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**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, Agnès Callamard, submitted pursuant to Council resolution 35/15. In her report, the Special Rapporteur focuses on violations of the right to life by armed non-State actors and argues that such actors are bound by human rights obligations.

The Special Rapporteur shows that the State's central role under international human rights law does not exclude other actors and that the sources of armed non-State actors' human rights obligations and legal personality may be traced to treaty and customary law. She then proposes a framework to hold such actors accountable under international human rights law, arguing that their human rights obligations should be context-dependent, actor-specific and gradated according to the nature of their control, capacity and governance.

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



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

I. Introduction

1. The present report is submitted to the Human Rights Council in accordance with resolution 35/15. In preparation for it, the Special Rapporteur issued a call for submissions to States, academic institutions and civil society entities and held expert meetings at the University of Essex, United Kingdom of Great Britain and Northern Ireland, on 15 and 16 June 2017 and at the Geneva Academy of International Humanitarian Law and Human Rights, Switzerland, on 8 November 2017. The Special Rapporteur thanks both institutions for their support, as well as those who responded to the call for submissions.¹

II. Activities of the Special Rapporteur

2. Information on the main activities undertaken by the Special Rapporteur between March 2017 and February 2018, on the unlawful death of refugees and migrants and on earlier activities can be found in reports submitted to the Human Rights Council and the General Assembly.²

3. The Special Rapporteur conducted official visits to Iraq from 14 to 23 November 2017³ and El Salvador from 25 January to 5 February 2018,⁴ at the invitation of the respective Governments. She thanks the Government of Mozambique for responding positively to her request for a visit.

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

4. Armed non-State actors⁵ 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 have launched deadly operations extraterritorially, including in Europe, Asia, Africa and the Middle East. Some operate in the context of armed conflicts. Others operate at the intersection of peace and war, or in contexts of low-intensity or unconventional violence.⁶ Some are driven by ideology or profit, many by both. The vast majority engage in governance-like functions, ranging from registering births, running clinics and schools, collecting taxes, developing rules and policies and operating dispute-resolution mechanisms or prisons. Some have political or State-like ambitions. All use violence.

5. Like killings by States, killings by armed non-State actors may be driven by “anti-civilian ideologies”⁷ that dehumanize and that may, in the worst of cases, result in genocide and crimes against humanity. Like States, armed non-State actors may kill for political

¹ The Special Rapporteur thanks the International Human Rights Law Clinic, Berkeley Law School, for its assistance.

² A/HRC/35/23, A/HRC/38/44/Add.3 and A/72/335.

³ A/HRC/38/44/Add.1.

⁴ A/HRC/38/44/Add.2.

⁵ Armed non-State actors 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.” Gerard McHugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners* (United Nations, 2006), p. 87.

⁶ Such situations are characterized by recourse to the police, often supported by the armed forces, to restore law and order. See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, International Committee of the Red Cross, 1987).

⁷ Hugo Slim, *Killing Civilians: Methods, Madness and Morality in War* (Hurst, 2007).

reasons, in retaliation, to create fear or for material gain. In the vast majority of cases, killings are carried out as part of a calculated strategy.

6. Armed non-State actors pose many challenges to the human rights community, particularly in terms of accountability. How to name their acts of violence? How to effectively support the rights of victims, as well as the public's right to know? Can the conduct of armed non-State actors be construed as a violation of human rights law, which traditionally has been reserved for States?⁸ Should the distinction between victims, on the basis of the relationship of the perpetrators with the State, be justified and sustainable, when armed non-State actors commit acts of violence?

7. In the Special Rapporteur's opinion, given the proliferation of complex armed non-State actors and the blurred distinction between political insurgents, criminal gangs and armed organizations with international brands and operations (see also General Assembly resolution 48/12), the current legal framework to address such actors presents unacceptable limitations. It is unjust to the victims of violations perpetrated by armed non-State actors and ineffective at addressing protection gaps. It is not tenable, sustainable or, ultimately, principled.

8. The Special Rapporteur maintains that armed non-State actors are bound by human rights obligations. In the present report, she shows that developments within the United Nations over the past 20 years have addressed armed non-State actors as duty bearers. She clarifies the sources of these obligations and shows that the attribution of human rights obligations does not validate armed non-State actors' authority. She proposes a context-dependent, specific and gradated framework focusing on the nature and extent of these actors' control, governance and capacity.

A. International developments

9. Member States have progressively addressed armed non-State actors through resolutions, as have the special procedures and commissions of inquiry of the Human Rights Council. These developments have been complemented on the ground by Member States' political and humanitarian engagement with armed non-State actors, including for the purpose of securing ceasefires and for peacemaking, and United Nations agencies and international non-governmental organizations have interacted with a range of armed non-State actors to protect civilians.

1. Security Council and General Assembly resolutions

10. Over the past two decades, there have been over 125 Security Council resolutions, approximately 65 General Assembly resolutions and over 50 statements by the President of the Security Council pertaining to the human rights obligations or other related responsibilities of armed non-State actors,⁹ prompting researchers to conclude that the Council and the Assembly "have recognized, at a minimum, that the conduct of at least some [armed non-State actors] – in contexts as diverse as the DRC to Syria – can amount to violations or abuses of human rights".¹⁰

11. Some of the acts described as either "abuses" or "violations" by the Security Council may implicate *jus cogens* norms, prohibitions under customary international human rights law, international human rights law, refugee law and/or international humanitarian law. Some Council resolutions are broad, while others specify which abuses or violations have been committed by armed non-State actors, such as extrajudicial executions (e.g., resolution 2295 (2016)) or sexual or gender-based violence (e.g., resolution 2149 (2014)).

⁸ Nigel Rodley, "Can armed opposition groups violate human rights?", in *Human Rights in the Twenty-First Century: A Global Challenge*, Kathleen Mahoney and Paul Mahoney, eds. (Springer Netherlands, 1993), pp. 297–298.

⁹ See <https://pilac.law.harvard.edu/ansas/>. See also Andrew Clapham, "Focusing on armed non-State actors", in *The Oxford Handbook of International Law in Armed Conflict*, Andrew Clapham and Paola Gaeta, eds. (Oxford University Press, 2014).

¹⁰ See <https://pilac.law.harvard.edu/ansas/>.

12. The focus on the obligations of armed non-State actors is clearest with regard to children. In 1999, the Security Council, in its resolution 1261 (1999), urged all parties to armed conflicts to ensure that the protection, welfare and rights of children were taken into account. Since then, the Council has established a mechanism for monitoring and reporting on six grave violations against children in armed conflict, including killings.¹¹ Armed non-State actors have frequently been mentioned as persistent violators.

