



“Mind the Gap: Human Rights and Non-State Parties to Armed Conflict”

Report from the Webinar/Informal Side Event to the 43rd Session of the Human Rights Council



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Introduction

As an informal side event to the 43rd Session of the Human Rights Council in July 2020, Fight for Humanity organized a webinar on the topic of non-state parties to armed conflicts and their human rights obligations. Hosted by Liechtenstein, France, and Slovenia and moderated by Mr. Peter Matt, Ambassador to the Mission of the Principality of Liechtenstein in Geneva, the webinar featured a highly qualified, all-woman, panel of human rights and humanitarian practitioners and academics who shared their views on this important subject.

The panel consisted of Ms. Agnes Callamard, Special Rapporteur of the UN on Extrajudicial, Summary or Arbitrary Executions, Ms. Vasilka Sancin, Head of Department of International Law at the University of Ljubljana and a member of the UN Human Rights Committee, Ms. Emilie Max, Researcher at the Geneva Academy of International Humanitarian Law (IHL) and Human Rights (IHRL) and Ms. Anki Sjoeberg, Co-Director and Founder of Fight for Humanity.



The webinar [can be watched here](#).

The question of whether non-state armed actors possess human rights obligations has been steadily gaining traction over the years, with academic opinion and institutional practice still undecided on the matter. Be that as it may, the reality of our time evidences that many millions of civilians live in areas controlled by non-state armed actors. In turn, this concession begs a careful examination by the international community of which legal frameworks are applicable to armed non-state actors, regulating their interaction with the civilian population under their control. Yet, states seem to be reluctant to concede that armed non-state actors can incur human rights obligations, fearing that such a recognition would legitimize their existence and undermine the state's sovereign prerogatives. This stance leads to a 'gap', not only in terms of legal rules applicable to such actors, but also institutionally, as there are no fora or mechanisms mandated to engage non-state actors in relation to their human rights obligations. Most regrettably though, this stance leads to a protection gap for the civilians living under the control of non-state armed actors, who cannot assert their uncontested entitlement to human rights guarantees.

The aim of this webinar – which forms part of Fight for Humanity's webinar series "First-hand views on human rights and peace" was precisely to shed some light on this highly controversial and

debatable topic, by explaining the legal frameworks applicable to non-state armed actors, and discussing how practitioners can engage such actors on the question of their human rights obligations and many other relevant issues.

Discussion points

Which entities qualify as non-state parties to armed conflict and which international legal frameworks apply to such entities?

The event started with a general discussion on which entities qualify as non-state parties to armed conflicts and the international legal frameworks applicable to them. Ms. Emilie Max explained that, in order to qualify as a party to a non-international armed conflict, non-state entities must meet the criteria set in either common Article 3 of the 1949 Geneva Conventions or Article 1 of Additional Protocol II of 1977 to the Geneva Conventions, respectively. According to the former provisions, which applies to all non-international armed conflicts and is customary in nature, a non-state party must attain a certain level of organization, in the sense that the group is capable of following a certain command structure, while also possessing the capacity to sustain military operations. According to the threshold of article 1 of AP II, which is higher, a non-state armed group must, in addition to being sufficiently organized, be under responsible command and possess the ability to exercise control over part of a state's territory, to an extent that enables it to implement Additional Protocol II. Therefore, the framework of international humanitarian law (IHL) applicable to the group will depend on (1) which instrument is applicable – i.e. has the state party ratified AP II or is only common Article 3 applicable? – and (2) which threshold the group actually fulfils.

Ms. Emilie Max proceeded to clarify that, while it is uncontroversial that IHL binds non-state parties to armed conflicts, without this applicability impacting the status or legitimacy of the non-state armed actors, the same does not hold true for international human rights law (IHRL). In contrast to IHL, which addresses 'parties' to armed conflicts, IHRL has been specifically crafted to address states. Nevertheless, Ms. Max explained that there is a 'minimum agreeable point' between stakeholders, humanitarian organizations, UN entities and independent experts that, as a matter of *policy*, if not as a matter of law, non-state actors which, during armed conflict, exercise sufficient control over territory and are thus capable of acting as state-like entities and/or *de facto* authorities have some human rights obligations towards the population under their control. The extent/nature of such obligations – i.e. negative and/or positive obligations – remain a point of contention.

