

# **‘HUMAN RIGHTS RESPONSIBILITIES OF ARMED NON-STATE ACTORS’**

**Building on State Practice at the Human  
Rights Council, the General Assembly and  
the Security Council**

Report of the Seminar Held on 8 November 2017

On 8th November 2017, the Geneva Academy convened a seminar of experts, comprising academics, civil servants, as well as governmental representatives, to discuss the issue of the human rights responsibilities of armed non-state actors (ANSA). The meeting was held under the Chatham House Rule. The present report is a summary of the main points of discussion from the meeting, compiled thematically.

## **1. SESSION I: GENERAL CONTEXT OF THE DISCUSSION**

The morning session was devoted to setting the general context of the discussion, and included the presentation of two studies on the issue: the Geneva Academy study entitled “Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council”; and, the Harvard Law School Program on International Law and Armed Conflict (PILAC) study on “Armed Non-State Actors and International Human Rights Law: an analysis of the practice of the UN Security Council and UN General Assembly”. The documents are available on the websites of the Geneva Academy and PILAC, respectively.

It was highlighted in the introductory remarks that even though the number of ANSAs and their negative impact were on the rise, the behaviour of a number of them, which controlled territory, was often left unmonitored from a human rights law perspective. It was recalled that while it was clear that IHL applied in armed conflict situations the International Court of Justice confirmed that international human rights law (IHRL) remains applicable both in international and non-international armed conflicts. However, one would have to acknowledge the lack of clarity regarding the application of IHRL to ANSAs. For instance, it was unclear to what extent an ANSA was under the obligation to fulfil positive obligations such as enacting legislation on the prohibition of torture or promoting gender equality in areas under its control. It was thus critical to establish whether IHRL obligations were anchored in some form of law or practice, as could be gathered, arguably, from the resolutions of the UNGA, the UNSC, and the Human Rights Council. It was also recalled, that it was important to discuss the obligations of states that have lost control of part of their territory, particularly, with regard to those states unwilling to adhere to obligations in areas controlled by ANSAs.

A keynote was delivered on the academic debate regarding the human rights responsibilities of ANSAs. Two perspectives on the issue were proposed: an NGO perspective, and the perspective of a Commission of Inquiry (CoI). The speaker recalled that in the 90’s, if human rights NGOs were only reporting on a state’s behavior, they would run the risk of being perceived as biased in favour of ANSAs. Today, human rights NGOs are routinely reporting on human rights violations committed by states and ANSAs, in order to be credible, and present a

balanced picture of the human rights situation in a given context. From a Col's perspective, it was explained that the major issues arose in situations where ANSAs moved in and out of governments, in a very fluid manner, as is the case in South Sudan and Libya, for instance. It was observed that such situations created awkward positions, where one act could be considered a 'violation' of human rights (thereby suggesting a clear legal obligation); and later, considered an abuse (when committed by an ANSA). However, 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. For instance, early in the Syria situation in 2012, it seemed obvious to the Syria Col, that it was unclear whether there was an armed conflict to apply IHL, but there was sufficient evidence to proceed under IHRL, and consider acts that violated peremptory norms (*jus cogens*) binding states, individuals and non-states entities, including armed groups. Another example would be the Panel of Experts on Accountability in Sri Lanka, which considered that ANSAs with territorial control – such as the LTTE – were bound to respect the most basic set of human rights; thus, moving away from the small category of *jus cogens* norms. Finally, the participants were reminded that the manner of approaching and considering 'abuses' or 'violations' of ANSAs was also critical in transitional justice contexts.

Another interesting example mentioned, was how UN Peace Keeping Operations approached the problem. It was observed that these operations increasingly report on the human rights violations committed in the different contexts where they are deployed. In these reports, the focus is usually not on individual criminal responsibility, but rather aims at painting a general outlook of the human rights situation. In the reports of the UN Mission in South Sudan for instance, it was indicated that the most basic human rights obligations and *jus cogens*, were binding on all parties in and outside of armed conflict, such as the recruitment of children before and during the conflict.

The keynote further elaborated on the main problems surrounding human rights obligations of ANSAs. First, the issue of 'legitimacy' was highlighted. It meant that in some way, ANSAs were legitimized or recognized when they were bestowed obligations under the IHRL framework. The second problem was termed as the possible 'dilution' of states' human rights obligations, which in a sense would let a government off the hook, if such were to be consolidated as ANSAs obligations.