13. The General Assembly, for its part, generally refers to acts of armed non-State actors as violations of international human rights and humanitarian law. For instance, in its resolution 70/234, on the situation of human rights in the Syrian Arab Republic, it strongly condemned all human rights abuses or violations of international humanitarian law by 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.

14. General Assembly resolution 71/198, on extrajudicial, summary or arbitrary executions, includes at least three paragraphs of relevance to the roles and responsibilities of non-State actors. In it, the Assembly acknowledged that international human rights and humanitarian law are complementary and mutually reinforcing, and noted, 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. It also expressed deep concern about killings committed by non-State actors, including terrorist groups and criminal organizations.

2. Human Rights Council

15. The Human Rights Council has similarly focused on armed non-State actors in its resolutions,¹² sometimes naming one or more armed non-State actors. For example, Council resolution S-22/1 addressed the so-called Islamic State in Iraq and the Levant and associated groups, while resolution S-23/1 is on Boko Haram. The Council has also addressed armed non-State actors in general terms, when speaking of human rights abuses or violations. Council resolutions have dealt with armed groups, rebels, terrorist organizations and transnational criminal networks, among others (see resolutions 20/17, 21/25 and 22/18).

16. Special procedures and commissions of inquiry have also focused on armed non-State actors. The commissions of inquiry, which have sought to ground the human rights obligations of such actors in the fact that they control territories and populations, have made recommendations to both States and armed groups without obvious distinction, prompting one observer to note that there seemed to be a growing tendency to view the violations thematically, without any particular (special) attention as to whether such violations were committed by a State or a non-State actor. Indeed, the Independent International Commission of Inquiry on the Syrian Arab Republic, 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 armed non-State actors with territorial control – such as the Liberation Tigers of Tamil Eelam (Tamil Tigers) – were bound to respect the most basic set of human rights.¹³

17. Since its establishment in 1982, the mandate on extrajudicial executions has looked at a variety of situations involving killings by armed non-State actors, including by focusing on States' due diligence and on the human rights responsibilities of armed non-State actors in the context of non-international armed conflicts. Particularly noteworthy is the 2005 Sri Lanka mission report, in which the then mandate holder pointed out that:

¹¹ See <https://childrenandarmedconflict.un.org/six-grave-violations/>.

¹² Geneva Academy of International Humanitarian Law and Human Rights, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council* (Geneva, 2016).

¹³ Andrew Clapham, "Human rights obligations for non-State actors: where are we now?", in *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*, Fannie Lafontaine and François Larocque, eds. (Intersentia, 2019).

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 [Tamil Tigers ... remain] 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.¹⁴

18. In subsequent reports, on visits to Afghanistan, Colombia, the Democratic Republic of the Congo and Sri Lanka, the Special Rapporteur elaborated on that premise, drawing the conclusion that armed non-State actors with control over territories and populations and with an identifiable political structure have human rights obligations and ought to respect human rights and humanitarian law norms. A similar approach was adopted by other mechanisms, such as the United Nations Fact-Finding Mission on the Gaza Conflict.¹⁵

3. Key implications

19. For over 20 years, Member States have viewed armed non-State actors both as perpetrators of human rights violations and as duty bearers, and have made efforts to strengthen the international regime for the protection of civilians (see, e.g., Security Council resolution 1894 (2009), preamble). Some States have engaged with armed non-State actors within and outside their territories for peacemaking or to protect civilians. These developments, along with the work of special procedures, highlight the following:

- (a) Armed non-State actors are seen as human rights duty bearers;
- (b) International obligations applicable to armed non-State actors are derived from international human rights, humanitarian, refugee and criminal law;
- (c) Armed non-State actors' obligations may include the obligation to respect *jus cogens* norms, customary human rights and humanitarian law or they may be broader;
- (d) Armed non-State actors that have displaced the *de jure* government and established (exclusive) territorial control are responsible for the protection (and accountable for violations) of human rights in areas under their control.

20. Commentators tend to agree that, while not binding, General Assembly resolutions reflect emerging State practice or *opinio juris*. Some Security Council decisions expressly adopted under Chapter VII of the Charter of the United Nations impose legal obligations on States,¹⁶ while others may contribute to the formation of *opinio juris*.¹⁷ Whether Security Council resolutions dealing with armed non-State actors are binding on the actors themselves remains unclear and debated.¹⁸ Notwithstanding the legal effect of these resolutions, these developments demonstrate that, during recent decades, Member States, the Security Council, the General Assembly, the Human Rights Council and a number of special procedures have recognized that the conduct of armed non-State actors can amount to human rights violations.

B. Existing limitations and deficits

21. An important rationale for binding armed non-State actors to human rights obligations is that the current legal framework for holding them accountable has unacceptably large deficits with regard to access to justice, remedies and reparations. States' implementation of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹⁹ is a recurring difficulty. Moreover, it has been particularly difficult to implement the Principles when violations are attributed to armed non-State actors.

¹⁴ E/CN.4/2006/53/Add.5, para. 25.

¹⁵ A/HRC/12/48.

¹⁶ See <https://pilac.law.harvard.edu/ansas>, pp. 21–29.

¹⁷ International Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić*, decision of 2 October 1995, para. 133; International Law Association, "London Conference (2000): final report on customary international law".

¹⁸ See <https://pilac.law.harvard.edu/ansas>.

¹⁹ General Assembly resolution 60/147, annex.

1. State obligation to protect under international human rights law

22. It has been suggested that the most effective way to hold armed non-State actors to account is for Governments to discharge their responsibility to protect their people.²⁰ The State may be held responsible for the 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 conduct.

23. The Special Rapporteur is committed to strengthening this approach, as highlighted in her report on a gender-sensitive approach to arbitrary killings.²¹ There are, however, situations where the obligation to protect is not enough or cannot apply, such as in the context of non-international armed conflicts or whenever armed non-State actors have escaped the effective control of the State.²² Under the due diligence requirement, States are not required to accept responsibility for the acts of insurgents.²³ Domestic adjudication is often unrealistic, particularly during conflict, leaving major accountability gaps.

24. Moreover, in some situations, States' interventions to re-establish authority and control may themselves lead to violations, including of the right to life. In such circumstances, invoking States' responsibility to protect against violations by armed non-State actors could be instrumentalized for greater repression and is unlikely to deliver protection. The Special Rapporteur is not suggesting that States' obligation to protect be ignored but, rather, that binding armed non-State actors to human rights obligations would complement it.²⁴

2. International humanitarian law

25. In the context of non-international armed conflicts, common article 3 of the Geneva Conventions, along with the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), and customary international humanitarian law are binding on armed non-State actors operating under responsible command, controlling territory and demonstrating a capacity to conduct sustained military operations. Common article 3 provides the most essential protection to civilians and persons placed *hors de combat*. Many of the provisions in Protocol II, which focuses 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" (art. 51 (2) of Protocol I).²⁵ Another prohibition applies to indiscriminate and disproportionate attacks.²⁶

26. It should be recalled that international human rights and humanitarian law are complementary, not mutually exclusive. The Special Rapporteur also recalls that international humanitarian law falls within her mandate.

