Non-State Armed Groups in Transitional Justice Processes
Adapting to New Realities of Conflict


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Introduction

Mechanisms of transitional justice have been considered increasingly relevant in helping societies emerging from armed conflicts to confront past abuses and ensure the return of long-lasting peace and stability. Designing and implementing such mechanisms in post-conflict and even ongoing conflict situations, however, comes with a set of specific challenges. These include the large numbers of both victims and armed actors, the difficulties in attributing responsibility, resource and capacity deficits, and the reduced resiliency of institutions. Relevant armed actors and agents of violence necessarily include non-state armed groups, which play a crucial role in contemporary armed conflicts and other situations of armed violence.

Engaging non-state armed groups in transitional justice processes during conflicts and post-conflict situations raises legal, political, and operational issues. First, the exact scope of the obligations of these groups under international law is still unclear. While it is today accepted by case law and state practice that non-state armed groups are bound by the law of armed conflict (or international humanitarian law), whether or not they have human rights law obligations still divides scholars and state practice. There is, in addition, no judicial international mechanism of supervision and implementation of international law for non-state actors. As a consequence, demanding reparations for violations of international humanitarian law and human rights committed by armed groups is difficult for victims.

Counterterrorism legislation presents a further obstacle for the engagement of non-state armed groups on transitional justice matters. Since September 11, 2001, states have adopted a variety of counterterrorism legislation, listing some groups as “terrorist” and imposing sanctions, including on those who provide “material support” to these groups, a notion that has been interpreted quite broadly in some cases. Finally, the complexity of contemporary armed conflicts and the multiplicity and diversity of the types of non-state armed groups involved in violent contexts make it more difficult to elaborate on the means to practically engage such actors in transitional justice processes.

1 Transitional justice can be defined as “the mechanisms and processes associated with a society’s attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with different levels of international involvement (or none at all) and individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or a combination thereof.” UN Secretary General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 23 August 2004, UN Doc. S/2004/616, para. 8.


3 The majority of armed conflicts in recent years have been “non-international armed conflicts”—that is, conflicts with one or several states opposing one or several non-state armed groups, or between such groups themselves. See Annyssa Bellal, ed., The War Report (Oxford: Oxford University Press, 2015).
This chapter explores the opportunities and challenges that arise in involving non-state armed groups in truth-seeking and accountability initiatives and efforts to provide reparations and guarantees of non-recurrence, understood “as a set of measures that are related to, and can reinforce one another, when implemented to redress the legacies of massive human rights violations and abuses.”\(^4\) It is argued that finding ways to better address the collective responsibility of non-state armed groups, ensuring that individuals have a legal right to reparation when their rights are violated by these actors, and establishing a degree of ownership in justice processes of non-state armed groups are essential steps to be taken. The analysis in this chapter focuses on legal argumentation. It also reflects operational and policy considerations, but should be considered as an invitation for further discussion rather than providing for definite answers.

**Defining non-state armed groups**

A range of non-state armed groups operate today in armed conflicts or other situations of violence, but one can find only a few definitions of the term in international law. The UN Security Council, for instance, has defined quite broadly a non-state actor as being an “individual or entity, not acting under the lawful authority of any State.”\(^5\) The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“the Kampala Convention”) considers “armed groups” to mean “dissident armed forces or other organized armed groups that are distinct from the armed forces of the state.”\(^6\) The European Union has defined non-state armed groups as those that “retain the potential to deploy arms for political, economic and ideological objectives, which in practice are often translated into an open challenge to the authority of the State.”\(^7\) Veronique Dudouet, in her research on the transformation of armed groups to actors in peace processes, proposes an interesting definition that will be used in this analysis: groups that operate “primarily within state borders, engaged in violent attempts to challenge or reform the balance and structure of political and economic power, to avenge past injustices and/or to defend or control resources, territory or institutions for the benefit of a particular ethnic or social groups.”\(^8\)

Among the types of non-state armed groups active in armed conflicts or other situations of violence and relevant for our analysis, one can list the following:

- armed opposition groups that seek the liberation of a social class or a nation
- paramilitary groups, which are irregular combat units that usually act on behalf of, or are at least tolerated by, a given regime
- terrorist groups that aim to spread panic and fear in societies in order to achieve political goals

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\(^4\) United Nations, *Report of the Special Rapporteur*, 2012, para 1; See also HRC Resolution 18/7 of 13 October 2011, defining the scope of the mandate of the Special Rapporteur aimed at the promotion of “truth, justice, reparations and guarantees of non-recurrence.”


