
Advance Unedited Version

Distr.: General
5 June 2018

Original: English

Human Rights Council

Thirty-eighth session

18 June– 6 July 2018

Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on armed non-State actors: the protection of the right to life*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnes Callamard, submitted pursuant to Council resolution 35/15. The report focuses on the role of armed non-State actors (ANSAs) vis-à-vis the right to life and argues that ANSAs are bound by human rights obligations. The report first highlights the gap between, on one hand, United Nations decision-making bodies addressing ANSAs as human rights perpetrators and duty-bearers, and on the other hand, the large protection and accountability deficits for people affected by ANSAs. The Special Rapporteur argues that international human rights law (IHRL) well complements the existing international legal regime to hold ANSAs to account. She shows that the State's central role under IHRL does not exclude other actors and that the sources of ANSAs human rights obligations and legal personality may be traced to treaty and customary law. She then proposes a framework to hold ANSAs accountable under IHRL: the extent of ANSAs human rights obligations should be context-dependent, ANSA-specific and gradated, determined through a review of the nature of ANSAs control, capacity and governance.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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Contents

	<i>Page</i>
I. Introduction	3
II. Activities of the Special Rapporteur	3
III. Armed non-State actors: The protection of the right to life.....	3
A. International developments.....	4
B. Existing Limitations and Deficits	6
C. The international human rights regime and non-State actors.....	9
D. Key Implications and Moving Forward.....	12
IV. Conclusions	19
V. Recommendations	20

I. Introduction

1. The present report is submitted to the Human Rights Council in accordance with resolution 35/15. To inform its contents, the Special Rapporteur issued a call for submissions to States, academia and civil society on the topic of “non-State actors and extrajudicial, summary or arbitrary killings” to which she received several replies. The call was followed by an expert meeting held on the same topic on 15-16 June 2017 at the University of Essex and a follow-up meeting on 8 November 2017 at the Geneva Academy of International Humanitarian Law and Human Rights. The Special Rapporteur thanks both institutions for their support as well as those who submitted responses to the call for submissions.¹

II. Activities of the Special Rapporteur

2. A full overview of the main activities of the Special Rapporteur between March 2017 and February 2018 can be found in the observations on communications report (A/HRC/38/44/Add.3). Activities undertaken in preparation of her most recent thematic report on the unlawful death of refugees and migrants to the General Assembly are included therein (A/72/335). Information on earlier activities can be found in her previous report to the Human Rights Council (A/HRC/35/23).

3. The Special Rapporteur conducted official visits to the Republic of Iraq from 14-23 November 2017 (A/HRC/38/44/Add.1), and El Salvador from 25 January to 5 February 2018 (A/HRC/38/44/Add.2), at the invitation of the respective Governments. She sent requests/reminders for official visits to the Governments of Brazil, Democratic Republic of the Congo (DRC), Kenya, Libya, Nigeria, Pakistan, Syrian Arab Republic, United States of America, Venezuela and Yemen.² The Special Rapporteur thanks the Government of Mozambique for responding positively to her request for a visit and encourages the Governments of all above-mentioned States to extend an invitation for a visit in the near future.

III. Armed non-state actors: the protection of the right to life

Introduction

4. Armed non-State Actors (ANSAs)³ have become a pervasive challenge to human rights protection. They may be called armed opposition groups, insurgents, rebels, terrorists, militias, criminal cartels, or gangs. They may hold or have held a sizable territory or a smaller one or none at all. Some may launch deadly operations extra-territorially, including in Europe, Asia, Africa and the Middle East. Some operate in the context of international or non-international armed conflicts (NIAC). Others operate in the shadowy intersection of peace and war, sometimes referred to as low intensity or unconventional violence⁴. Some are driven by ideology or profit, many by a mixture of both. The vast

¹ The Special Rapporteur also wishes to thank the Human Rights Law Clinic of Berkeley Law School for their assistance.

² Transmitted on 11/10/2017; 20/03/2018, 17 and 18/05/2018.

³ ANSAs are “Groups that have 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 organizations; and are not under the control of the State(s) in which they operate.” G. McHugh, M. Bessler, *Humanitarian negotiations with armed groups: A manual for practitioners*, 2006, p. 87.

⁴ Such situations are characterized by recourse to the police, often supported by the armed forces, to restore law and order. See Yves-Sandov, Christophe-Swinarski and Brun-Zimmermann (eds), *Commentary on the Additional Protocols to the Geneva Conventions*, 1987

majority engage in a range of governance-like functions, ranging from registering birth and running clinics and schools to collecting taxes, developing rules and policies, and operating dispute-resolution mechanisms or their own prisons. Some have political or state-like ambitions. All use violence as part of their *modus operandi*.

5. Like killings by States, killings by ANSAs may be driven by “anti-civilian ideologies,”⁵ de-humanization, which, at its worst, may result in genocide and crimes against humanity. Like States, ANSAs may kill for political reasons, in retaliation, to create fear, for material gain. In the vast majority of cases, killings are not random but part of a calculated strategy.

6. ANSAs pose a large number of challenges to the human rights community, particularly in terms of accountability. How to name ANSAs acts of violence? How to effectively support the rights of their victims, as well as the public right to know? While ANSAs conduct may be immoral or illegal, can it be constructed as a violation of human rights law, which has traditionally been reserved for States?⁶ Should the distinction between victims, on the basis of the relationship of the perpetrators with the State, be justified and sustainable, when ANSAs commit similar organized acts of violence?

7. In the Special Rapporteur’s opinion, in light of the proliferation of complex ANSAs, the blurred distinction between political insurgents and criminal gangs, and armed organizations with an international brand and operations (see also A/RES/71/118), the current legal framework to address ANSAs presents unacceptable limitations. It is unjust to the victims of ANSAs violations and ineffective at addressing protection gaps. It is not tenable, sustainable, or ultimately principled.

8. This report maintains that ANSAs are bound by human rights obligations. It shows that developments within the United Nations over the last 20 years, address ANSAs as duty-bearers. It clarifies the sources of these obligations, and shows that the attribution of human rights obligations does not validate ANSAs authority. The Special Rapporteur then proposes a context-dependent, ANSA-specific and graduated framework focusing on the nature and extent of ANSAs control, governance, and capacity.

A. International developments

9. UN Member States have progressively addressed ANSAs through their resolutions. So have special procedures and Commission of Inquiries (COIs) of the Human Rights Council (HRC). These developments have been complemented on the ground by Member States’ political and humanitarian engagement with ANSAs, including for the purpose of cease-fire and peace-making, and by UN agencies and INGOs interacting with a range of ANSAs to ensure protection of civilians.

1. Security Council and General Assembly resolutions

10. Over the last two decades, there have been over 125 Security Council (UNSC) resolutions, approximately 65 General Assembly (UNGA) resolutions and over 50 UNSC Presidential Statements that pertain to the human rights obligations or other related responsibilities of ANSAs⁷, prompting researchers to conclude “*It is incontrovertible that the U.N. Security Council and the U.N. General Assembly have recognized, at a minimum, that the conduct of at least some ANSAs—in contexts as diverse as the DRC to Syria—can amount to violations or abuses of human rights*”⁸.

11. Some of the acts, described as either “abuses” or “violations” by the UNSC may implicate *jus-cogens* norms, prohibitions under customary international human rights law

⁵ Hugo Slim, *Killing Civilians: Methods, Madness and Morality in War*, 2008.

⁶ Nigel Rodley, *Can Armed Opposition Groups Violate Human Rights?* Human Rights in the Twenty-First Century: A Global Challenge 297, 298 (1993).