The 'dilution' argument was a valid concern, although it was ignoring the fact that states were sometimes already off the hook in circumstances where state's power on the ground was suspended. The 'legitimacy' issue on the other hand was considered to be a false problem, because it was based on the view that obligations could only be held by states, a position directly contradicted by the fact that ANSAs do have obligations under IHL. IHL and IHRL obligations are not meant to protect the sovereignty of states or to divert this sovereignty to ANSAs, but to protect the individual's dignity. International law is therefore capable of focusing on ANSAs, both under IHL and IHRL, without automatically bestowing to them any form of legitimization or recognition.

In conclusion, the keynote asked whether a treaty itself could directly bind an armed group. There has been an academic push towards looking at this possibility, which is slowly being

applied in practice. One could think of the African Charter on the Rights and Welfare of the Child – for instance, which is applicable to ANSAs, the Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, or the US Alien Tort Statute (ACTA). Indeed since the 80's, the practice based on the ACTA, clearly showed that international law did not just bind states, but also other entities like non-state actors. Finally one should underline that there was pushback from some participants on the keynote presentation.

## **2. SESSION II: ANSAS AND SPECIFIC HUMAN RIGHTS OBLIGATIONS**

In the second part of the meeting, participants debated on selected human rights issues and ANSAs.

### **A. PROHIBITION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT**

The impact of non-state actors – including ANSAs – on the prohibition of torture is increasingly growing. The definition of torture from UNCAT could include ANSAs, acting under the acquiescence of states. Furthermore international treaties could establish obligations for anyone, including ANSAs. It was also suggested that it could be useful to move away from the 'obligations based' approach, and adopt a 'rights based' approach, which views the issue from the perspective of victims. In that regard, one could wonder whether customary international law had evolved to impose IHRL obligations on ANSAs, especially deriving from the UDHR. But it was observed that it might also be interesting to look at the general principles of international law, rather than treaties and custom. In addition, one could also focus on states' direct and indirect obligations, for instance, on states' negative obligation not to encourage torture by an ANSA within the state. It was also emphasized that states should take their positive obligation to prevent torture more seriously. This discussion was debated and controversial among participants. How to address the issue of ANSAs' own legislations on the prohibition of torture, including prevention was considered tricky and there was no agreement among participants on this point.

### **B. RIGHT TO LIFE**

Violations of the right to life by ANSAs is a recurrent issue. The need to look at the realities on the ground was emphasized, in particular, in cases where there was a fluid concept of what is or is not, a state or a non-state entity. In this respect, it was noted that there could be an added

value of the IHRL framework, as not all ANSAs can be said to be a party to an armed conflict (e.g. armed gang or smugglers linked to human trafficking). In that context, more research is needed to identify and clarify the key characteristics of ANSAs, as well as which IHLR obligations would be more precisely applicable to them.

### **c. NON-DISCRIMINATION AGAINST WOMEN**

CEDAW General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations is an important and interesting document, which deals with human rights obligations of ANSAs. In particular it specifically addresses the application of the convention to state and non-state actors, such as armed groups and by making suggestions as to how non-state actors can respect women's rights in conflict-affected areas. The question which arose during the discussion was how could CEDAW engage with states and involve ANSAs based on this Recommendation? Para 25 of CEDAW General Recommendation 35 was also mentioned in this discussion. It declares that: 'In addition, both international humanitarian law and human rights law have recognized the direct obligations of non-State actors in specific circumstances, including as parties to an armed conflict. Those obligations include the prohibition of torture, which is part of customary international law and has become a peremptory norm (*jus cogens*).'

## **3. ISSUES RAISED IN THE PLENARY DEBATES**

The different issues raised in the plenary debates can be organised along the following key themes.