Elaborating upon this point, Professor Vasilka Sancin explained that while there is no general consensus on the precise normative legal framework incumbent upon non-state armed groups, there seems to be a prevalent *expectation* within the international community that armed groups will nevertheless respect human rights, especially when they act as *de facto* authorities. However, the obligation to *respect* human rights should be distinguished from the obligation to *ensure* human rights, which still seems to rest solely with the state. Professor Sancin then breached the issue of enforceability of human rights obligations, highlighting an institutional shortcoming when it comes to engaging non-state armed actors on this matter. She pointed out that while there are various mechanisms in place which consistently monitor the human rights situation in certain countries from a perspective of *states*, or mechanisms that enter into dialogues with state authorities in relation to their human rights obligations, there are no such mechanisms or fora for non-state armed groups.

Who are the perpetrators and who are the victims of human rights violations?

Building upon the issues breached by Professor Sancin, Special Rapporteur Agnes Callamard geared the discussion towards the subject of legal recognition, namely, who should be considered as perpetrators and who as victims of human rights violations. In this vein, the Special Rapporteur highlighted that through a process of perpetual interpretative contestation, the human rights edifice has evolved into a living framework, which can accommodate the 'lived reality' of people and especially victims of human rights violations. The question, in her view, should therefore be what context the world is faced with now, which then the human rights framework should strive to accommodate. This context, according to the Special Rapporteur, also englobes the new and rapidly developing international counter-terrorism regime. In her opinion, this regime weakens IHL and IHRL standards and neglects the victims of IHRL and IHL violations. Therefore, according to Ms. Callamard, *the standing international legal framework is not fit to protect the civilian population on the ground.* In this sense, a narrow, orthodox reading of human rights law as being applicable only to states, while perhaps relevant in 1948 when the regime was nascent, is no longer meaningful in 2020, since it "denies, rejects and silences" the experiences of people living under the control of armed groups all over the world. The Special Rapporteur concluded her first intervention by asserting that, in her opinion, *there is no doubt that the human rights framework applies to the realities of these people and no doubt that the violence perpetrated against them by non-state armed groups amounts to human rights violations.*

Victims of non-state armed actors as a class apart from victims of states?

The discussion then shifted to whether there should be a distinction between victims of non-state actors and victims of states when it comes to human rights violations. Addressing the issue from a practical and non-legal perspective, Ms. Anki Sjoeborg explained that, as a matter of principle, and recalling Article 1 of the 1948 Universal Declaration of Human Rights according to which "human beings are born free and equal in dignity and rights", there should be no distinction between these classes of victims. Unfortunately, however, she conceded that such a distinction *does* exist because of the existing legal framework and, as a result, people in areas controlled by non-state armed groups do not have access to the same rights or protections, nor do the victims enjoy the same treatment, especially in terms of reparation and justice. This discrepancy can be very problematic especially in fragile or post-conflict societies, as it weakens social cohesion and creates obstacles to peace. Finally, she highlighted that there is an important information gap when it comes to human rights violations perpetrated by non-state armed actors, because in most cases, areas that are not controlled by the state authorities are not part of official statistics.

Still on the subject of identifying the victims of human rights violations, Professor Sancin proceeded to draw a distinction between non-state armed groups that control territory and those which do not, explaining that, if a group, by virtue of controlling territory, has the capacity to respect human rights, it is expected to do so. Political motivations or aspirations, however, cannot be considered a factor in this equation.

Non-state armed groups exercising "governance functions"

Turning to the issue of what actually transpires on the ground, Special Rapporteur Agnes Callamard noted that while armed groups are capable of committing severe crimes against the civilian population, they do not rule solely through force, violence or cruelty but, rather, they also exercise "governance functions" on the territory they control. This is precisely why the question of human rights becomes so pertinent, since the human rights framework was specifically designed to address authorities undertaking governance functions. This observation however also requires a flexible

understanding of what constitutes “territory”, as there can be situations where an armed group controls an area for one part of the day (or night) and the state authorities control it for another part.

According to the Special Rapporteur, the “governance function” of such groups is a reality that should not be ignored, all the more so since the capability of an armed group to fulfil governance functions more adequately than the state authorities themselves in a specific region, will ultimately be more decisive than their military capacities for their maintenance of control in the region. For example, such governance functions can extend to judicial and policing activities, such as administering prisons and conducting trials. This is a rapidly accelerating reality on the ground to which states and the international community cannot respond by simply negating the applicability of human rights norms to non-state armed actors. In this vein, Ms. Callamard *stressed the need to create a taxonomy of what governance functions groups are engaging in and veer away from a narrow, IHL-centered, military understanding of control.*

Why do non-state armed groups choose to respect or to ignore human rights?