⁷ <https://pilac.law.harvard.edu/ansas/>; Andrew Clapham, ‘Focusing on ANSAs’ in Clapham & Gaeta (eds) *The Oxford Handbook of International Law in Armed Conflict* (2014).

⁸ <https://pilac.law.harvard.edu/ansas/>, conclusion

(IHRL), IHRL, refugee and/or International Humanitarian Law (IHL). Some resolutions are broad while others specify which violations/abuses have been committed by ANSAs, such as extrajudicial executions (e.g. S/RES/2295 (2016)) or sexual or gender-based violence (e.g. S/RES/2149 (2014)).

12. The focus on ANSA obligations is at its clearest with regard to children. In 1999, UNSC resolution 1261 (S/RES/1261) called on all parties to conflicts to respect their legal obligations regarding children. Over time, the UNSC established monitoring and reporting into six grave violations against children in armed conflict, including killings⁹. ANSAs have been frequently mentioned as persistent violators.

13. The UNGA, for its part, generally refers to acts of various ANSAs as violations of IHRL and IHL. For instance, it has strongly condemn[ed] all violations and abuses of IHRL and of IHL “committed by parties to conflict in Syria, including “armed extremists,” “armed anti-Government groups,” “Al-Qaida affiliated terrorist groups,” and the “so-called Islamic State in Iraq and the Levant (Da’esh) and Al-Nusrah Front and their continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law.” (A/RES/70/234)

14. The latest UNGA resolution related to arbitrary executions includes at least three paragraphs relevant to the roles and responsibilities of NSAs. It acknowledges that “[IHRL] and [IHL] are complementary and mutually reinforcing”; it notes “with deep concern the growing number of civilians and persons hors de combat killed in situations of armed conflict and internal strife, and that women and girls are disproportionately affected by conflict” and it is equally concerned with “killings committed by non-State actors, including terrorist groups and criminal organizations” (A/RES/71/198).

2. Human Rights Council

15. The HRC has similarly reported on ANSAs, through both its country and thematic resolutions¹⁰. It has adopted resolutions that directly named one or more ANSAs, such as resolution S-22/1 addressing the ‘Islamic State’ and associated groups in Iraq, and resolution S-23/1 considering Boko Haram in ‘affected States’. The HRC has also addressed ANSAs in general terms, although not in a uniform fashion, speaking of human rights ‘abuses’ or ‘violations’. The subjects of HRC resolutions include armed groups, rebels, and terrorist organizations. On at least one occasion, resolutions included transnational criminal networks (Mali, A/HCR/RES/20/17, A/HRC/RES/21/25 and A/HRC/RES/22/18).

16. Special procedures and COIs have also included a focus on ANSAs. COIs have sought to ground ANSAs human rights obligations in the fact of control of territory and population and made recommendations to both States and armed groups with no obvious distinction, prompting an observer to note: “there seemed to be a growing tendency to view the violations ‘thematically’, without any particular (special) attention, as to whether such violation were committed by a state or non-state actor. Indeed, the Syria CoI for instance insisted that peremptory norms (**jus cogens**) bind individuals and non-state entities, while the Panel of experts on Accountability in Sri Lanka considered that ANSAs with **territorial control** – such as the LTTE – were bound to respect the most basic set of human rights¹¹.”

17. Since its establishment in 1982, the mandate on extra-judicial executions has focused on a variety of situations that have included killings by ANSAs, including through a focus on State’s due diligence and on the direct human rights responsibilities of ANSAs in the context of NIACs. Particularly noteworthy is the 2005 Sri Lanka mission report:

⁹ <https://childrenandarmedconflict.un.org/six-grave-violations/>

¹⁰ Geneva Academy, Academy In-Brief No.7, December 2016.

¹¹ Andrew Clapham, “Human Rights Obligations for Non-State-Actors: Where are We Now?” In Fannie Lafontaine and François Larocque, ed., *Essays in Honour of Louise Arbour, 2018*; See also T. Rodenhäuser, ‘International legal obligations of armed opposition groups in Syria’, *International Review of Law* 2, 2015.

Human rights norms operate on three levels - as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community... As a non-State actor, the LTTE [...] remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights (E/CN.4/2006/53/Add.5).

18. In subsequent reports on Afghanistan, Colombia, DRC and Sri Lanka, the Special Rapporteur elaborated that ANSAs with territorial and population control, and an identifiable political structure, have human rights obligations and ought to respect human rights and humanitarian law norms. A similar approach has been adopted by other UN mechanisms, such as the Fact-Finding Mission on the Gaza Conflict (A/HRC/12/48).

3. Key Implications

19. Spanning over 20 years, Member States have regularly addressed ANSAs both as perpetrators of human rights violations and as duty-bearers. Their verbal acts reflect concerted efforts to strengthen international protection of civilians (e.g. S/RES/1894, preamble (2009)). A number of them have engaged with ANSAs within or outside their territories, for the purposes of peace-making, or civilians protection. These developments, along with the work of special procedures, highlight the following:

- ANSAs are addressed as human rights duty-bearers.
- International obligations applicable to ANSAs are derived from international human rights, humanitarian, refugee, and criminal law.
- ANSAs obligations may include the obligation to respect *jus cogens* norms, customary human rights and humanitarian law or they may be broader.
- ANSAs that have displaced the *de jure* government and established (exclusive) territorial control are responsible for the protection (and violations) of human rights in the areas under their control.

20. Commentators tend to agree that UNGA resolutions are not binding but reflect emerging State practice or *opinio juris*. Some UNSC decisions expressly adopted under Chapter VII impose legal obligations on States,¹² while other resolutions may be of great relevance to the formation of *opinio juris*.¹³ Whether the UNSC resolutions addressing ANSAs are binding on these ANSAs remains unclear and debated¹⁴. Notwithstanding their legal effect, these developments demonstrate that over the last decades, Member States, UNSC and UNGA, HRC and a number of special procedures have increasingly recognized that the conduct of a large number of ANSAs can amount to violations of human rights.

B. Existing limitations and deficits

21. An important rationale for binding ANSAs to human rights obligations is that the current legal framework to hold them accountable has unacceptably large deficits with regard to access to justice, remedies, and reparations. State's implementation of the Basic Principles and Guidelines on the Right to a Remedy and Reparations (A/RES/60/147) under IHL and IHRL¹⁵ is a recurring difficulty.¹⁶ But it is non-existent as far as human rights violations committed by ANSAs are concerned.

¹² HLSPILAC, 2017, pp.21-29

¹³ ICTY Appeals Chamber, 2 October 1995, Prosecutor v. Tadić, Case No.IT-94-1-AR72, para. 133; ILA Final report on Customary International Law, London, 2000.

¹⁴ HLSPILAC, 2017

¹⁵ Carla Ferstman, Mariana Goetz, & Alan Stephens, eds., *Reparations for Victims of Genocide, War Crime and Crimes against Humanity* (2009).

¹⁶ Christine Evans, *The Right to Reparation in International Law for Victims of Armed*, 2012, pp.44, 75.

1. State obligation to protect under IHRL

22. It has been suggested that the most effective way to hold ANSAs to account is under the theory that “governments should discharge their responsibilities” to protect their people.¹⁷ The State may be held generally responsible for the wrongful conduct of non-State actors, when it can be shown that it has failed to exercise due diligence to prevent, investigate and respond to such acts.