27. One often-heard argument is that international humanitarian law is sufficient to bind armed non-State actors to obligations and to protect the right to life, particularly because customary international humanitarian law applicable in non-international armed conflicts has grown dramatically since the mid-1990s, including following the decision of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Tadić*.²⁷

28. In fact, there are limitations to the respect for, and protection against, arbitrary deprivation of life by armed non-State actors. First, international humanitarian law accountability mechanisms and enforcement for violations committed in non-international

²⁰ See <https://soundcloud.com/uniofessex/professor-sir-nigel-rodley/reposts>.

²¹ A/HRC/35/23.

²² Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press, 2017), pp. 210–216.

²³ See *Yearbook of the International Law Commission, 1972, vol. II* (United Nations publication, Sales No. E.73.V.5).

²⁴ Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002).

²⁵ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012), p. 339.

²⁶ *Ibid.*, pp. 348–357.

²⁷ See also Sivakumaran, *The Law of Non-International Armed Conflict*, pp. 56–57.

armed conflicts have been historically weak, particularly for armed non-State actors.²⁸ Second, States parties to a conflict remain bound by international human rights law. Limiting armed non-State actors' obligations to common article 3 of the Geneva Conventions and customary international humanitarian law would establish an inequality of obligations. Third, the application of international humanitarian law to armed non-State actors requires a "nexus" or direct link to the conflict.²⁹ This excludes areas under such actors' control where there is "peace" and where certain activities are carried out, such as administration, that do not involve confrontation with enemy combatants. Other bodies of law should apply, including international human rights law.³⁰ The notion that armed non-State actors should continue to be governed solely by common article 3 of the Geneva Conventions creates unacceptable protection gaps for victims, unless armed non-State actors are obliged to respect human rights.³¹ Lastly, international humanitarian law applicable to non-international armed conflicts does not mention reparation, "and there have been virtually no instances where organized armed groups have undertaken to make reparations for violations of international humanitarian law or have made such reparations in practice".³² The right to reparation is limited to a State's failure to protect individuals from violence by armed non-State actors, as clarified by the International Committee of the Red Cross.³³

29. A final and obvious limitation exists in situations involving armed non-State actors and resulting in a massive loss of lives that are not, however, armed conflicts and to which international humanitarian law does not apply. For instance, at the start of the Syrian catastrophe, the Independent International Commission of Inquiry on the Syrian Arab Republic considered that the threshold of an armed conflict had not been reached and that armed groups were bound by peremptory rules of international law (*jus cogens*).³⁴ More generally, low-intensity conflicts involving criminal cartels do not amount to non-international armed conflicts.

3. International criminal law

30. Individuals who are members of armed non-State groups may be held to account, under international criminal law, for war crimes, crimes against humanity or genocide. Armed non-State actors may have international obligations outside armed conflict, in the context of crimes against humanity and genocide, which may be prosecuted by the International Criminal Court, ad hoc tribunals and national courts.

31. The Special Rapporteur acknowledges that international customary law and the Rome Statute of the International Criminal Court are essential in the fight against impunity, including in relation to members of armed non-State groups. For instance, through the self-referral process, the Court has issued arrest warrants against members of armed non-State groups in the Central African Republic, the Democratic Republic of the Congo and Uganda. In September 2017, the Security Council adopted resolution 2379 (2017), which led to the establishment of an investigative team to support Iraq in holding the so-called Islamic State in Iraq and the Levant accountable.³⁵

32. These initiatives are welcome but also run the risk of appearing selective of perpetrators and of entrenching a culture of impunity for State actors. Furthermore, the above-mentioned referral process and the establishment of international tribunals are complex and lengthy processes. Another limit is the lack of jurisdiction over armed non-State

²⁸ Ibid., chaps. 10–11.

²⁹ Fortin, *The Accountability of Armed Groups under Human Rights Law*, pp. 47–51; <https://link.springer.com/article/10.1007/s40802-016-0061-2>.

³⁰ Sivakumaran, *The Law of Non-International Armed Conflict*, p. 98.

³¹ Geneva Academy, *Human Rights Obligations of Armed Non-State Actors*, p. 21; Fortin, *The Accountability of Armed Groups under Human Rights Law*, pp. 52–53.

³² Emanuela-Chiara Gillard, "Reparation for violations of international humanitarian law", *International Review of the Red Cross*, vol. 85, No. 851 (2003), pp. 529–552.

³³ See https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule150.

³⁴ A/HRC/S-17/2/Add.1.

³⁵ See www.un.org/press/en/2017/sc12998.doc.htm.

actors as “collective entities”.³⁶ Furthermore, international criminal law does not provide for reparations to victims of violations by armed non-State actors,³⁷ while States that incorporate the Rome Statute into domestic law do not establish judicial remedies for individual reparations. A final limitation is that not all crimes committed by armed non-State actors meet the threshold required under international criminal law.

4. International counter-terrorism framework

33. Since 11 September 2001, international counter-terrorism legislation has emerged a main body of law to frame the acts of a number of armed non-State actors.³⁸ While there is no 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 and are carried out with the intent to intimidate a population.³⁹ Individual acts of terrorism may amount to war crimes or crimes against humanity while disproportionate State responses to terrorism may constitute international crimes and human rights violations.⁴⁰

34. One issue with characterizing armed non-State actors as “terrorists” and their acts as subject to international counter-terrorism legislation is that many groups are ill-defined or not defined at all. In other words, Governments could label anyone a “terrorist”, including journalists and human rights defenders.

35. Moreover, the concern due to civilians in the context of counter-terrorism efforts⁴¹ should extend to the rights of victims.⁴² The United Nations Global Counter-Terrorism Strategy includes five references to victims, three of which are in paragraph 8, section I, which demand of States that they put in place, on a voluntary basis, national systems of assistance for victims of terrorism. For his part, in 2011, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism insisted that the protection of the rights of the victims is a genuine legal duty modelled on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁴³ Such an obligation has rarely been implemented, however. It seems that the counter-terrorism framework remains limited to addressing crimes against the State.

36. At the domestic level, individual members of armed non-State groups may be tried under a combination of counter-terrorism and criminal law. There are serious weaknesses to counter-terrorism laws around the world, including vague and broad definitions and the potential criminalization of democratic rights. Furthermore, the characterization of “terrorism” for acts that may amount to war crimes, crimes against humanity or genocide constitutes, in the Special Rapporteur’s opinion, a fallacy of historical proportions and a potential violation of the rights to justice, to know and to participate. Finally, the place and experiences of victims in the judicial accountability process have been treated ad hoc, which is why there exists limited evidence that victims of “terrorism” can access remedies and reparations.