The discussion then veered into the complex topic of *why* non-state armed groups choose to respect or not respect human rights. In this regard, Ms. Emilie Max pointed out that there is a variety of non-state armed actors that differ in the way they are organized, what they fight for, how they fight for it and the services they provide for the civilian population under their control. Ms. Max highlighted the importance of countering the *false assumption that armed actors do not want or cannot respect human rights.* On the contrary, there are many documented cases where human rights have been foundational to the group’s very existence, such as when the group is formed as a reaction to IHRL violations committed by the state. In other cases, IHRL may be the main legal reference for such groups, which declare their commitment and willingness to respect human rights. Ms. Max reiterated the importance of engaging with armed groups on what they are able and willing to respect and *why* they would like to do so, so as to ensure that the obligations that are ascribed to them ultimately reflects their needs, characteristics and capacities. In this context, some scholars have developed a useful “sliding scale theory” of ascription of human rights obligations to armed groups, pursuant to which the IHRL framework does not apply to armed groups *en bloc* but, rather, non-state armed groups would assume the obligations that correspond to their capacities on the ground. For example, the higher the level of control is exercised by a group on a specific territory, the more obligations the group would have.

How to incentivize armed groups to respect human rights norms?

Next, Ms. Anki Sjoeborg discussed what can be done from a practical perspective in order to incentivize non-state armed groups to respect human rights norms. Ms. Sjoeborg pointed out that, indeed, many non-state armed actors, are aware of IHRL and are willing to respect this framework, especially in cases where they perceive themselves and the people they claim to protect as victims of human rights abuses on behalf of the state. There is however a need to challenge a common perspective among armed groups that human rights are something that they can claim as belonging to them and their communities, as opposed to something they must respect and provide. In this sense, there is wide array of practical options for fostering respect for human rights norms by non-state armed groups. Such examples would include dissemination or training sessions on human rights, measures to support local human rights organizations operating on the ground, supporting research and reporting work on what is actually happening in practice, advocacy work or developing awareness through awareness raising campaigns. However, it is important to understand that respect is crucially about creating incentives and the political willingness for compliance on behalf of the armed non-state actors. This requires a comprehension of the specific context in which the armed group is

operating, what they can relate to and which frames would function in each specific case. Another important incentive is that of inclusion. If an armed group perceives that the international community will always exclude it from peace processes and dialogue *regardless of what they do*, it will not be incentivized to indicate its respect for human rights norms.

Justice, remedies and reparations for victims of armed groups?

In relation to this issue, Ms. Callamard made three main points. First, she clarified that it is important for states to stop criminalizing association with non-state armed groups in the context of the counter-terrorism regime, as this makes it very difficult for humanitarian practitioners to access the areas controlled by such groups and provide the victims with the assistance and aid they might need. Second, she agreed with the importance of establishing policy frameworks, human rights principles, guarantees and incentives for armed groups which would engender an attitude geared towards compliance. And, finally, she emphasized that the question of enforceability must be addressed. On this issue, states could be innovative, for example, by setting up ad hoc institutions mandated to monitor the actions of non-state armed groups from the viewpoint of IHRL. In this vein, conceptual work is also important, namely, deconstructing the perception that non-state armed groups don't have any human rights obligations and, according to Ms. Callamard, conceding that they actually do possess such obligations, at least to the extent that their capacities allow.

Ms. Max also noted the importance of recalling that, even in situations where a non-state armed group has gained control of territory, the state still bears the primary responsibility of *ensuring* respect for international humanitarian law and for protecting human rights (obligation of due diligence under IHRL). However, the extent of this obligation remains vague when it comes to how a state can ensure respect for IHRL by a non-state armed group and it is a point which merits further exploration.

How do we help foster change in non-state armed actors?

Finally, in her concluding intervention, Ms. Anki Sjoeborg, highlighted the importance of producing change through rewarding positive behavior, as opposed to punishing bad behavior. The “naming and shaming” approach, while still pertinent, can only be done under certain specific conditions, which will not result in dissuading further dialogue. In this sense, it is important to distinguish which non-state actors fail to respect IHRL as a matter of choice, which as a matter of capacities and which due to lack of knowledge. These observations should be incorporated into the methodology employed when approaching such actors, and when a non-state actor conforms to certain IHRL standards this should be commended and not go unnoticed.

A lively Q&A session...

