestic law should be encouraged, or at least lenient sentences given, to fighters who respect the law. Moreover, any development of IHL and to the extent applicable, IHRL, should be realistic and not be prejudicial towards ANSAs. On the other hand, the full force of counter-terror measures should be directed against those who choose not to comply. This distinction should be made in a transparent and fair manner based on objective criteria. To the extent that third parties choose to support ANSAs on the fulfilment of human rights standards such as security and justice in territories under their control, such support should be precluded for ANSAs who engage in terrorist acts that are not compliant with IHL and/or significantly violate IHL.

■ **Encourage ANSA ownership of IHL**

Ownership improves compliance. The Final Act of the Diplomatic Conference of Geneva (1974–1977) reveals that national liberation movements were invited to attend, because codification of IHL is a 'universal task' towards which such movements can 'contribute positively'.²⁴ In the current political climate it is not conceivable that ANSAs would be permitted to sit at the table with states. However, creative means should be encouraged to promote ownership of IHL by ANSAs. One way to do so is to have third parties collect ANSA perspectives in order to have them heard within relevant international processes. Another way is to encourage ANSAs to contribute to the normative framework by making public commitments to IHL standards and, ideally, through creating a peer network of ANSAs for IHL promotion. The international NGO Geneva Call is making strides in these directions. It has created Deeds of Commitment, which mirror international treaties but are available for ANSA signature, and it convenes a periodic meeting of signatories, similar for example, to States Parties meetings to the Convention Banning Anti-Personnel Landmines. Furthermore, it has collected ANSA perspectives on issues such as child protection in armed conflict to share with international community actors. Over 50 ANSAs are engaged by Geneva Call, including PKK and PYD/YPG.²⁵ The ICRC has just completed a two year-long consultation process with 36 ANSAs on the protection of healthcare, in order to better understand challenges and develop good practice recommendations. Such humanitarian engagement, even with terror-listed entities, must not be criminalised or prevented, but should rather be supported and encouraged.

Conclusion

IMPROVING INTEROPERABILITY OF IHL, IHRL, AND COUNTER-TERROR MEASURES

The analysis shows that as a matter of doctrine and practice IS rejects IHL, and therefore is legitimately labelled a terrorist organisation. On the other hand, PKK/YPG doctrine is for the most part IHL compliant, and in spite of some violations, so is its practice. YPG/PKK is concerned about its external reputation, and therefore has incentives to comply with IHL and thereby distance itself from being grouped together with IS as a terrorist organisation. The Syrian Kurds are keenly aware of the all-important role of the US, and would clearly like to win its support.

However, PKK (and YPG to a lesser extent) are also labelled as terrorists, for reasons that have more to do with politics than their IHL record. This has two implications. First, the incentive to comply with IHL (and take all the difficult steps to implement necessary procedure to ensure compliance) is lessened if they are just going to be labelled terrorists anyway. Second, it is more difficult for outside actors to work with PKK/YPG towards either humanitarian or political ends when they are subjectively labelled as terrorist. This represents an opportunity lost by the international community.

This finding of the report should not be lost on emerging powerful ANSAs such as Arhrar al-Sham (Free Men of Syria), arguably the largest Syrian ANSA, supported by Turkey and Qatar. Currently some observers are coming to recognise Arhrar al-Sham may be the best of less than ideal options. Some European diplomats meet with Arhrar al-Sham's political officers, however the United States has remained sceptical

and has concerns in terms of the group's relations with extremist organisations. Over the past year this ANSA has tried to present itself as a more moderate force and has reached out to Western governments to propose itself as a legitimate partner. Ahrar al-Sham cares about its external reputation. For instance the group's head of foreign and political relations published an op-ed in a US newspaper: 'We consider ourselves a mainstream Sunni Islamic group that is led by Syrians and fights for Syrians. We are fighting for justice for the Syrian people. Yet we have been falsely accused of having organisational links to al-Qaeda and of espousing al-Qaeda's ideology. Nothing could be further from the truth' and he criticises 'the misguided way that Syrian revolutionaries are labelled as either 'moderate' or 'extremist,' and his insistence that 'the term 'moderate' is...[so] narrow and arbitrary... that it excludes the bulk of the mainstream opposition'.²⁶

Therefore ANSAs like Ahrar al-Sham, PKK and YPG (to name just a few) should be given the clear and consistent message that the 'line in the sand' is IHL compliance. They would then have the choice of being a potential credible partner on the one hand, or a pariah like IS on the other. It is also the job of the international community to ensure that CTM do not fog this simple yet essential equation.