³⁶ Annyssa Bellal, “Non-State armed groups in transitional justice processes: adapting to new realities of conflict”, in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, Roger Duthie and Paul Seils, eds. (New York, International Center for Transitional Justice, 2017).

³⁷ Under the Rome Statute, a trust fund for victims was established to provide restitution, compensation and rehabilitation for victims.

³⁸ Robert Barnidge, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (Springer, 2008), pp. 14–18.

³⁹ Jairo Munive and Jonathan Somer, *Armed Non-State Actors: Counter-Terrorism and the Protection of Civilians*, 17 (Copenhagen, Danish Institute of International Studies, 2015), p. 21.

⁴⁰ United Nations Office on Drugs and Crime, *Frequently Asked Questions on International Law Aspects of Countering Terrorism* (2009), p. 41.

⁴¹ E/CN.4/2006/98, paras. 67–71 and 74.

⁴² See www.ohchr.org/EN/Issues/Terrorism/Pages/Statements.aspx.

⁴³ A/66/310, paras. 23 and 27.

C. International human rights regime and non-State actors

37. The Special Rapporteur reaffirms the centrality of States and their obligations under international law, including human rights law. This, however, does not mean that States are the only duty bearers.

1. Inalienable human rights

38. Whether derived naturally or from international legal sources, human rights are the entitlements of all humans. They are “inalienable” and thus sanctions ought to be applied against any State, group or person seeking to violate those rights. For instance, the intent of the Universal Declaration of Human Rights is to prohibit and provide redress for human rights violations, whether committed by a State or a separate entity.

39. This understanding of international human rights law acknowledges that State obligations are the cornerstone of the human rights regime. Other bricks too support the edifice of rights, 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. ... armed groups must accept that 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”.⁴⁴

40. Interpreters of the Universal Declaration of Human Rights have pointed out that its drafters omitted specific language about duties and instead included reference to the responsibilities that all members of society have towards each other to refrain from committing human rights abuses.⁴⁵ The *travaux préparatoires* on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights highlight a range of debates over non-State actors, which, along with the wording of some articles, suggest that States are not the only duty bearers⁴⁶ and that duties attached to non-State actors are distinct from the obligations imposed upon States and from those imposed on different non-State actors.

41. Recognition of armed non-State actors has translated into a few developments particularly relevant to the right to life, including 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 Africa. In addition, the Committee on the Elimination of Discrimination against Women has noted, in paragraph 16 of its general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations, 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.

2. Legal personality of armed non-State actors

42. The international legal personality of armed non-State actors 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, neither of which is deemed to be applicable to armed non-State actors.⁴⁷ In the Special Rapporteur’s opinion, however, it is

⁴⁴ E/CN.4/2006/53/Add.5, para. 27.

⁴⁵ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia, University of Pennsylvania Press, 1999), chap. 7.

⁴⁶ Fortin, *The Accountability of Armed Groups under Human Rights Law*, pp. 210–216.

⁴⁷ Duncan B. Hollis, “Why State consent still matters: non-State actors, treaties, and the changing sources of international law”, *Berkeley Journal of International Law*, vol. 23, No. 1 (2005), pp. 137–174; Zegveld, *The Accountability of Armed Opposition Groups in International Law*.

not legally justified to consider States the only natural persons of international law with discretion to allocate personality to other entities.

43. The International Court of Justice leaves open the possibility of reconsidering the categories of subjects in international law.⁴⁸ Developments over the past 50 years confirm that legal personality may derive from different sources, including treaty law, customary international law, bilateral agreements and recognition by third States. A number of non-State entities, including the United Nations, the International Committee of the Red Cross and non-governmental organizations, have been attributed international legal personality, under one or another theory. Under belligerency, insurgency and international humanitarian law, new subjects of international law can and have emerged, without the explicit consent of the State. Research shows that non-State actors' legal personality exists along a spectrum,⁴⁹ as it is linked to their functionality in the international sphere, and that it fluctuates over time. Armed non-State actors' legal personality is not as extensive as that of States but sufficient to imply obligations under international law and treaties.⁵⁰ Different sources imply different obligations.

44. As explained below, the most straightforward approach to assessing armed non-State actors' legal personality is to look at two possible sources: common article 3 of the Geneva Conventions or the so-called de facto authority theory. Under both, legal personality is connected to the level of organization and control over territory or people.⁵¹

Common article 3 of the Geneva Conventions

45. Under this approach to legal personality,⁵² the fact that armed non-State actors party to a non-international armed conflict are bound by common article 3 of the Geneva Conventions and other provisions of customary international humanitarian law – and are thus subject to direct international obligations – means that they should be regarded as possessing international legal personality. Furthermore, the International Court of Justice and the European Court of Justice have confirmed that international legal persons are bound by customary international law.⁵³ Accordingly, it may be argued that armed non-State actors parties to a non-international armed conflict are bound by customary international law depending on their capacities and realities,⁵⁴ including customary international human rights law.⁵⁵

De facto authority

46. The legal and political construction of de facto authority provides evidence of the flexibility of the international legal system in response to situations on the ground. While there may be disagreement as to which armed non-State actors are a de facto entity, there is consensus about their conceptual existence. De facto authorities are armed non-State actors exercising exclusive control over a specific territory,⁵⁶ meaning that they “exist side-by-side

⁴⁸ *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

⁴⁹ Fortin, *The Accountability of Armed Groups under Human Rights Law*, p. 98.

⁵⁰ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), p. 82.

⁵¹ Fortin in *The Accountability of Armed Groups under Human Rights Law*, chaps. 4–5.

⁵² Submission of Daragh Murray to the Special Rapporteur, 2017.

⁵³ *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at p. 89, para. 37; European Court of Justice, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, judgment of 16 June 1998, para. 45.

⁵⁴ See www.ejiltalk.org/book-discussion-daragh-murrays-human-rights-obligations-of-non-state-armed-groups-3/.

⁵⁵ Daragh Murray, *Human Rights Obligations of Non-State Armed Groups: An Exploration of the Practice of the UN Human Rights Council* (Geneva, Geneva Academy of International Humanitarian Law and Human Rights, 2016), chap. 4.