The discussion was followed by a lively Q&A from the audience, with the first question relating to the inconsistent semantic practice of the United Nations Security Council (UNSC) when it comes to addressing human rights violations in its resolutions, and whether the term “abuses” which is employed by the Security Council in relation to non-state armed actors has any legal significance or simply implies that such acts, while politically deplorable, are not actually human rights violations.

Answering this question, Professor Sancin noted that while the practice is not consistent, it may well constitute a political decision on behalf of the UNSC. However, regardless of the terminology used, states remain under an obligation to address such violations, not only in terms of ensuring respect for human rights but also for providing remedies to the victims, regardless of whether such actions are referred to as “abuses” or “violations”.

A second question from the audience, directed towards Special Rapporteur Agnes Callamard, touched upon how a balance can be struck between IHL, IHRL, and the counter-terrorism regime.

In response to this question, Ms. Callamard once more highlighted that the regime is not victim-centered but, rather, it's about safeguarding the interests of the state and that it is of the utmost importance to insist on the complementarity between this regime and human rights law.

A third question was directed towards Ms. Anki Sjoeborg and asked, in practical terms, if different methodological approaches should be taken when engaging armed groups depending on their specific characteristics. In this regard, Ms. Sjoeborg opined that a 'one-fits all' solution is not feasible when engaging armed groups. Rather, a differentiated approach should be adopted depending on the capacities of the actors, on whether they have sophisticated civilian or political structures, on whether they administer hospitals or have parliaments or whether they are mainly made up of fighters, conducting military operations. For example, non-state armed actors who serve as *de facto* authorities in an area, could be engaged on more elaborate freedoms such as freedom of expression or association, as opposed to guerilla type actors.

There was also a question from the audience regarding the degree of control an armed group should exercise over territory and populations in order to be bound by IHRL. In answering this question, Ms. Emilie Max pointed out the importance of conceptualizing what control means in such circumstances. For example, while duration should not be considered a particularly relevant criterion, the temporal factor could be important if it determines the scope of human rights obligations with which a group can or cannot comply. Similarly, the spatial component should also be further explored. In Ms. Max's opinion there is an interesting parallel to be drawn in this regard with state jurisdiction and belligerent occupation, as a legal institution with precise normative contours for what control means. However, in Ms. Callamard's opinion, caution is required when transposing a concept that was meant for IHL into a situation that should be governed by IHRL, because the concept of control under IHL is largely defined in operational, military terms, while, the "governance function" of certain armed groups that control territory, can extend far beyond military operations. On this point, Ms. Max countered that belligerent occupation is precisely an institution conceived to address a situation where a state exercises a sufficient level of control to have government functions in another state's territory and, therefore, could be very pertinent to the discussion of delineating the sort of control a non-state armed group should possess in order to incur human rights obligations.

Conclusion: new challenges and new opportunities

The webinar was concluded with a very accurate summary of the main points breached by Ambassador Peter Matt. Ambassador Matt noted the importance of international stakeholders and interlocutors proceeding with the required conceptual work, which will enable us to move away from our orthodox precepts about human rights. In this vein, he reiterated the importance of recognizing the 'governance' function of non-state actors, as opposed to only perceiving them as perpetrators of violent acts, as well as the importance of introducing humanitarian exemption clauses to the anti-terrorist legal regime. The Ambassador also noted one of the most pertinent points that were brought up during the discussion, namely the need to create a forum to exchange on human rights with non-state parties to conflict. Finally, he stressed the need to work towards enforceability and a more victim-centered approach, while also emphasizing the importance of developing a positive approach to incentivize non-state armed actors to respect human rights and refrain from seeing them solely in a negative light.

The Ambassador's apt summary serves as a good point of departure for the next steps ahead. Indeed, the discussion of the panelists indicated that there is an urgent need to deconstruct the orthodox conceptualization of human rights as a prerogative of states and recalibrate the human rights framework so as to accommodate the reality of people living in areas controlled by non-state armed actors. This is not a simple process however and requires concerted action on various fronts.

On the one hand, the material and personal scope of application of human rights to non-state armed actors would have to be further explored and delineated: in which situations do non-state armed actors have human rights obligations and which ones have such obligations to begin with? All of them? Those which control territory? From the moment they control territory or before this point in time? Additionally, the precise human rights norms applicable to non-state armed actors would have to be clarified because, as the discussion showed, not all armed actors have the capacity to comply with all human rights norms. On the other hand, and from a practical perspective, humanitarian and human rights practitioners must augment their efforts to engage non-state armed actors in relation to their human rights obligations, if we wish to see change occurring on the ground.