23. The Special Rapporteur is particularly committed to strengthening this approach, as highlighted in her report on a gender-sensitive approach to her mandate (A/HRC/35/23). There are, however, situations where the obligation to protect is not enough or cannot apply, such as in the context of NIACs or whenever ANSAs have escaped the effective control of the State¹⁸. Under the due diligence requirement, the State is not required to accept responsibility for the acts of insurgents¹⁹. Domestic adjudication is often unrealistic, particularly during conflict, which greatly limits both the applicability and the usefulness of the State due diligence framework,²⁰ leaving major gaps in terms of accountability.

24. Moreover, there is a range of situations, where States’ interventions to re-establish their authority and control may, themselves, lead to violations, including of the right to life. In such circumstances, invoking the States’ responsibility to protect against ANSAs violations could be instrumentalized for greater repression and will unlikely deliver protection. The Special Rapporteur is not suggesting that State’s obligation to protect be ignored. She is recommending that binding ANSAs to human rights obligations will complement it.²¹

2. International humanitarian law

25. In the context of NIACs, Common Article 3 of the Geneva Conventions (CA3), along with Additional Protocol II (APII) or customary IHL are binding on ANSAs operating under responsible command, controlling territory, and demonstrating a capacity to conduct sustained and concerted military operations. CA3 provides the “most essential protection” to civilians’ and persons *hors de combat*. Many of the provisions in APII, which focus on the conduct of hostilities, have become customary law. The broadest demand is that “the civilian population as such, as well as individual civilians, shall not be the object of attack.”²² Another prohibition applies to indiscriminate and disproportionate attacks²³.

26. It should be recalled that IHL and IHRL are complementary and not mutually exclusive. In case of conflict between them, the *lex specialis* should apply (E/CN.4/2005/7, para. 50) while respect for the right to life applies also in hostilities²⁴. The Special Rapporteur further recalls that IHL falls within her mandate, as per the relevant resolutions (e.g. A/RES/71/198) and her predecessors’ reports.

27. One often heard argument is that IHL is sufficient to bind ANSAs to obligations, and that it is sufficient to protect the right to life, particularly because customary IHL rules applicable in NIACs have grown dramatically since the mid-1990s, including through the ICTY *Tadic* decision²⁵.

28. In fact, there are a number of limitations to the respect for, and protection against, ANSAs arbitrary deprivation of life. First, IHL accountability mechanisms and enforcement for violations committed in NIACs have been historically weak, and particularly so with

¹⁷ <https://soundcloud.com/uniofessex/professor-sir-nigel-rodley/reposts> (2014).

¹⁸ Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, 2017, pp.210-216

¹⁹ Extract Yearbook of International Law Commission 1972 Vol. II (A/CN.4/264, 136); Sambiaggio Case; *GL Solis (USA) v United Mexican States*, 3 October 1928.

²⁰ Human Rights Watch, *The Justice Questions After ISIS*, 2017

²¹ Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* 183, 2002

²² Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, 2012, p. 339

²³ *Ibid*, pp.348-257

²⁴ ICJ, Advisory opinion, *Legality of the Threat or Use of Nuclear Weapons* [1996], Para 25

²⁵ <http://www.icty.org/case/tadic/4>; Sivakumaran, 2012, pp.56-57.

regard to ANSAs²⁶. Second, States parties to a conflict remain bound by IHRL. Limiting ANSAs obligations to CA3 and customary IHL establishes an inequality of obligations as a fundamental principle. Thirdly, the application of IHL to ANSAs requires a “nexus” to the conflict.²⁷ This excludes areas under ANSAs control where a certain “peace” or normality exists, and ANSAs activities that are distinct from confrontations with an enemy combatant, such as administration. Other bodies of law should apply, including IHRL.²⁸ The notion that ANSAs should continue to be solely governed by IHL CA3 creates unacceptable protection gaps: victims under ANSAs’ control will be inadequately protected unless ANSAs are obliged to respect human rights²⁹. Lastly, IHL applicable to NIACs does not mention reparation, “*and there have been virtually no instances where armed opposition groups have undertaken to make reparations for violation of IHL or have made such reparations in practice.*”³⁰ The right to reparation is limited to a State’s omission to protect individuals from ANSA violence, as clarified by the ICRC Summary of Rule 150.³¹

29. A final and most obvious limitation is that there are situations involving ANSAs, and massive loss of lives, which are not armed conflicts and thus where IHL does not apply. For instance, at the start of the Syria catastrophe, the COI considered that the threshold for the application of armed conflict had not been reached, and therefore that armed groups operating in Syria were bound by peremptory rules of international law (*ius cogens*) (A/HRC/S-17/2/Add.1). More generally, so-called low intensity conflicts involving organized criminal cartels, have not been deemed as amounting to NIACs.

3. International criminal law

30. ANSAs’ individual members may be held to account, under ICL, for war crimes, crimes against humanity or indeed genocide. ANSAs may be subject to international obligations outside armed conflict, in the context of crimes against humanity and genocide. Such crimes may be prosecuted by the International Criminal Court (ICC), ad hoc tribunals and national courts that have domesticated these crimes.

31. The Special Rapporteur acknowledges the importance of ICL and the Rome Statute, as breakthrough in the fight against impunity, including in terms of holding members of ANSAs accountable. For instance, through the self-referral process, the ICC issued arrests warrants against members of ANSAs in Uganda, DRC and Central African Republic. In September 2017, UNSC adopted Resolution 2379, which establishes an independent investigative team to support Iraqi efforts to hold ISIS accountable.³²

32. These initiatives are welcomed but raise many risks, including by selecting perpetrators and entrenching a culture of impunity for State actors. Furthermore, the ICC referral process or indeed the establishment of international tribunals or special courts is a complex and lengthy one. Another limit is the lack of jurisdiction over ANSAs as “collective entities”.³³ Further, ICL does not provide for reparations to victims of ANSAs violations³⁴ while States that domesticate the Rome Statute do not undertake to establish judicial remedies for individual reparations. A final and obvious limitation with ICL is that not all crimes committed by ANSAs meet the required ICL threshold.

²⁶ Sivakumaran, 2012, Chapters 10 and 11.

²⁷ Fortin, p.47-51; <https://link.springer.com/article/10.1007/s40802-016-0061-2>.

²⁸ Sivakumaran, 2012, p. 98.

²⁹ Geneva Academy, December 2016, p. 21; Fortin, 2017, 52-53.

³⁰ Gillard, Emanuela-Chiara Gillard, *Reparation for violations of international humanitarian law*, 85 Int’l Rev. of the Red Cross, 2003, p.34-35.

³¹ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule150.

³² <https://www.un.org/press/en/2017/sc12998.doc.htm>.

³³ Annyssa Bellal, *Non-State Armed Groups in Transitional Justice Processes: Adapting to New Realities of Conflict*, 2017

³⁴ Under the Rome Statute, a Trust Fund for Victims (TFV) was established to provide restitution, compensation and rehabilitation for victims under a dual mandate.

4. The international counter-terrorism framework

33. Since 9/11, international counter-terrorism legislation (ICTL) has emerged as one of the main bodies of law to frame the acts of a number of ANSAs.³⁵ While there is no international consensus on a definition of terrorism, there is loose consensus around the idea that it entails acts that either cause death or injury to persons, or damage to property, combined with a specific intent to intimidate a population.³⁶ Individual acts of terrorism may fall within the category of war crimes or crimes against humanity while disproportionate illegal State responses to terrorism may also fall within the definition of international crimes and human rights violations³⁷.