NOTES

- 1 An Iraqi ethno-religious minority.
- 2 The Kurdistan Region in Iraq is autonomous, with its own government, armed forces (the Peshmerga) and security service (Asayish) and a separate visa regime. Erbil, the capital of the Kurdistan region is an important site of Kurdish transnational politics.
- 3 For the legal definition see page 22.
- 4 The recognition of an ANSA as a belligerent, beginning with the American War of Independence, was a prior non-treaty-based means to bring the laws of war into effect. However, it has not been invoked since the 19th Century.
- 5 Additional Protocol 1 stipulates that peoples 'fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination', or what are commonly called national liberation movements, may invoke the law of IAC. However, this provision has been interpreted narrowly to mean in relation to de-colonisation, and while some ANSAs have made declarations, it has never been applied.
- 6 In NIACs – which by their nature involve ANSAs – there is no international legal framework equivalent to the United Nations Charter, which regulates the jus ad bellum of when the use of armed force may be justified in inter-state relations.
- 7 See Articles 3 and 4. The Optional Protocol is generally considered a human rights instrument rather than an IHL instrument, but it nevertheless regulates the subject matter of IHL.
- 8 The obligations and restrictions are found in the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Section III (particularly Article 43), and The Fourth Geneva Convention, Section III (particularly Article 64).
- 9 See <http://www.un.org/en/terrorism/instruments.shtml> and <http://www.un.org/en/terrorism/securitycouncil.shtml>
- 10 The Common Definition is found in European Union Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA). The listing regime is contained in European Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism.
- 11 This statement by the Court, the meaning of which depends on the placement of the comma, is incorrect as not all acts of terrorism would be unlawful acts of war (such as our example of Matilda).
- 12 18 US Code § 2339B - Providing material support or resources to designated foreign terrorist organisations, defines terrorism with reference to section 212(a)(3)(B) of the Immigration and Nationality Act (which does not contain any armed forces exception), and section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (which requires violence perpetrated against non-combatant targets).
- 13 See <http://www.kurdishinstitute.be/charter-of-the-social-contract/>
- 14 The YPG faces competition from the Iraqi-trained (KDP) Peshmerga. Syrian Kurds trained by the Iraqi Peshmerga forces are currently fighting IS in Sinjar and throughout Nineveh Province. Furthermore, the YPG rejects what it calls a proliferation of party militias. It advocates for a unified force under the central command of the YPG.
- 15 Daily State Department press briefing, 20 October 2014.
- 16 Government Response to the House of Commons Foreign Affairs Committee Report: UK Government policy on the Kurdistan Region of Iraq at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415796/48533_Cm_9029_Accessible.pdf
- 17 Interview with several Kurdish political parties, April 2015, Erbil. While the KDP aims to curb and counterbalance the PKK/PYD/YPG presence in its neighbourhood, and in this it is strongly supported by Turkey, the PUK presence in Syria is to insure PYD/YPG strategic dependence on Iran.
- 18 See <http://ypgrojava.com/en/index.php/statements/783-august-1-gen-comm-statement-about-recent-activities-of-the-turkish-military-in-rojava-and-coalition-s-attitude-towards-these-developments>.
- 19 Interview, Peshmerga Commander, April 2015, Makhmour.
- 20 All sources in this section are available on the 'In their words' database (www.intheirwords.org) unless otherwise stated.

- 21 To view some of the images see: <http://www.humanosphere.org/world-politics/2015/02/islamic-state-slaps-branding-u-n-food-aid/>
- 22 Islamic laws of war are not necessarily compatible or incompatible with IHL. Some Islamic-based ANSAs have committed to both bodies of law.
- 23 See for instance Richard Barrett in the Independent: 'We cannot destroy ISIS, so we will have to live with it' at <http://www.independent.co.uk/voices/we-cannot-destroy-isis-we-will-have-to-learn-to-live-with-it-10334244.html> Richard Barrett was head of counter-terrorism at MI6 before spending nine years as the co-ordinator of the UN's Al-Qaeda and Taliban monitoring team.
- 24 Note that the statement refers only to movements recognised by regional intergovernmental organisations. See <http://www.redcross.org/humanityinwar/final-act-of-the-diplomatic-geneva-conference-1974-1977>.
- 25 See www.genevacall.org
- 26 See https://www.washingtonpost.com/opinions/the-deadly-consequences-of-mislabeling-syrian-revolutionaries/2015/07/10/6dec139e-266e-11e5-aae2-6c4f59b050aa_story.html

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