### **A. SOURCE OF THE OBLIGATIONS AND THEORETICAL ASPECTS**

The participants were reminded that the application of IHRL to ANSAs was not a new issue. It has a long history, particularly from the American and Spanish civil war. With regard to the impact of human rights on the issue of state building, one participant noted that one could find ways to apply them in a manner that recognizes ANSAs as temporary actors. In addition, it was suggested that an ANSA could have obligations but not rights, as granting obligations did not necessarily create 'stately' rights. It was also noted that there is no concrete rule on the

cessation of obligations for states, when ANSAs that are active on their territories, would be the ones better placed to incur obligations. In these cases, there has to be continued indirect or parallel obligations and an analogy was drawn with the principle of complementarity. Some participants were of the opinion that there were no legal basis for IHRL obligations of ANSA and that UNSC and the HRC resolutions could not be considered as such a legal basis in that respect. In addition, according to these participants, the treaty, which was usually mentioned to claim a legal basis for IHRL obligations of ANSA (the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict) was not a 'human rights treaty' per se, but rather a 'mixed' treaty, (i.e. an 'IHL' and 'Human Rights' treaty). Furthermore, one participant highlighted that some critical questions listed below had to be asked before shaping the debate:

### **1. Purpose of the Discussion**

- What problem would the issue of IHRL obligations of ANSAs, be solving: the enhancement of the protection of victims; the need to address the scourge of ANSAs and the increasing capacity of these groups; the issues surrounding the lack of enforcement mechanisms for IHL violations; or, the fact that the nation-state system is perceived as no longer being representative, thus calling for a more diverse system?

### **2. Typology and Legitimacy Concerns**

- Was there a need to identifying the different types of ANSAs that are operating today and who could make this categorization?
- What were the criteria defining 'de facto authorities'?
- Was the discussion focusing on ANSAs controlling territory or also addressing armed gangs and/or drug cartels?
- Would IHRL also apply to ANSAs that fall below the threshold of organization required by IHL?
- What would be the consequences of talking about human rights obligations of so-called 'terrorist groups', especially with regard to the 'legitimacy concern' and because there was a political problem with engaging with such groups?

Participants emphasized that their posture in the debate would be significantly different depending on the answer to these questions.

## **B. VALUE-ADDED OF HUMAN RIGHTS OBLIGATIONS OF ANSAS**

Some participants noted that the value-added of applying IHRL to ANSAs, was the need for regulation in addressing the relationship between ANSAs and populations. Such a discussion

would be in the interest of victims, especially where ANSAs have authority in territories. It was also pointed out that there were situations where ANSAs had an interest to fulfill their duties towards their constituencies, for instance when they exercises states' administrative responsibilities and judiciary obligations. However, one needed to beware, that the distinction between politics and the law was being blurred in this discussion. The binary nature of the debate that placed the protection of victims on the side of the IHRL obligations for ANSAs, was not necessarily the best way to approach the discussion. ANSAs seemed to be granted IHRL obligations, because of the alleged existence of a legal vacuum. Nevertheless, owing to the existing difficulty in the implementation of IHL generally – and by ANSAs particularly, it was observed that there could be an additional difficulty to implement human rights norms, by a wide range of ANSAs, which may not be sufficiently organized.

### C. ROLE OF THE STATES, ESPECIALLY WHEN THEY ARE SUPPORTING ANSAs

Many participants underlined the importance of focusing on the obligations of states when they support ANSAs. That was deemed especially important for Human Rights Treaty bodies, such as CEDAW, or the Committee on Enforced Disappearances. Participants were further reminded, that it was also possible to address what states are doing positively with regard to IHRL obligations; for instance, by promoting good and positive actions/practice.

### D. ROLE OF INTERNATIONAL INSTITUTIONS, SUCH AS THE UNSC AND THE HUMAN RIGHTS COUNCIL (HRC)

Many questions were raised with regard to the role of international institutions, such as the UNSC, or the HRC, with regard to this issue. There was an inquiry into the precise role of the UNSC and HRC in international law creation, including questions about their legitimacy in this discussion. For example, was it legitimate that the HRC was the body entitled to make the categorization of 'abuses' as violations with regard to ANSAs – especially with regard to *de facto* authorities? Should the UNSC, as an executive organ, be making such serious decisions, including dealing with these issues on behalf of all other countries? Should the UNSC be at the vanguard of such a discussion – so that the law, whether treaty or custom, could eventually catch up? What was the role or impact of such organs with regards to the creation of international law, including customary law? The impact on the ground of the decisions and resolutions adopted by these bodies, was also raised. It was finally recalled that there was a danger of parcelling or diluting human rights, including the related key question of which entity had the authority to do so. Some participants also revisited the discussion about how the

extension of the human rights framework to ANSAs, did invoke matters of sovereignty and legitimization.