34. One first issue with characterizing ANSAs as “terrorists” and their acts as falling within ICTL, is that many groups allegedly engaged in “acts of terrorism” are ill-defined, or not defined at all. One is left with the impression that everyone may be labeled a “terrorist,” including journalists and human rights defenders, so long as governments have determined so.

35. Secondly, concerns for civilians in the context of counter-terrorism efforts,³⁸ extend to the rights of victims.³⁹ The United Nations Global Counter-Terrorism Strategy includes five references to victims, three of which are in paragraph 8 of the first pillar, which demand of States that they put in place, on a *voluntary* basis, national systems of assistance for victims of terrorism. The Mandate on human rights protection while countering-terrorism insisted that the protection of the rights of the victims constitutes a genuine legal duty modeled on the aforementioned Basic Principles (A/66/310). To this day, such a legal obligation has rarely been implemented. It would appear that the counter-terrorism framework remains essentially conceived and perceived as addressing crimes against the State.

36. At the domestic level, ANSAs individual members may be tried under a combination of counter-terrorism and criminal law. There are intrinsic and serious weaknesses to counter-terrorism laws around the world, such as vague and broad definitions, and the potential criminalization of democratic rights. The Special Rapporteur is concerned that the offence of “membership to a terrorist organization” is used as “short-cuts” by over-stretched, under-resourced, and at times unwilling policing institutions. The characterization of “terrorism” for what may amount to war crimes, crimes against humanity or genocide constitutes, in the Special Rapporteur’s opinion, a fallacy of historical proportion and a potential violation of the right to justice, the right to know, and the right to participate. Finally, the place and experiences of victims in the judicial accountability process is *ad hoc* and limited, and there is, to date, limited evidence of victims of “terrorism” accessing remedies and reparations.

C. The international human rights regime and non-State actors

37. The Special Rapporteur reaffirms the centrality of States and their obligations to international law, including human rights law. She insists however that the State’s central role does not exclude other actors and that States were not meant to be, and are not, the sole duty bearer under the IHRL regime.

1. Inalienable human rights

38. No matter whether they derive naturally or from international legal sources, human rights are fundamentally the entitlements of humans. They are “inalienable” and thus ought to be applied against any “State, *group*, or person” aiming at the destruction of these

³⁵ Robert Barnidge, *Non-State Actors and Terrorism*, 2008, 14-18.

³⁶ DIIS, *Armed Non-State Actors: Counter-Terrorism and the Protection of Civilians*, 17 (2015), p.21.

³⁷ UNODC, *international Law Aspects of Countering Terrorism*, 2009, p.41

³⁸ E/CN.4/2006/98, paras 67-71, 74.

³⁹ <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Statements.aspx>.

rights.⁴⁰ For instance, the intent of the UDHR is to prohibit and provide redress for human rights violations regardless of whether the violations are committed by a State or a separate entity.

39. This understanding of IHRL acknowledges that State obligations are an essential attribute. They are the corner stone of the human rights regime. But they are not its *raison d'être*, which is the entitlement of humans. Further, other bricks support the edifice of rights derived from being human, including the duties of non-State actors: “*the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights. [...] insofar as they aspire to represent a people before the world, the international community will evaluate their conduct according to the Universal Declaration’s “common standard of achievement (E/CN.4/2006/53/Add.5, para. 27).*”

40. Interpreters of the UDHR deliberations point out that drafters primarily kept specific language about duties out of the document, and instead included all members of society’s responsibilities towards each other to refrain from committing human rights abuses.⁴¹ The Travaux Préparatoires of the UDHR and ICCPR highlights a range of debates over non-State actors (NSA), which, along with the wording of some articles, suggest that States are not the only duty-bearers⁴² and that duties attached to NSA are not one and the same but “specific:” they are distinct from the obligations imposed upon States and they are distinct from one non-State actor to another.

41. Since the adoption of the UDHR and the ICCPR, the recognition of ANSAs has translated into a few developments at treaty-level. Particularly relevant to the right to life, they include the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the African Union Convention for the Protection and Assistance of Internally Displaced Persons. In addition, the Committee on the Elimination of Discrimination against Women noted in its General Recommendation No. 30 (2013) that “under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights.” (CEDAW/C/GC/30, para. 16).

2. ANSAs possession of legal personality

42. ANSAs international legal personality has been the object of extensive research. One position is that international personality is derived from only two possible sources, international treaties and State consent, which are not deemed to be applicable to ANSAs⁴³. The Special Rapporteur is of the view that it is not legally justified (nor realistic) to consider States the only natural persons of international law possessing free discretion to allocate personality to other entities.

43. International Court of Justice (ICJ) Advisory Opinion on *Reparation for Injuries* regarding international legal personality leaves open the possibility of reconsidering the categories of subjects in international law⁴⁴. Developments of the last fifty years confirm that legal personality may be derived from a spectrum of sources, including treaty law, customary international law, bilateral agreements, and recognition by third states. A number of non-State entities have been attributed *some* international legal personality, under one or another theory, including the United Nations, ICRC and NGOs. Under belligerency, insurgency and IHL, new subjects of international law can emerge and have

⁴⁰ G.A. Res. 217A (III), U.N. Doc.A/810 at 71 (1948)

⁴¹ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, Ch. 7 (2004).

⁴² Fortin, pp.210-216.

⁴³ Duncan b. Hollis, *Why State Consent Still Matters*, Berkeley Journal of International Law 137, 139 (2005); Zegveld, 2002.

⁴⁴ ICJ Advisory Opinion, 11 April 1949, p.174.

emerged, without the explicit consent of the State. Research shows that NSAs legal personality exists “along a spectrum”:⁴⁵ It is tied to their functionality on the international sphere and fluctuates over time. ANSAs legal personality is not as extensive as that of States but sufficient to imply obligations under international law and treaties⁴⁶. Different sources of ANSAs legal personality imply different obligations.

44. As elaborated below, the most straight-forward approach to ANSAs legal personality is to derive it from two possible sources: CA3 or the *de facto authority* theory. Under both, the ANSAs legal personality is connected to its level of **organization** and its **control** of territory or people.⁴⁷

2.1 Customary Law

45. Under this approach to legal personality⁴⁸, the fact that ANSAs party to a NIACs are bound by CA3 and other customary IHL – and thus subject to direct international obligations – means that they should be regarded as possessing international legal personality. Further, the ICJ and the European Court of Justice have confirmed that international legal persons are bound by customary international law.⁴⁹ Accordingly, it may be argued that ANSAs parties to a NIAC are bound by some customary international law in accordance with their capacities and realities⁵⁰, including customary IHRL⁵¹.

2.2 De Facto Authorities

46. The legal and political construction of “*de facto*” authority provides ample evidence of the flexibility of the international legal system in response to situations on the ground. While there may be disagreement as to *which ANSAs* are *de facto* entity, there is a large level of consensus about their conceptual existence. *De facto* authorities are ANSAs exercising *exclusive control* over a specific territory,⁵² meaning that they are “independent entities that exist side-by-side with the established authorities”⁵³; they have in effect displaced State authority and as a result exercise “*effective sovereignty*”.⁵⁴ The *de facto* legal construct applies to entities that are party to a conflict but also to those that are not.⁵⁵

47. A decisive element is that the entity exists in an area beyond the reach of the territorial State (the *de jure* authority), thereby generating a *legal vacuum*.⁵⁶ The jurisprudence has consistently demonstrated that such a vacuum must be filled⁵⁷: acts of the *de facto* authority must be acknowledged and given legal validity, in the interests of both the affected individuals and the international community. The international legal obligations under which *de facto* authorities are bound include IHRL.⁵⁸ The population and individuals of the State cannot lose their inalienable rights because of changes in the

⁴⁵ Fortin, p.98

⁴⁶ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (2006), p.82

⁴⁷ See in-depth review by Fortin, Chapters 4 and 5.