⁵⁶ See Jochen A. Frowein, “De facto regime”, in *Max Planck Encyclopaedia of Public International Law* (Oxford University Press); Jean S. Pictet, ed., *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva, International Committee of the Red Cross, 1960), pp. 36–37.

with the established authorities”;⁵⁷ in effect have displaced State authority and thus exercise “effective sovereignty”.⁵⁸ The de facto legal construct applies to entities that are party to a conflict and to those that are not.⁵⁹

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.⁶⁰ The jurisprudence has consistently demonstrated that such a vacuum must be filled:⁶¹ acts of the de facto authority must be acknowledged and given legal validity, in the interests of the affected individuals and the international community. The international legal obligations under which de facto authorities are bound include those under international human rights law.⁶² The population and individuals cannot lose their inalienable rights because of changes in the authorities. Armed non-State actors retain obligations by virtue of their control and independent existence and because of the international legal rejection of a legal vacuum.⁶³

Armed non-State actors without exclusive control

48. The justifications underpinning de facto authorities’ legal obligations may be equally applicable to armed non-State actors without exclusive territorial control. Such actors 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 armed non-State actors, whether they exercise exclusive control over territories or not: “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.”⁶⁴ The implication is that armed non-State actors are thus bound both by customary international law and the territorial State’s obligations under international human rights law.

Armed non-State actors’ capacity to bear obligations

49. An alternative approach to the legal personality focus is to treat it as an over-stated, “highly subjective notion that is linked to, and formed by, individual scholars’ conceptions of the whole system of international law”,⁶⁵ reflecting an outdated vision and an intrinsic lack of imagination.⁶⁶ It has been suggested that participation in the international legal system,⁶⁷ or non-State actors’ capacity to bear obligations,⁶⁸ are far more relevant to the determination of whether 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

⁵⁷ Zegveld, *The Accountability of Armed Opposition Groups in International Law*, p. 15.

⁵⁸ Pictet, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War*, p. 37.

⁵⁹ Michael Schoiswohl, “De facto regimes and human rights obligations: the twilight zone of public international law?”, *Austrian Review of International and European Law*, vol. 6, No. 1 (2001), pp. 45–90.

⁶⁰ Philip Brown, “The legal effects of recognition”, *American Journal of International Law* 630, 1950.

⁶¹ Security Council resolution 276 (1970); European Court of Human Rights, *Loizidou v. Turkey*, judgment on the merits of 18 December 1996, para. 45.

⁶² European Court of Human Rights, *Cyprus v. Turkey*, judgment of 10 May 2001, para. 96.

⁶³ Human Rights Committee, general comment No. 26 (1997) on the continuity of obligations.

⁶⁴ Submission of Daragh Murray, 2017.

⁶⁵ Fortin, *The Accountability of Armed Groups under Human Rights Law*, p. 71.

⁶⁶ August Reinisch, “Accountability of international organizations according to national law”, in *Netherlands Yearbook of International Law*, vol. 36 (Asser Press, 2005), pp. 119–167; Clapham, *Human Rights Obligations of Non-State Actors*. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994), p. 4.

⁶⁷ Robert McCorquodale, “An inclusive international legal system”, *Leiden Journal of International Law*, vol. 17, No. 3 (September 2004), pp. 477–504.

⁶⁸ Clapham, *Human Rights Obligations of Non-State Actors*, pp. 68–9.

to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity.⁶⁹

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 armed non-State actors' 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 fulfilment of any obligation under international law.⁷⁰

D. Key implications and moving forward

51. The present report has highlighted the following:

- Armed non-State actors commit violations of the right to life and other human rights.
- International humanitarian law, international criminal law and domestic criminal law have roles to play in holding armed non-State actors to account. However, there are situations where they do not apply or need to be complemented by international human rights law.
- The current legal regime has resulted in inequality of obligations among parties to non-international armed conflicts, protection gaps for people affected by armed non-State actors and accountability deficits, some of which may actually amount to distinct violations of the right to life under article 6 of the International Covenant on Civil and Political Rights, involving the responsibility of the States.
- Resolutions of the Security Council, the General Assembly and the Human Rights Council have addressed armed non-State actors as perpetrators of human rights violations and as duty bearers.⁷¹
- Armed non-State actors' legal personality sources may be traced to, among others, treaty and customary law. Under the "de facto authority" legal construct, armed non-State actors inherit the treaty obligations of the State they have displaced. Under the customary law approach, armed non-State actors are bound by customary human rights law.
- Armed non-State actors' human rights obligations may be linked to the inalienability of human rights and these actors' capacity to exercise human rights obligations. This approach, particularly important in cases where armed non-State actors do not control territories, may also be applied as an overall framework for all such actors.

52. As highlighted throughout the report, armed non-State actors' legal personality and possession of human rights obligations do not mean that there is an equality of obligations between States and armed non-State actors, or among such actors. As set out below, the application of human rights obligations to armed non-State actors should be context-dependent, actor-specific and graduated. The content and extent of armed non-State actors' human rights obligations are determined by three interlinked indicators: (a) the nature and extent of their control; (b) the level of their governance; and (c) consequently, the extent of their capacity.

1. Key characteristics

Control by armed non-State actors

53. Territorial control, extrapolated from international humanitarian law, has emerged as a key element in understanding armed non-State actors' capacities. The focus on territories and territorial control allows for legal personality and for the notion that armed non-State

⁶⁹ Ibid.

⁷⁰ Murray, *Human Rights Obligations of Non-State Armed Groups*, p. 75.

⁷¹ See <https://pilac.law.harvard.edu/ansas>.

actors controlling territories should be bound by the legal obligations of the State⁷² to the extent that these obligations are owned by and due to the population of the State.

54. The centrality of territory requires some nuance. First, territorial control is an elusive concept that does not specify how much territory, for how long and what type of control is required. On the ground, control over territories, whether in the context of non-international armed conflict or not, tends to shift. Control is sometimes shared between armed non-State actors and the State. For example, some armed non-State actors exert control at night only. Others exert control over certain aspects of the community life only while the State continues to govern others.

55. Second, human rights obligations are not only derived from control over a physical territory or a given population. Armed non-State actors with no or limited territorial control should still have some human rights obligations, particularly when absence of territorial control is part of their strategy.⁷³ In fact, jurisprudence on crimes against humanity has clarified that a primary requirement for armed non-State actors is that they demonstrate a capacity to carry out an attack of the scale required by article 7 of the Rome Statute.⁷⁴ In situations where an armed non-State actor does not control territory, it remains bound by customary international human rights law by virtue of its functionality and provided it meets the organizational requirement.⁷⁵

56. Third, the Special Rapporteur recalls that she and her predecessors have demonstrated that the prohibition against targeted killing constitutes an extraterritorial obligation. As such, and because it is a *jus cogens* norm, it should be binding upon them extraterritorially as well. The notion that the so-called Islamic State in Iraq and the Levant may have committed a human rights violation when targeting civilians in Iraq but not when targeting civilians in France or Pakistan is untenable.

57. Finally, so-called cyberattacks, including by armed non-State actors, may violate human rights, including the right to life. Such attacks should not be outside the scope of the obligations imposed on armed non-State actors simply because they occur in a different space or because they are initiated outside of territories that they control.