\(^6\) Article 1.


• vigilante or self-defence groups, composed of armed civilians acting in self-defence, whose degree of organization varies and is often loose; these groups do not necessarily have a political purpose, such as replacing the existing government, but rather aim to defend themselves against the attacks of enemy armed forces
• mafia-type structures, syndicates, or urban gangs, as well as counterfeiters, smugglers, or pirates
• mercenaries recruited from third states who are paid to fight as part of combat units or to conduct independent special tasks

It is clear that non-state armed groups have very different structures and ideologies. Even within the category of armed opposition groups, for example, there are substantive structural differences between an armed group that has state-like characteristics, sometimes defined as “de facto authority,” like the Liberation Tigers of Tamil Eelam during the armed conflict in Sri Lanka, and groups with looser organizational structures, like the anti-Balaka in the conflict in the Central African Republic. Christopher Clapham notes that in Africa we see a plethora of movements, for the most part locked into regional patterns of conflict, which generally suffer from weak internal organization and poorly articulated goals and can be far less readily incorporated into stable political settlements than earlier liberation insurgencies (whose goals were in any event always clear and limited) and reform insurgencies.

This structural disparity makes it more difficult to achieve a coherent system of responsibility of non-state armed groups for violation of international norms, which, as a consequence, affects transitional justice processes.

**Truth seeking**

Establishing truth in the context of armed conflicts can be done through various mechanisms, both official and non-official. These include commissions of inquiry and fact-finding.

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10 De facto authorities can be defined as “entities, which exercise effective authority over some territory, no matter whether they are engaged in warfare with the sovereign or are subsisting in times of peace.” De facto authorities include partially recognized or not recognized states, but are not limited to these actors. The Arantzazu Mendi case, House of Lords, Judgment of 23 February 1939, L.R., [1939] A.C. 256 (House of Lords), reproduced in 1942 ILR 60, at 65 et seq. See also Michael Schoiswohl, “De Facto Regimes and Human Rights Obligations – The Twilight Zone of Public International Law?” *Austrian Review of International and European Law*, 6 (2001): 50; Jan Van Essen, “De Facto Regimes in International Law,” *Utrecht Journal of International and European Law* 28, no. 74 (2012): 31–49.
missions, which can be mandated either by the UN Human Rights Council or by the UN Security Council and the UN Secretary General, or be initiated by the Office of the High Commissioner for Human Rights (OHCHR) as part of its general mandate under General Assembly resolution 48/141. Both types of investigative bodies aim to establish the facts and record the context of events, identify alleged perpetrators, and provide recommendations to the state concerned and the international community as to how to address violations.

In recent years, commissions of inquiry and fact-finding missions have frequently addressed violations of international humanitarian law and human rights law committed by non-state armed groups. For instance, the mandate of the Office of the UN High Commissioner for Human Rights (OHCHR) investigation in Sri Lanka expressly included the examination of “alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the last phase of the armed conflict.” The Independent International Commission of Inquiry on the Syrian Arab Republic has, since 2012, also systematically reported on the violations of international law committed by non-state armed opposition groups, as have other OHCHR fact-finding missions in Mali and the Central African Republic.

Commissions of inquiry and fact-finding missions can therefore be useful tools for establishing as a preliminary step the responsibility of non-state armed groups during a particular conflict. That said, one should also keep in mind that these mechanisms often operate with tight time constraints, leaving less space for the participation of victims.

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16 Recent examples include the 2004 International Commission of Inquiry on Darfur (UNSC Res. 1564, 2004); The 2009 International Commission of Inquiry on Guinea (established by the UN Secretary-General on 16 October 2009, S/2009/556; The 2010 Secretary-General’s Panel of Experts on Accountability in Sri Lanka (Established by the UN Secretary-General, 22 June 2010, SG/SM/12967); The 2013 International Commission of Inquiry on the Central African Republic (UNSC Res. 2127, 2013).