⁴⁸ Daragh Murray, *Submission to the Special Rapporteur*, 2017.

⁴⁹ Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, ICJ, 20 December 1980, para. 37; A Racke GmbH & Co v. Hauptzollamt Mainz, European Court of Justice, 16 June 1998, para. 45.

⁵⁰ Marco Sassoli, *Two fascinating questions*, EJIL: Talk, November 4, 2016.

⁵¹ Daragh Murray, *Human Rights Obligations of Non-State Armed Groups*, 2016, Chapter 4

⁵² See Jochen A Frowein, ‘De Facto Regime’ in Max Planck, *Encyclopaedia of Public International Law*, para 3; Jean S Pictet (ed), *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva, International Committee of the Red Cross, 1960) 37.

⁵³ Zegveld, 2002, p.15.

⁵⁴ Jean S. Pictet, 1960, p.37.

⁵⁵ Michael Schoiswohl, *De Facto Regimes and Human Rights Obligations*, 6 Austrian Review of International and European Law 50, 2001.

⁵⁶ Philip Brown, *The Legal Effects of Recognition*, 44 American Journal of International Law 630, 1950

⁵⁷ UNSC Resolution 276 (1970); ICJ Advisory Opinion, 21 June 1971, para. 125; Loizidou v. Turkey, ECtHR, 18 December 1996, para. 45.

⁵⁸ Cyprus v. Turkey, ECtHR, 10 May 2001, para. 96.

authorities. ANSAs retain obligations by virtue of their control and independent existence, and an international legal rejection of legal vacuum⁵⁹.

2.3. *ANSAs with no exclusive control*

48. The justifications underpinning *de facto* authorities' legal obligations may be equally applicable to ANSAs falling below the threshold of exclusive territorial control. By existing independently of the territorial State, ANSAs generate a legal vacuum in the same manner as *de facto* authorities, the only difference being one of degree. Some forms of legal vacuum are generated by ANSAs, whether or not they exercise exclusive control over territories: "*In such circumstances, the armed group forces itself onto the international plane, justifying the application of international law in accordance with the de facto control theory.*"⁶⁰ The implication is that ANSAs are thus bound both by customary international law and the territorial State IHRL obligations.

2.4 *ANSAs capacity to bear obligation*

49. An alternative approach to the legal personality focus is to minimize its importance, as an over-stated, "highly subjective notion that is linked to, and formed by, individual scholars' conceptions of the whole system of international law,"⁶¹ reflecting an outdated vision and an intrinsic lack of imagination⁶². It has been suggested that participation in the international legal system⁶³, or NSA capacities to bear obligations⁶⁴ are far more relevant to the determination of whether or not non-State actors have international duties than the existing categories of subjects and objects:

*We have an international legal order that admits that states are not the only subjects of international law. It is obvious that non-state entities do not enjoy all the competences, privileges, and rights that states enjoy under international law, (...) we need to admit that international rights and duties depend on the capacity of the entity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity.*⁶⁵

50. Interestingly, both the legal personality approach and its rejection lead to more or less the same conclusions as to one of the sources of ANSA human rights obligations: their capacity to bear obligations. Such capacity tends to be assessed according to two main determinants: control (e.g. over territories and/or population), and an organizational structure capable of ensuring the group's fulfillment of any obligation under international law⁶⁶.

D. Key Implications and Moving Forward

51. **The report has highlighted the following:**

- ANSAs commit violations of the right to life and other human rights.
- IHL, ICL and domestic criminal law have a role to play in holding ANSAs to account. However, there are many situations where they do not apply or need to be complemented by IHRL.
- The current legal regime has resulted in inequality of obligations amongst parties to an NIAC; large protection gaps for people affected by ANSAs; and

⁵⁹ HRC GC 26 also supports this position, even though it does not deal with ANSA.

⁶⁰ Murray, 2017, para. 27.

⁶¹ Fortin, p.71.

⁶² Reinisch 2005; Clapham 2006. Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, 1994, p.4.

⁶³ R.McCorquodale, 'An Inclusive International Legal System', 17 LJIL 477, 2004

⁶⁴ Clapham 2006, 68-9

⁶⁵ Ibid

⁶⁶ Murray, 2016, p.75

accountability deficits, some of which may actually amount to distinct violations of the right to life under Article 6 ICCPR, involving the responsibility of the States.

- Resolutions by the UNSC, UNGA and HRC have addressed ANSAs as perpetrators of human rights obligations and as duty-bearers.⁶⁷
- ANSAs' legal personality sources may be traced to, amongst others, treaty and customary law. Under the *de facto authority* legal construct, ANSAs inherits the Treaty obligations of the State they have displaced. Under the customary law approach, ANSAs are bound by customary human rights law.
- In addition, ANSAs human rights obligations may be linked to the inalienability of human rights and the ANSAs capacity to exercise human rights obligations. This approach, particularly important in cases where ANSAs do not control territories, may also be applied as an overall framework for all ANSAs.

52. As highlighted throughout the report, ANSAs legal personality and possession of human rights obligations do not mean that there is an equality of obligations between States and ANSAs, or amongst ANSAs. The remaining of the report will suggest that the application of human rights obligations to ANSAs should occur in a context-dependent, ANSA-specific and gradated manner. The central element is that the content and extent of ANSAs Human Rights obligations are determined through a review of three interlinked indicators: (i) the nature and extent of ANSAs control; (ii) the level of ANSAs governance and (iii) consequently, the extent of their capacity.

1. Key Characteristics

1.1. ANSAs Control

53. Territorial control, extrapolated from IHL, has emerged as a key element of the understanding of ANSA capacities. The focus on territories and territorial control allows for legal personality and for the notion that ANSA controlling territories should be bound by the legal obligations of the State⁶⁸ to the extent that these obligations are owned by and due to the population of the State.

54. The centrality of territory in determining human rights obligations requires some nuancing. First, territorial control is an elusive concept, which does not say much in terms of how much territory, for how long, and what type of control is required. On the ground, control over territories, within the context of a NIAC or not, tends to shift and move. There is ample evidence highlighting dual, time-specific control, shared between ANSAs and the State. Some ANSAs exert control at night only; others exert control over certain aspects of the community life only while the State continues to govern others; etc.

55. Second, at a normative level, human rights obligations are not only derived from a physical territory or implemented towards a given population. ANSAs with no or limited territorial control should still have some human rights obligations, particularly, but not exclusively, when the absence of territorial control is part of the ANSA strategy⁶⁹. In fact, with regard to one particularly egregious form of human rights violation, that of crimes against humanity, the jurisprudence has clarified that the primary requirement for ANSAs is that they only need to demonstrate a capacity to carry out an attack of the scale required by Article 7 of the Rome Statute.⁷⁰ In situations where an ANSA does not control territory, it remains bound by customary IHRL, by virtue of its functionality and provided it meets the organizational requirement.⁷¹

⁶⁷ HLSPILAC, 2017

⁶⁸ Fortin, Chapter 9.

⁶⁹ This was the strategy for instance of the Lord Resistance Army.

⁷⁰ See for instance, Katanga Trial Judgement, 1119; Fortin, Chapter 10.