58. The above suggests that the concept of control should be interpreted in a flexible manner: “it is the activity made possible by the exercise of control, and not the precise contours of the control itself, that is determinative”.⁷⁶

Organizational requirement

(a) Armed non-State actors’ governance functions

59. International law and the literature have largely defined the indicators with regard to armed non-State actors’ level of organization in military-like terms.⁷⁷ These do not, however, help in determining whether armed non-State actors bear human rights obligations. The Special Rapporteur suggests that organizational indicators should also focus on governance activities.

60. In 1965, the sociologist Bernard Fall noted that “a government that is losing to an insurgency isn’t being out-fought, it’s being out-governed”.⁷⁸ Some 40 years later, umpteenth

⁷² Fortin, *The Accountability of Armed Groups under Human Rights Law*, chap. 9.

⁷³ As was the case, for instance, with the Lord’s Resistance Army.

⁷⁴ See, for instance, International Criminal Court, *The Prosecutor v. Germain Katanga*, case No. ICC-01/04-01/07, judgement of 7 March 2014, para. 1119; Fortin, *The Accountability of Armed Groups under Human Rights Law*, chap. 10.

⁷⁵ Fortin, *The Accountability of Armed Groups under Human Rights Law*, pp. 382–385.

⁷⁶ Submission of Daragh Murray, 2017.

⁷⁷ Indicators include the existence of a command structure, the modes of communication, whether military training is provided, external relations, the ability to control territory and the ability to procure.

⁷⁸ Cited in Fortin, *The Accountability of Armed Groups under Human Rights Law*, p. 45.

studies of rebel groups⁷⁹ and criminal organizations⁸⁰ have provided further empirical evidence to support the conclusion that the quality of (local) governance, including security and service provision, and dispute resolution mechanisms⁸¹ are a far greater determinant of rebels' and criminals' rise to local power than State capacity to fight or control.

61. Systems of governance of armed non-State actors vary enormously: some engage in diplomacy or external communication while others focus on domestic audiences; some seek to impose a radical, revolutionary system of governance and values, while others rely on existing social values and institutions; some seek to address grievances and historical injustice, while others are driven by greed. Some may govern through lawlessness, uncertainty and fear, but most promulgate and implement rules, including through dispute-resolution mechanisms and quasi-law enforcement functions.⁸²

62. The realities of armed non-State actors' governance confirm the importance of international human rights law, both in non-international armed conflicts and in situations of unconventional violence. Evidence shows that such actors' ability to establish and maintain control is largely grounded in their capacity either to outperform the State or to impose their own governance systems. This suggests that, in response, States should focus on providing goods, services, dispute resolution mechanisms and safety, as these are key to eliciting civilian collaboration. This underscores the need to understand armed non-State actors' governance and to develop indicators aimed at improving human rights protection, fostering engagement and ensuring accountability.

(b) Political character of armed non-State actors

63. Studies of modern warfare and organized violence also indicate a blurring of the distinction between war, organized crime and large-scale violations of human rights.⁸³ They also point to a blurring of armed non-State actors' key motivations and modus operandi, with the political and the criminal intersecting in several ways.

64. It should be noted that the terms used by Governments to refer to armed non-State actors have no bearing on the international law in effect or on the attribution of human rights obligations. A group can be an organized armed group under international human rights, humanitarian law or criminal law, as well as a terrorist group or a criminal organization under domestic law or according to international resolutions. This is also true for the individual members of such groups.⁸⁴

65. Under international humanitarian law, the motive behind armed non-State actors' actions is not an element to assess a non-international armed conflict.⁸⁵ The question is whether it is relevant to determine the nature and scope of human rights obligations imposed on armed non-State actors. As noted, a single armed non-State actor may have a spectrum of motives and modus operandi over the course of its existence. From a human rights point of

⁷⁹ Zachariah Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (Cornell University Press, 2011); Ana Arjona, Nelson Kasfir and Zachariah Mampilly, eds., *Rebel Governance in Civil War* (Cambridge University Press, 2015).

⁸⁰ Enrique Desmond Arias, *Criminal Enterprises and Governance in Latin America and the Caribbean* (Cambridge University Press, 2017); Kent Eaton, "The downside of decentralization: armed clientelism in Colombia", *Security Studies*, vol. 15 No. 4 (2006), pp. 533–562; Angélica Durán-Martínez, "To kill and tell? State power, criminal competition and drug violence", *Journal of Conflict Resolution*, vol. 59, No. 8 (2015), pp. 1377–1402.

⁸¹ Ana Arjona, "State capacity and the prevention of rebel and criminal governance: the centrality of dispute resolution institutions", presentation made at the Conference on Criminal Governance in Comparative Perspective, New York, 16 February 2018.

⁸² Fortin, *The Accountability of Armed Groups under Human Rights Law*, p. 362.

⁸³ Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Oxford, Polity Press, 2012), p. 2.

⁸⁴ Sandesh Sivakumaran, "The potential applicability of IHL to the use of state force against large-scale criminal organizations", presented at the workshop entitled "Interface of national security and humanitarian law in situations of low-intensity armed conflict/high-intensity emergency", Ulster University, 7 November 2017.

⁸⁵ International Tribunal for the Former Yugoslavia, *Prosecutor v. Limaj et al.*, case No. IT-03-66-T, judgment of 30 November 2005, para. 170.

view, the key issue is not why armed non-State actors are presiding over people's lives but the fact that they are. The relationship of such actors with communities and individuals is defined by the functions they perform rather than by their intent. Still, motivations may matter, for instance in terms of assessing armed non-State actors' willingness to respect human rights or the nature of their governance functions. Thus, the Special Rapporteur suggests that while a particular motive does not necessarily engender human rights obligations, it should be considered when assessing an armed non-State actor's governance.

2. Gradated approach to the right to life

66. International jurisprudence, the special procedures of the Human Rights Council and the treaty bodies have elaborated on and strengthened our understanding of the specificities 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 and judicial developments and breakthroughs. The prohibition against the arbitrary deprivation of life covers a range of situations, from targeted assassinations and killings in the private sphere to death by neglect or omission. Below, the Special Rapporteur highlights some preliminary findings regarding the right-to-life obligations that ought to be binding on armed non-State actors.

Principle of non-discrimination

67. The principle of non-discrimination, which is central to all human rights, applies with particular force to the right to life. It ought to be binding on all armed non-State actors in all their interactions with populations and individuals and ought to apply on all grounds, including ethnicity, tribe, race, religion, social group, gender and sexuality.

Obligation to respect the right to life

68. The obligation to respect the right to life requires armed groups not to violate individuals' right to life. The absolute prohibition against extrajudicial executions applies to all armed non-State actors in all situations. Within the context of a non-international armed conflict, the added value of international human rights law resides in the range of obligations to respect the right to life, which falls below the immediate threshold of intentional murder (covered by common article 3 of the Geneva Conventions), and the obligations related to the use of force more generally.