17 See, for example, the OHCHR Mission to Kyrgyzstan to Investigate Serious Violations of Human Rights in Andijan, Uzbekistan in May 2005 (2005); The OHCHR Mission to Western Sahara and Refugee Camps in Tindouf (2006); OHCHR Fact-finding Mission to Kenya (2008); OHCHR Mission on Situation of Human Rights in Honduras Since the Coup d’état on 28 June 2009 (2009); The 2013 OHCHR Mission in Mali.


20 The different reports of the Independent Commission on Syria can be found at: www.ohchr.org/EN/HRBodies/HRC/IICSSyria/Pages/Documentation.aspx


23 Victims participation, apart from testimonies, are limited in COIs and FFMs, but they are an essential part of truth-seeking, “which requires the active participation of individuals, who wish to express their grievances and
Further, they can focus only on a narrow scope of events and facts, thus limiting their truth-seeking functions. Another limitation of such bodies with regard to truth seeking lies in the multiplicity of existing non-state armed groups in some conflict situations, such as in Libya, the Democratic Republic of the Congo, and Syria. As a consequence, it can prove difficult for these mechanisms to address all the violations committed by all the actors at a given time, leaving many violations unaccounted for.

Truth commissions can be described as “officially sanctioned, temporary, non-judicial investigative bodies” whose tasks usually include collecting statements from victims, witnesses, and perpetrators; researching and investigating the root causes of an armed conflict; holding public hearings; engaging in outreach programs; and issuing a final report that summarizes the commission’s findings and recommendations. Some truth commissions have been able to denounce violations of human rights and humanitarian law committed by armed groups per se. For instance, Liberia’s Truth and Reconciliation Commission determined that:

all armed groups whether affiliated with warring factions or with the Government of Liberia are responsible for the commission of human rights violations including violations of international humanitarian law, international human rights law, war crimes and egregious domestic laws violations of Liberia. These groups include: NPFL, LURD, Liberia Peace Council, Militia, ULIMO, MODEL, Armed Forces of Liberia, ULIMO-K, ULIMO-J, Antiterrorist Unit, ECO MOG, Vigilantes, Lofa Defense Force, Liberia National Police, Special Operation Division, Revolutionary United Front (RUF), Special Anti-Terrorist Unit, Special (SATU) Security Unit, Special Security Service, Black Beret, National Security Agency, National Bureau of Investigation, Criminal Investigation Division, and Kamajors.

Whereas ultimately truth commissions aim at accounting for past human rights and international humanitarian law violations, their focus is not only on the responsibility of the perpetrators, as they also seek to understand the patterns and causes of violations. In that regard, “the work of the commission can help a society understand and acknowledge a contested or denied history, and in doing so bring the voices and stories of victims, often hidden from public view, to the public at large.”

Truth commissions are designed and resourced differently according to the specific context in which they are created, and their results depend on contextual variables. But because they have a wide margin for including the voices of members of armed groups, not only as individuals who have violated international law but also in certain circumstances as victims, especially when they are former child soldiers, truth commissions can be particularly useful report on the facts and underlying causes of the violations and abuses which occurred.” United Nations, Report of the Special Rapporteur, 2012, para 54.

24 Cadelo, 724–725.
26 Ibid., 17–20.
where armed groups are concerned.

In addition, as truth commissions are non-judicial tools that often take a comprehensive approach to establishing facts and understanding the root causes of and circumstances surrounding a given conflict, they may be less threatening to non-state armed groups than strict criminal justice mechanisms. Indeed, many non-state armed groups believe, rightly or not, that national or international criminal law processes are biased against them.

**Accountability**

Because the majority of armed conflicts today are of a non-international character, it is unsurprising that many cases at the International Criminal Court (ICC) deal with individual members of non-state armed groups. The development of international criminal law at both the national and international levels has thus arguably made an important contribution to the fight against impunity for the crimes committed by members of such groups. Prosecutions of international crimes are an important part of transitional justice processes in that they “help strengthen the rule of law, reflect a new set of social norms, and begin the process of reforming and building trust in government institutions . . . [are] a source of comfort for victims . . . [and] play a vital role in restoring their dignity and delivering justice.”