⁷¹ Fortin, 382-385

56. Thirdly, this report will recall the long history of the Mandate demonstrating that the prohibition against targeted killing constitutes an **extraterritorial obligation**. The Special Rapporteur will add that, to the extent that the prohibition against extrajudicial killings constitutes a *ius cogens* norm applicable to all ANSAs, it should be binding upon them extra-territorially as well. The notion that ISIL may have committed a human rights violation when it targeted civilians in Iraq but did not do when it engaged in the same acts in France or Pakistan is untenable.

57. Finally, so-called “cyber-attacks”, including by ANSAs, may violate a range of human rights, including the right to life. Such attacks should not be outside the scope of the obligations imposed on ANSAs simply because of their occurring in a different space, and because they have been initiated by them, but out of territories they do not control.

58. Altogether, this suggests that the concept of control be interpreted in a flexible manner: *“In this regard it is the activity made possible by the exercise of control, and not the precise contours of the control itself, that is determinative.”*⁷²

1.2. Organizational Requirement

a. ANSAs Governance Functions

59. International law and the literature have largely defined the indicators with regard to ANSAs level of organization in military-like terms⁷³. These, however, offer little in terms of determining whether they may support human rights obligations. The Special Rapporteur will suggest that organizational indicators should include a focus on ANSAs governance activities.

60. In 1965, the sociologist Bernard Fall noted: *“A government that is losing to an insurgency isn’t being out-fought, it’s being out-governed.”*⁷⁴ Some twenty years later, studies after studies of rebel groups⁷⁵ and, far more recently, of criminal organizations⁷⁶, have provided further empirical evidence to his conclusion: the quality of (local) governance, including security and service provisions, and dispute resolution⁷⁷, is a far greater determinant of rebels’ and criminals’ rise to local power, than state capacity to fight or control,

61. ANSAs systems of governance vary enormously: some engage in diplomacy or external communication while others focus on their domestic audiences; some may seek to impose a radical, revolutionary system of governance and values, while others may rely on existing social values and institutions; some may seek to address grievances and historical injustice, while others may largely be driven by greed. ANSAs may govern through lawlessness, uncertainty and fear, but most engage also and frequently in promulgation of rules and in their implementation, including through dispute-resolution mechanisms and quasi-law-enforcement functions.⁷⁸

62. The reality of ANSA governance particularly well demonstrates the importance of IHRL both in situations in the margins of a NIAC and in situations of unconventional violence. Empirical evidence shows that the ability of ANSAs to establish and maintain their “control” is largely grounded on their capacities to “outperform” the State or to

⁷² Murray, 2017.

⁷³ Indicators include the existence of a command structure; the modes of communication; whether military training is provided; external relations; the ability to control territory; the ability to procure.

⁷⁴ Fortin, p.45; referring to B. Fall, *“The Theory and Practice of Insurgency and Counter Insurgency,”* US Naval War College Review, Newport Rhode Island, April 1965.

⁷⁵ Zachariah Cherian Mampilly, *Insurgent Governance and Civilian Life during War*, 2011; Ana Arjona et al, *Rebel Governance in Civil War*, 2015.

⁷⁶ Enrique Desmond Arias, *Criminal Enterprises and Governance in Latin America and the Caribbean*, 2017; Kent Eaton, *“The Downside of Decentralization: Armed Clientelism in Colombia,”* Security Studies 15(4): 1-30, 2006; Angelica Duran-Martinez, *“To Kill and Tell? State Power, Criminal Competition, and Drug Violence,”* Journal of Conflict Resolution 59(8): 1377–1402, 2015.

⁷⁷ Ana Arjona, Presentation, Columbia University Conference, 2018

⁷⁸ Fortin, p.362

impose their own governance systems by force and fear, or a combination of both. It suggests that States' responses to such situations should include a strong focus on the provision of goods, services, dispute resolution mechanisms and safety, as these are key to eliciting civilian collaboration. It points to the necessity of understanding ANSAs governance and developing indicators for the purpose of human rights protection, engagement and accountability.

b. The political character of ANSAs

63. Studies of modern warfare and organized violence have also indicated a “blurring of the distinction between war (which is defined as violence between states or organized political groups for political moves), organized crime (violence undertaken by privately organized groups for private purposes), and large-scale violations of human rights (violence undertaken by states or politically-organized groups or other groups against individuals).”⁷⁹ They also point to a blurring of ANSAs key motivations and *modus operandi*, with the political and the criminal intersecting in more ways than one.

64. It should be first noted that the terms used by Governments to refer to ANSAs on their territories or outside have no bearings on the international law in effect or on the attribution of human rights obligations. A group can be both an organized armed group for the purposes of IHL, IHRL or criminal law as well as a terrorist group or a criminal organization for the purposes of domestic law or international listing. This is true as well for individual members of such groups.⁸⁰

65. Under IHL, the motive behind ANSAs actions is not an element of the test for a NIAC nor is it a part of the overall assessment.⁸¹ The question is whether it is relevant in terms of determining the nature and scope of human rights obligations imposed on ANSAs. As pointed out, a single ANSA may have a spectrum of motives and *modus operandi* over its existence. From a human rights point of view, the key issue is not *why* ANSAs are presiding over people's lives but the fact that they are. The ANSAs' relationship with communities and individuals is defined by the functions that they perform or ought to perform, rather than by their intent. Still, motivations may matter, for instance in terms of assessing ANSAs willingness to respect human rights or the nature of ANSAs governance functions. As such, the Special Rapporteur is suggesting that while a particular motive is not a pre-requisite for human rights obligation, it is part of the overall assessment to be made of ANSAs governance.

66. There is no evidence that the recognition of ANSAs as subjects of IHL, or the UNSC, UNGA or UNHRC resolutions regarding ANSAs have resulted into their legitimization, or that it has limited Governments' right to respond to armed conflicts, rebellions or violence using all lawful means. When ANSAs legitimization occurs, it is not because of international legal principles but for eminently political reasons, reflective of international, regional or domestic realities, and/or as part of peace-building processes.

2. A graduated approach applied to the Right to Life

67. International Jurisprudence, Special Procedures and Treaty Bodies have elaborated and strengthened the understanding of the content of the right to life, and of the prohibition against the arbitrary deprivation of life. They point to a right whose normative content and boundaries fluctuate and evolve rapidly, under the combined effects of technological, normative or judicial developments and breakthrough. The prohibition against arbitrary deprivation of life covers a range of situations from targeted assassinations to killings in the private sphere, and death by neglect or omission. The Special Rapporteur will highlight here preliminary findings in terms of the Right to Life obligations that ought to be binding on ANSAs.

⁷⁹ Kaldor M, *New and Old Wars: Organized Violence in a Global Era*, 2012, 2.

⁸⁰ Sandesh Sivakumaran, *The potential applicability of IHL to the use of state force against large-scale criminal organizations*, 7 November 2017.

⁸¹ Limaj Trial Judgment, ICTY, para. 170.

The principle of non-discrimination

68. Central to human rights, it applies with particular force to the right to life. It ought to be binding on all ANSAs in all their various interactions with populations and individuals, including acts of policing, law enforcement, dispute resolutions, etc. This principle ought to apply in its full, including on the basis of ethnicity, tribe, race, religion, social group, gender and sexuality, to name some.

Obligation to Respect

69. This is primarily a negative obligation, which requires that armed groups do not violate individuals' right to life. The absolute prohibition against extrajudicial executions applies to all ANSAs in all situations. Within the context of a NIAC, the added value of IHRL resides in the range of obligations to respect the right to life, which falls below the immediate threshold of intentional murder, (already covered by IHL CA3), and those related to the use of force more generally.