69. Respect for the right to life also implies that all armed non-State actors should implement a total ban on anti-personnel mines and cooperate in mine clearance efforts and support victims of mines.⁸⁶

70. Violence against women and children by members of armed non-State actors and/or as part of a sanctioned policy is prohibited under international humanitarian law and subject to sanction under international criminal law. Furthermore, article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict prohibits armed non-State actors from recruiting and using children.

Policing and justice

71. The responsibility to respect includes 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 arbitrary deprivation of life.

72. Many violations take place in the context of law enforcement, which, when performed by armed non-State actors, raises many concerns. The default position within the human rights community is that policing and judicial functions by armed non-State actors, outside de facto States, are largely illegitimate. Yet, empirical evidence shows that armed non-State actors perform some of these functions regularly and that local populations demand law and

⁸⁶ Geneva Call, "Deed of commitment for adherence to a total ban on anti-personnel mines and for cooperation in mine action" (2000).

order and stability. Armed non-State actors may also play a role in terms of responding to crimes committed by their members. Conflict and violence, and the breakdown of law and order, heighten women's and girls' vulnerability to such violence. Armed non-State actors may be the only ones able to offer some protection and accountability.⁸⁷

73. The Special Rapporteur is not suggesting that all armed non-State actors have an obligation to deliver policing functions or justice. There are minimum guarantees, however, that they should be required to provide, as far as law enforcement is concerned, extrapolated from international law and soft norms, and linked to their governance capacity.⁸⁸

74. 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.⁸⁹ Armed non-State actors should, as a priority, investigate killings (or acts of torture or sexual violence) committed by their members. Depending on their capacity, armed non-State actors' obligations should be extended to investigating killings by third parties operating in their territories.

75. Armed non-State actors should be absolutely prohibited from applying the death penalty.

Obligations to protect, prevent and punish

76. In its general recommendation No. 30, the Committee on the Elimination of Discrimination against Women elaborated on the obligations to prevent and investigate all forms of violence against women, including sexual violence, and to punish those responsible. These may be addressed and applicable to armed non-State actors.

Obligation to fulfil

77. Armed non-State actors 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 concerned.⁹⁰ All armed non-State actors 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 vulnerable groups, without discrimination.⁹¹

3. Protection of those engaging with armed non-State actors

78. Armed non-State actors' duty to ensure access to humanitarian aid and other services imposes a complementary duty on States to permit access to areas under the control of armed non-State actors. When such actors are listed as "terrorists", humanitarian and human rights actors seeking to provide assistance to populations see their efforts undermined, prevented or criminalized, and humanitarian staff are arrested.

79. Counter-terrorism laws have proven to be blunt instruments, discouraging compliance with human rights norms and restricting promotion and training efforts.⁹² These laws also may harm civilians in conflict-affected areas by preventing the distribution of humanitarian aid and services,⁹³ making the delivery of even basic assistance difficult.⁹⁴ This impedes access to health care and basic education, and worsens the overall situation.⁹⁵

⁸⁷ Sivakumaran, *The Law of Non-International Armed Conflict*, p. 559.

⁸⁸ Andrew Clapham, "Detention by armed groups under international law", *International Law Studies*, vol. 93 (2017), p. 31. See also the submission of Daragh Murray, 2017.

⁸⁹ Minnesota Protocol.

⁹⁰ See also www.genevacall.org/wp-content/uploads/dlm_uploads/2016/08/GaranceTalks_Issue01_Report.pdf.

⁹¹ S/PRST/2014/3, p. 1.

⁹² A/HRC/6/17/Add.3, para. 42.

⁹³ See <https://web.law.duke.edu/sites/default/files/humanrights/tighteningpursestrings.pdf>.

⁹⁴ A/HRC/6/17 and Corr.1, paras. 46–47.

⁹⁵ *Ibid.*

4. New instrument

80. Some international civil society organizations have engaged with armed non-State actors to ensure respect for human rights and humanitarian standards. Among them is Geneva Call, which has encouraged armed non-State actors to sign and implement its “Deed of commitment for adherence to a total ban on anti-personnel mines and for cooperation in mine action”, which constitutes an “effective model of procedural accountability”.⁹⁶ The Declaration of Minimum Humanitarian Standards too seeks to address gaps regarding armed non-State actors.

81. The Special Rapporteur is recommending that such initiatives be strengthened and that representatives of States, civil society, United Nations entities, armed non-State actors and individual experts develop a new instrument outlining principles and guidelines on human rights and humanitarian standards protection, implementation and dissemination. Armed non-State actors could be encouraged to adopt and implement such an instrument, which would be enforced through self-monitoring and reporting, in addition to monitoring by an external, impartial body.⁹⁷

5. Enforceability

82. Extending the applicability of human rights law to armed non-State actors raises the difficult question of identifying and establishing appropriate mechanisms and bodies to hold such actors accountable. Below are some existing mechanisms that could be scaled up and additional options.

International Criminal Court

83. The International Criminal Court remains an important tool to ensure that members of armed non-State actors are held accountable. While the focus is on individual criminal responsibility, international law does not preclude the possibility of an organization engaged in crimes against humanity being held internationally responsible.⁹⁸ Extrapolating from the international jurisprudence, including the reasoning of the Court’s Pretrial Chamber, organized criminal gangs too may be held accountable for crimes against humanity.⁹⁹

Sanctions mechanisms

84. Under Chapter VII of the Charter of the United Nations, the Security Council has imposed sanctions, including travel bans and asset freezes, against members of armed non-State actors for alleged human rights violations in Côte d’Ivoire, the Democratic Republic of the Congo and the Sudan (Darfur). Such measures ought to be evaluated in terms of their human rights impact and extended to other armed non-State actors, including criminal networks.

Treaty bodies and special procedures

85. Special procedures should continue to cover human rights violations by armed non-State actors and to engage with such actors, and treaty bodies could contribute to assessments of violations by non-State actors; for instance, the Working Group on Enforced or Involuntary Disappearances, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities.

⁹⁶ Fortin, *The Accountability of Armed Groups under Human Rights Law*, p. 392.

⁹⁷ Sivakumaran, *The Law of Non-International Armed Conflict*, pp. 566–567.

⁹⁸ Murray, *Human Rights Obligations of Non-State Armed Groups*, p. 67. The author reviews the international jurisprudence to demonstrate his point.

⁹⁹ Murray, *Human Rights Obligations of Non-State Armed Groups*, p. 69. The Open Society Justice Initiative has suggested that both the Government of Mexico and the Zetas drug cartel have committed crimes against humanity (see www.opensocietyfoundations.org/reports/undeniable-atrocities-confronting-crimes-against-humanity-mexico).