However, in view of the length of criminal trials and the limited breadth of action of international criminal law, targeting a few individuals and relying only on individual criminal responsibility can be seen as insufficient to address violations of international law committed by non-state armed groups. As underlined by one commentator, “while the increasing ability to hold individual perpetrators to account is important, in general there is an agreement that international criminal law and individual prosecutions do not address the full range of the needs of victims.”

One limit of international criminal courts, or any international courts, is their lack of jurisdiction over non-state armed groups as “collective entities.” There are, however, reasons for holding a group itself responsible for the violations of international law committed by its members. From a moral point of view, for example, the group may condone, justify, and even incite individuals to commit crimes. Indeed, “organized armed groups regularly succeed to create a climate in which crimes are perceived to be in conformity with, rather than a deviation from, standards of behavior accepted within such a group.” Another compelling

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30 See, for example, *The Prosecutor v. Jean-Pierre Bemba*, who was at the time of his arrest president and commander in chief of the Mouvement de Libération du Congo (MLC) in relation to the conflict in the Central African Republic; See also *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, member of the non-state armed group “Ansar Edd” in the context of the conflict in Mali.

31 Cadelo, 717.


35 Jann Kleffner, “The Collective Accountability of Organized Armed Groups for System Crimes,” in *System Criminality in International Law*, ed. André Nollkaemper and Harmen van der Wilt (Cambridge: Cambridge University Press, 2009), 246. See also the ICTY in the Tadić case: “Although only some members of the group
reason is that the person who committed violations with the support of the group might be dead, which would prevent any possibility of obtaining reparation in an individualized criminal trial. The group, on the other hand, might have assets that could be seized if responsibility is established.

Holding a group accountable can also enable better implementation of international law—for instance, by calling on the group to change its practice, rather than simply punishing the individual, and encouraging it to develop training and structures to prevent and punish violations. Such reform measures can be seen as guarantees of non-recurrence, which are a key element of transitional justice processes in both conflict and post-conflict situations, as discussed below. The prospect of establishing at the international level a system of criminal accountability for collective entities, like armed groups, however, is dim. International criminal law is conceived as being applicable to individuals, and the assumption is that it is practically unfeasible to try a collective entity as such.

A further powerful and recurrent obstacle to accountability in the context of non-international armed conflicts is the provision of amnesties to members of non-state armed groups. Research has shown that amnesties for such actors are commonly used during and after conflict, suggesting that “that the accountability norm has not spread as far in the civil war context.”

Blanket amnesties, which cover violations of international humanitarian law and human rights, are still a controversial topic both in international law and practice, and there is a rule prohibiting them, allowing amnesties only for those who participated in hostilities but respected international humanitarian law (that is, did not commit genocide, war crimes, or crimes against humanity). It has been argued, however, that certain forms of amnesties may be, in some circumstances, a “necessary evil.” Indeed, many non-state armed groups distrust the government, and it is not uncommon for states at the end of a conflict to be unable or unwilling to establish procedures in which all parties can have confidence. Because the lack of incentives to compromise and the fear of prosecution may push these groups back to armed struggle, granting amnesties may be the only means to bring groups to the negotiation table. In such contexts, some plead for the adoption of a “contextual approach” to amnesties, which could, for example, require amnesties to be supported by a widespread political

may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less or indeed no different from that of those actually carrying out the acts in question.” ICTY, Judgment, Prosecutor v. Tadić (IT-94-1-A), Appeals Chamber, 15 July 1999, 191.