70. Respect for the right to life also implies that all ANSAs should implement a total ban on anti-personnel mines, and cooperate in mine clearance and support to victims of mines⁸².

71. Violence against women and children by ANSAs members and/or as part of a sanctioned policy is prohibited by IHL and sanctioned by ICL. Furthermore, Article 4 of the Optional Protocol to the CRC is addressed to ANSAs and prohibits them from recruiting and using children. All ANSAs should be bound by these obligations.

“Policing and Justice”

72. The responsibility to respect includes a range of other prohibitions. A central concern of the Special Rapporteur has been the use of lethal force by State agents in violation of the principles of necessity, proportionality and precaution. The imposition of the death penalty in contravention of fair trial guarantees also constitutes an arbitrary deprivation of life.

73. Many of these violations take place in the context of law enforcement, which, if or when performed by ANSA, raises many concerns. The default position within the human rights community is that policing and judicial functions by ANSAs, outside de facto States, are largely illegitimate. And yet, empirical evidence tells us that ANSAs perform some of these functions regularly. It also tells us that local population demands law and order and stability. ANSAs policing functions may also play a role in terms of responding to crimes committed by their members. The conflicts or violence, and the breakdown of law and order heighten women and girls vulnerability to such violence. ANSAs may be the only actors able to offer some degree of protection and accountability⁸³.

74. The Special Rapporteur is not suggesting that all ANSAs should be under the obligation to deliver policing functions or justice. She is suggesting, however, that there are minimum guarantees that ANSAs should be required to provide, as far as law enforcement is concerned, depending on the sophistication of their governance capacity. Such minimum guarantees may be extrapolated from the Minnesota protocol, “*Common Article 3, as elaborated in the 2016 ICRC Commentary, the substance of the obligations in Article 75 of API, the Provisions of APII, the 1990 Turku Declaration of Minimum Humanitarian Standards.*”⁸⁴

75. The obligation to investigate is particularly important within the human rights framework. It applies with particular force to the right to life. It gives practical effect to the duties to respect and protect the right to life.⁸⁵ ANSAs should, as a priority, investigate

⁸² Geneva Call

⁸³ Sivakumaran, p. 559.

⁸⁴ Andrew Clapham, “*Detention by Armed Groups under International law*”, Vol.93, International Law Studies, 93 International Law Studies (2017), p.31. See also, Murray, 2017, op cit.

⁸⁵ Minnesota Protocol

killings (or acts of torture or sexual violence) committed by their members. Depending on their capacities, ANSAs obligation should be extended to investigating killings by third parties operating on their territories.

76. ANSAs should be absolutely prohibited from issuing death penalty sanctions.

Obligations to Protect: Prevent and Punish

77. CEDAW General Recommendation 30, also addressed to ANSAs, elaborates on the obligations to prevent, investigate and punish all forms of violence against women, including sexual violence. Some of the steps pertinent to the obligation to *prevent* acts of violence against women or other individuals may be applicable to a large number of ANSAs.

Obligation to fulfil

78. ANSAs should also have a range of positive obligations, related to minimum survival requirements (rights to health, housing, water and food) when the right to life is concerned⁸⁶. All ANSAs should be prohibited from withholding access to international assistance. They should also take all reasonable steps to protect and ensure access to humanitarian aid, and other services, particularly to all vulnerable groups, without discrimination.⁸⁷

3. Protection of those engaging with ANSAs

79. ANSAs' duty to ensure access to humanitarian aid and other services imposes a complementary duty on States: that they permit international and domestic actors access to areas under ANSAs control: The “[I]mproved compliance with international humanitarian law and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-State actors.” (S/2009/277, para. 39).

80. Humanitarian and human rights actors seeking to provide assistance to populations under control of ANSAs internationally listed as “terrorists” or engage with them for the purpose of human rights protection face a range of problems. There has been repeated evidence of these groups' efforts being undermined, prevented or criminalized, and humanitarian staff arrested.

81. Counter-terrorism laws have proven very blunt in their application, discouraging compliance with human rights norms, and restricting promotion and training efforts (A/HRC/6/17/Add.3, para. 42). These laws also may harm civilians in conflict-affected areas by preventing the distribution of humanitarian aid and services,⁸⁸ making delivery of even the most basic assistance difficult.⁸⁹ This impedes access to health care and basic education, and worsens the overall situation of the area.⁹⁰

4. A New Instrument

82. Some international civil society organizations have engaged with ANSAs to ensure respect for human rights and humanitarian standards. This includes Geneva Call “Deed of Commitments for Adherence to a Total ban on Anti-Personnel Mines” which ANSAs are encouraged to sign and implement, and which constitutes an “effective model of procedural accountability”⁹¹. Another initiative, the 1990 Declaration on Minimum Humanitarian Standards, seeks to address gaps regarding ANSAs as well.

⁸⁶ See also https://www.genevacall.org/wp-content/uploads/dlm_uploads/2016/08/GaranceTalks_Issue01_Report.pdf.

⁸⁷ UN doc. S/PRST/2014/3, p.1

⁸⁸ <https://law.duke.edu/humanrights/tighteningthepursestrings/>

⁸⁹ A/HRS/6/17 ¶ 46, 47.

⁹⁰ Ibid.

⁹¹ Fortin, p.392

83. The Special Rapporteur is recommending that such initiatives should be strengthened, or that representatives of States, civil society, UN agencies, ANSAs, along with individual experts, develop a new instrument outlining “Principles and guidelines on human rights and humanitarian standards protection, implementation, and dissemination”. ANSAs could be encouraged to adopt it and implement it. Such instrument will be enforced through self-monitoring and reporting, in addition to monitoring by an external impartial body⁹².

5. Enforceability

84. Extending the applicability of human rights law to ANSAs raise the difficult question of identifying and establishing appropriate mechanisms and bodies to hold ANSAs accountable. Below are some existing mechanisms that could be scaled up and additional options.

a. *The ICC*

85. The ICC remains an important tool to ensure that members of an ANSA be held accountable under the Rome Statute. While the focus is on individual criminal responsibility, international law does not preclude the possibility that an organization engaged in crimes against humanity may be held internationally responsible.⁹³ Extrapolating from the international jurisprudence, including the ICC Pre-Trial Chamber reasoning, it can be further determined that organized criminal gangs may also commit crimes against humanity⁹⁴.

b. *Sanctions*

86. Under Chapter VII, UNSC has imposed sanctions, including travel bans and asset freezes, against members of ANSAs for alleged human rights violations in Darfur/Sudan, Cote d'Ivoire and DRC. Such measures ought to be evaluated in terms of their human rights impact and expanded to other ANSAs when and where deemed useful, including criminal networks.

c. *A Role for Treaty Body and Special Procedures*

87. Special Procedures should continue to cover human rights violations by ANSAs and to engage with ANSAs. Some Treaty Provisions could also be more systematically assessed as far as ANSAs are concerned. For instance, the UN Working Group on Enforced or Involuntary Disappearances, the UN Committee on the Rights of the Child or the Committee on the Rights of Persons with Disabilities may be able to assess ANSAs violations.

88. It may be possible to set up experimental or ad hoc institutions focusing on the acts of ANSAs, including violations of the new proposed instrument, or other specific ANSAs human rights obligations.

d. *Compensation and Reparations*

89. The attribution of (financial) remedies and reparations for human rights violations by ANSAs is challenging, both from a procedural and substantive standpoint. The Special Rapporteur suggests that Transitional Justice may constitute an important opportunity for new developments.