## E. ACCOUNTABILITY

The issue of reparation and remedies for IHLR violations committed by ANSAs was raised on several occasions during the debate. It was emphasized that there was currently no judicial or quasi-judicial international mechanism (such as the European Court of human rights or UN treaty bodies) to hold ANSAs accountable under IHLR. In this regard, some participants questioned whether this expansion of the application of human rights to ANSAs, would have any practical impact in its operation and enforcement, generally, but also, especially for the victims on the ground. Another participant proposed that means to establish ANSA accountability could be explored, such as setting up experimental institutions that would focus on the acts of ANSAs, just like other institutions, namely – treaty bodies, and human rights courts. Symbolic reparations could also be a solution to the accountability gap. Some participants noted that the ICC was perhaps a sufficient tool to ensure that members of an ANSA be criminally accountable for IHL and IHLR violations. Others were of the opinion that while individual criminal responsibility was indeed crucial in this context, it was not always satisfactory in the sense that it could not account of the ‘collective’ responsibility of ANSAs. In that particular regard, transitional justice mechanisms could be an interesting and valuable framework for discussion. In Colombia for instance, it was foreseen that the state would assume the responsibility for the abuses committed by the FARC, while it was also expected that the group would be involved in the reparation process. Some participants however were of the opinion that the focus on the remedial process might be distracting and that it would be wiser to focus on compliance and policy.

## F. CONTENT OF HUMAN RIGHTS OBLIGATIONS

The content or issue regarding which human rights obligations would apply to ANSAs, was raised. In that regard, some participants suggested one could distance oneself from the notion of “legal obligation” to focus on the content of the norms. Whether or not to use a list, as in Philip Alston’s reports when he was SR on extrajudicial, summary or arbitrary executions, was proposed. One participant also noted that it was possible to look at ANSAs through the lens of duties and responsibilities, inspired by the context and language of the UDHR, and therefore not duplicate the system of obligations for states. Other participants were dubitative with regard to the possibility of establishing a list – or even guidelines for ANSAs, as for them the discussion was premature and too political. However, the posture of some participants also depended on the following elements: - the types of ANSAs concerned and the (political and legal) scope of



such project. If the path of elaborating such guidelines was to be pursued, it was therefore essential that these issues be clarified.

## G.ANSA'S PERCEPTION AND ENGAGEMENT

The question on how to engage ANSAs – like the Islamic State –, on human rights law, was raised. It might be difficult to have such conversations with such armed groups on these issues. It was also highlighted, that even if it was difficult, engagement and training were key. Often, when trainings are conducted with ANSAs, one of the questions asked, is whether the ANSA knows about human rights. It was noted, also, that there has been engagement with ANSAs that can be considered *de facto* authorities.<sup>1</sup> The UNSC itself has often put states and ANSAs on the same level when talking about application of human rights to parties – which can be interpreted as an extension of the IHL principle of equality of belligerents. Therefore, there is maybe a need for states to adjust their posture to ANSAs that actually adhere to obligations. Additionally, it was emphasized how important it is, to highlight the content of the human rights law that ANSAs are required to adhere to on the ground.

## 4. CONCLUDING REMARKS

The key concluding remarks can be summarized as follows:

The rise of ANSAs in contemporary conflicts and situations of violence and their impact on IHL and human rights calls for increased and more sustained attention from the international community. While international organizations and academics have addressed this issue, states should become more involved in the debate. Areas such as access to remedy, monitoring and accountability mechanisms are of particular importance. There seemed to be a general agreement that ANSA, which control territory and perform government like functions, might have at least *de facto* IHRL obligations. As a consequence, the typology of groups have to be considered in more details, in particular the definition of *de facto* authorities and more work needs to be done with regard to the specific content of IHRL applicable to ANSAs. Finally, no

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<sup>1</sup> De facto authorities have been defined as 'entities, which exercise effective authority over some territory, no matter whether they are engaged in warfare with the sovereign or are subsisting in times of peace'. See Arantzazu Mendi case, House of Lords, Judgment of 23 February 1939, L.R., [1939] A.C. 256 (House of Lords), reproduced in 1942 International Law Review 60, at §65 et seq. See also M. Schoiswohl, 'De facto regimes and human rights obligations – the twilight zone of public international law?' Austrian Review of International and European Law 6 (2001), 50; and J. Van Essen, 'De Facto Regimes in International Law', 28 Utrecht Journal of International and European Law 74 (2012), 31-49.

legal, political or moral ground should prevent engagement with ANSAs on humanitarian norms (IHL and human rights).