86. Moreover, it may be possible to set up experimental or ad hoc institutions focusing on the acts of armed non-State actors, including violations of the new proposed instrument, and on human rights obligations specific to such actors.

Compensation and reparations mechanisms

87. The attribution of (financial) remedies and reparations for human rights violations by armed non-State actors is challenging, from a procedural and a substantive standpoint. Truth-seeking and peace and reconciliation commissions could address armed non-State actors' collective responsibility and ensure that individuals have a right to reparation.¹⁰⁰ Their examples could be emulated.

88. As part of the peace plan between the Government of Colombia and the Revolutionary Armed Forces of Colombia (FARC), Law No. 1448¹⁰¹ affirmed the responsibility of the State to provide reparations regardless of the identity of the perpetrators.¹⁰² In October 2016, FARC declared that it would forfeit all assets to fund reparations to victims and in order to transition into a legitimate political party. The group also issued a public apology to victims.

89. The International Commission of Inquiry for Darfur has emphasized that both the Sudan and the rebels should pay compensation for crimes committed in Darfur, whether or not the perpetrators are identified and punished.¹⁰³

90. The compensation commission envisaged in the 2006 peace agreements involving the Sudan could serve as a model for future reparations schemes. It should also be possible to tie the forfeiture of armed non-State actors' assets to truth, peace and reconciliation processes, or to seize their bank accounts. A third option would be for the international community to step in, having recognized victims' right to reparations for violations of the right to life, irrespective of the perpetrator's identity.

Collective and symbolic reparations mechanisms

91. Collective reparations are a way of making amends for violations that affect entire communities. They are focused on victims as a group of individuals bound by a common identity, common experiences or a common type of violation.¹⁰⁴ The Inter-American Court of Human Rights and the Extraordinary Chambers in the Courts of Cambodia have handed down rulings including collective and moral reparations, which may represent useful models.

92. The goal is to find out what happened in order to advance community reckoning with the past and public acknowledgment of the harm inflicted on victims.¹⁰⁵ Armed non-State actors should provide public apologies and contribute to national memorials and commemoration ceremonies.¹⁰⁶

IV. Conclusions

93. **The current legal framework applicable to armed non-State actors presents unacceptable accountability and protection deficits. In 2009, the Secretary-General 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”.**¹⁰⁷

¹⁰⁰ See www.ictj.org/sites/default/files/ICTJ_Book_JusticeMosaics_2017.pdf.

¹⁰¹ See www.unidadvictimas.gov.co/sites/default/files/documentosbiblioteca/ley-1448-de-2011.pdf (in Spanish).

¹⁰² Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, p. 220.

¹⁰³ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, para. 591 (25 January 2005). Available at <https://www2.ohchr.org/english/darfur.htm>.

¹⁰⁴ See www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf.

¹⁰⁵ Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, p. 160.

¹⁰⁶ See, for instance, the Peruvian Truth and Reconciliation Commission.

¹⁰⁷ S/2009/277, para. 39.

94. The present report has shown that armed non-State actors can be accommodated as subjects of international human rights law, without treating them akin to States. Armed non-State actors are not bound by the full range of human rights laws but to a threshold of norms derived from the nature of their control and degree of organization, or capacity. Attributing certain human rights obligations to certain non-State actors does not nullify but complement States' responsibilities. The benefits of holding armed non-State actors responsible under international human rights law are also derived from the complementary duty that States continue to have to respect, protect and fulfil human rights.

95. There is no evidence that the recognition of armed non-State actors as subjects of international humanitarian law or that the adoption of Security Council, General Assembly or Human Rights Council resolutions regarding them have resulted in their legitimization. When armed non-State actors become legitimate, it is not because of international legal principles but for eminently political reasons and/or as part of peacebuilding processes.

96. Binding members of armed non-State actors to human rights obligations fills existing gaps in relation to international accountability for human rights violations and provides a legal foundation for access to remedies and reparation for victims.¹⁰⁸

V. Recommendations

97. States should:

(a) Encourage the adoption by armed non-State actors of policies, practices and codes of conduct for human rights protection;

(b) Develop guidelines for human rights-based engagement with armed non-State actors;

(c) Fully implement their obligation to protect against killings by armed non-State actors, and evaluate current due diligence mechanisms in light of these actors' activities and strengthen their implementation, in full respect of international human rights law;

(d) Hold individual members of armed non-State actors to account under international human rights law and international criminal law, 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) Encourage and permit international and national civil society organizations, among others, to engage with armed non-State actors for the purpose of human rights protection;

(g) In situations of armed conflict, respect the provisions of international human rights and humanitarian law regarding humanitarian access and protection of civilians;

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

98. States, under the auspices of United Nations and other international processes, should:

(a) Strengthen accountability for armed non-State actors' human rights violations, including by establishing trust funds to ensure remedies and reparations for victims of such violations and by imposing sanctions on the leaders of armed non-State actors responsible for human rights violations;

¹⁰⁸ Clapham, *Human Rights Obligations of Non-State Actors*.

(b) **Support initiatives to develop a coherent taxonomy of armed non-State actors and identify indicators to assess their governance and capacity to bear human rights obligations;**

(c) **Support research into the background, legal status and impact of Security Council, General Assembly and Human Rights Council resolutions on armed non-State actors;**

(d) **Identify, evaluate, develop and/or implement mechanisms to promote a more formal recognition of armed non-State actors' obligations under international human rights law;**

(e) **Explore the establishment of specialized human rights courts to try armed non-State actors.**

99. **Armed non-State actors should:**

(a) **Respect the right to life, without discrimination, including the prohibition against arbitrary deprivation of life;**

(b) **Protect all civilians and members of armed forces hors de combat or taken prisoners;**

(c) **Adopt and implement policies, practices and codes of conduct to protect human rights;**

(d) **Draft or contribute to the drafting of commitments;**

(e) **Not engage in reprisal or revenge attacks;**

(f) **Allow external independent and impartial bodies to monitor compliance with human rights commitments and obligations;**

(g) **Abide by the principle of non-discrimination in all policies and governance interventions;**

(h) **Adopt and implement minimum guarantees related to law enforcement;**

(i) **Ensure access to international humanitarian assistance for populations under their control.**

100. **United Nations agencies and international and national civil society organizations should:**

(a) **Develop and implement guidelines for engaging with armed non-State actors for the purpose of human rights protection;**

(b) **Encourage and support armed non-State actors in adopting and adhering to international human rights law;**

(c) **Encourage and support the development of written commitments by armed non-State actors on human rights protection, including oversight monitoring mechanisms;**

(d) **Provide human rights technical advice and training to armed non-State actors;**

(e) **Monitor and report on armed non-State actors' efforts to protect human rights;**

(f) **Document case studies and best practices on engagement with armed non-State actors for the purpose of human rights protection.**