⁹² Sivakumaran, pp.566-567.

⁹³ Daragh Murray, 2016, p.67 – The author reviews the international jurisprudence to demonstrate his point.

⁹⁴ Murray, 2016, p.69. The Open Society Justice Initiative has suggested that both the Mexican government forces and the Zetas drug cartel have committed crimes against humanity: <https://www.opensocietyfoundations.org/reports/undeniable-atrocities-confronting-crimes-against-humanity-mexico>.

90. For instance, Truth and Peace and Reconciliation Commissions might be tailored to address ANSAs collective responsibility, and ensure that individuals have a legal right to reparation⁹⁵. The Peace Plan between the Colombia Government and the FARC included the adoption in 2011 of Law 1448⁹⁶, which affirmed the responsibility of the State to provide reparations irrespective of the identity of the perpetrators.⁹⁷ In October 2016, FARC declared that it would forfeit all assets to fund victim reparations, as a condition of transitioning into a legitimate political party. The group also issued a public apology to all victims.

91. The International Commission of Inquiry on Darfur emphasized that Sudan but also rebels are responsible to pay compensation for their crimes in Darfur, whether or not the perpetrators are identified and punished.⁹⁸ A compensation commission was envisaged in the 2006 peace agreements. Even though it was not established, this may still constitute an example for future reference. Related to this is the possibility to tie forfeiture of ANSAs assets to peace-process, and/or truth and reconciliation. Otherwise, there would need to be a means of seizing, for example, ANSAs-held bank accounts.

92. A third option will be for the “international community” to step in, having recognized a victim’s right to reparations for right to life violations, irrespective of the perpetrator’s identity.

e. Collective and Symbolic Reparations

93. Collective reparations are a way to make amends for rights violations that affect entire communities. They are focused on victims as a group, bound by a common identity, experience, or form of violation.⁹⁹ The Inter-American Court of Human Rights (IACtHR) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) have handed rulings with collective and moral reparations, which may be useful models for violations by ANSAs.

94. There are examples of successful truth and reconciliation commissions involving ANSAs.¹⁰⁰ When they are the perpetrators of right to life violations, ANSAs should provide reparations. Here, the goal is to find out what happened in order to advance community reckoning with the past and public acknowledgment of harm inflicted on victims¹⁰¹. ANSAs should also provide public apologies, and contribute to national memorials and commemoration ceremonies.

IV. Conclusions

95. **The current legal framework applicable to ANSAs presents unacceptable accountability and protection deficits. In 2009, then UN Secretary-General Ban Ki Moon observed that “we need urgently to develop a comprehensive approach towards improving compliance by all these [non-state armed] groups with the law, encompassing actions that range from engagement to enforcement” (S/2009/277, para. 39).**

96. **This report has shown that ANSAs can be accommodated as subjects of IHRL, without treating them as akin to States. ANSAs are not bound by the full range of human rights law but to a threshold of norms derived from the nature of their control and degree of organisation, or capacity. Attributing certain human rights obligations to certain NSAs does not nullify but complement State’s responsibilities. The benefits**

⁹⁵ https://www.ictj.org/sites/default/files/ICTJ_Book_JusticeMosaics_2017.pdf.

⁹⁶ Law 1448 on Victims’ Right to Comprehensive Reparation and Land Restitution.

⁹⁷ Evans, at 220.

⁹⁸ Report of the International Commission of Inquiry on Darfur of the United Nations Secretary-General, para. 591 (25 January 2005).

⁹⁹ The Rabat Report: The Concept and Challenges of Collective Reparations, Feb. 2009, <https://www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf>.

¹⁰⁰ E.g. the Peruvian Truth and Reconciliation Commission.

¹⁰¹ Evans, at 160

of holding ANSAs obligated under IHRL is also derived from the complementary duty that States continue to have to respect, protect, and fulfil human rights.

97. There is no evidence that the recognition of ANSAs as subjects of IHL, or the UNSC, UNGA or UNHRC resolutions regarding ANSA has resulted into their legitimization. When ANSAs legitimization occurs, it is not because of international legal principles but for eminently political reasons, reflective of international, regional or domestic realities, and/or as part of peace-building processes.

98. Binding ANSAs members to human rights obligations fills existing gaps in relation to international accountability for human rights violations. It provides a legal foundation for access to remedies and reparation for victims of ANSAs violations.¹⁰²

V. Recommendations

99. States should:

(a) Encourage ANSAs' adoption of policies, practices, and codes of conduct for human rights protection;

(b) Develop guidelines for human-rights based engagements with ANSAs;

(c) Fully implement their obligation of protection against killings by ANSAs; evaluate current due diligence mechanisms in light of ANSAs activities, and strengthen their implementation, in full respect with IHRL;

(d) Hold ANSAs individual members to account under IHRL and ICL, when applicable;

(e) Define "membership," "assistance," "material support," to illegal organizations, including "terrorist" organizations, armed groups or criminal cartels, in ways that are precise and restricted to the type of conduct to be suppressed for the purpose of protecting human rights;

(f) Ensure and permit international and national civil society organisations and others to engage with ANSAs for the purpose of human rights protection;

(g) In situations of armed conflicts, respect the provisions of IHL and IHRL regarding humanitarian access and protection of civilians;

(h) Design nuanced and flexible listing and delisting instruments related to "terrorism".

100. States, under the auspices of the UN or other international process, should:

(a) Strengthen accountability for ANSAs human rights violations including by establishing trust funds to ensure remedies and reparations for victims of ANSAs violations; Imposing sanctions on ANSAs leaders responsible for human rights violations;

(b) Support initiatives to develop a coherent taxonomy of ANSAs and identify indicators to assess ANSAs' governance and capacity to hold human rights obligations;

(c) Support research into the background, legal status and impact of U.N. Security Council, General Assembly and Human Rights Council resolutions on ANSAs;

(d) Identify, evaluate, develop and/or implement mechanisms to move international law toward a more formal recognition of ANSAs obligations under IHRL;

(e) Explore the establishment of specialized human rights court(s) to try ANSAs;

¹⁰² Andrew Clapham, 2006.

101. ANSAs should:

- (a) Respect the right to life, without discrimination, including the prohibition against arbitrary deprivation of life;**
- (b) Protect all civilians as well as members of armed forces hors de combat or taken prisoners;**
- (c) Adopt and implement policies, practices, and codes of conduct to protect human rights; Draft or contribute to the drafting of commitments;**
- (d) Not engage in reprisal or revenge attacks;**
- (e) Allow external independent and impartial bodies to monitor compliance with human rights commitments and obligations;**
- (f) Abide by the principle of non-discrimination in all their policies/governance interventions;**
- (g) Adopt and implement minimum guarantees related to law enforcement;**
- (h) Ensure access to international humanitarian assistance of populations under their control.**

102. UN Agencies, International and National Civil Society Organisations should:

- (a) Develop and implement guidelines for engagement with ANSAs for the purpose of human rights protection;**
 - (b) Encourage and support ANSAs' adoption of, and adherence to, IHRL;**
 - (c) Encourage and support ANSAs' development of written commitments on human rights protection, including oversight monitoring mechanisms;**
 - (d) Provide human rights technical advice and trainings to ANSAs;**
 - (e) Monitor and report on ANSAs' human rights protection;**
 - (f) Document case studies and best practices on engagement with ANSAs for the purpose of human rights protection.**
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