39 See Rule 159 of the ICRC Customary International Humanitarian Law study, which underlines that the ICRC holds the position that amnesties cannot be granted for war crimes. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159


consensus or to be accompanied by accountability and redress measures that are “not necessarily criminal in nature,” such as truth telling or reparations.\textsuperscript{43}

Even limited amnesties come with risks, however, from an accountability standpoint. In Burundi in 2003 and 2015, for example, “temporary immunities” were accorded notably to different armed actors. Aimed at shielding the armed forces of both non-state armed groups and the state from judicial prosecution for political offenses (like an attempted coup), these measures were initially planned to be temporary, and considered at first to be a successful tool for transitional justice in the context of non-international armed conflicts.\textsuperscript{44} However, the immunities proved to be anything but temporary. Still in place at the time of writing, they cover not only political offences but also other crimes, including those allegedly committed by the regime now in power. “Burundi’s experience shows that even when in law temporary immunity is limited to certain political offences, in reality it guarantees full impunity to perpetrators of serious human rights crimes.”\textsuperscript{45}

Be that as it may, one should keep in mind that amnesties or other forms of judicial immunities only bar prosecutions at the national level. Under international law, a member of a non-state armed group can still face prosecution before an international court or a foreign domestic court, which can judge the alleged perpetrator of an international crime on the basis of the principle of universal jurisdiction.\textsuperscript{46}

\section*{Reparation}

As the main subjects of international law, states are the drafters and recipients of international norms, which has an impact on the establishment of responsibility for violations of those norms. The Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), elaborated by the UN International Law Commission, largely codifies customary international law.\textsuperscript{47} After taking almost half a century to be finalized,\textsuperscript{48} the document has been criticized by some scholars who argue that its set of rules on state responsibility might be somewhat outdated with respect to contemporary problems.\textsuperscript{49} In a world where all sorts of different non-state actors evolve at the domestic and international levels, a system of responsibility based entirely on a state-centric paradigm falls short of dealing in a

\textsuperscript{43} Salonidis, 883.
\textsuperscript{46} See Salodinis, 889–892.
\textsuperscript{49} Edith Brown Weiss noted that “while the Commission’s almost exclusive concern with states may have been appropriate at the beginning of its work, it does not reflect the international system of the twenty-first century.” Edith Brown Weiss, “Invoking State Responsibility in the Twenty-First Century,” \textit{American Journal of International Law} 96 (2002): 799.
comprehensive manner with the consequences of violations of international norms by these actors.  

The norms applicable to the establishment of the responsibility of states foresee the possibility that the behavior of an non-state armed group could directly entail the responsibility of the state as such in three different scenario: 1) when a non-state armed group is in fact acting under the control of a state; 2) when certain conduct is carried out in the absence or default of official authorities; and 3) when the group becomes the new government. In these instances, the acts committed by the non-state armed group are directly attributable to the state, as if they had been committed by the state itself. As a consequence, the non-state actor as the responsible state will be under the “obligation to make full reparation for the injury caused by the internationally wrongful act.”

Furthermore, states have the obligation to exercise due diligence and do everything in their capacity to protect everyone in their jurisdiction against threats to the enjoyment of human rights posed by nonstate armed groups. As articulated by the Inter-American Court of Human Rights in its landmark Velásquez Rodríguez v. Honduras case of 1988,

an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

The extent to which states have a legal obligation to guarantee the rights of victims to an effective remedy and reparation for violations committed by non-state armed groups, however, is still unsettled. Some practice has gone in this direction. For example, truth commissions in Peru and Sierra Leone defined the term victims for the purpose of future reparations programs broadly enough to include victims of such violations. But given the fact that the recommendations of both commissions have been poorly implemented, one can say that an obligation of the state to provide reparations for acts committed by these actors is at

50 According to Jutta Brunnée, state responsibility remains the “paradigm form of responsibility on the international plane. Given the focus of classical international law upon the rights and obligations of states, its enduring conceptual centrality is hardly surprising. Nor are its inherent limitations in facilitating international legal accountability. By definition, the regime can facilitate only inter-state accountability on the basis of positive legal rule [...] the regime at once reflects a particular vision of international law and reveals the partial nature of that image.” Jutta Brunnée, “International Legal Accountability Through the Lens of the Law of State Responsibility,” Netherlands Yearbook of International Law XXXVI (2005): 23.

51 Under article 8, “the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” A typical example of the application of this article would involve the actions of militias—i.e., organized non-state armed groups controlled by a state.

52 Article 9 provides that “the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”

53 As for article 10 of the International Law Commission Articles on State Responsibility, it declares that “the conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.”

54 Article 31.

best a crystallizing norm of customary international law, and at worst merely a good practice.\(^{56}\)

A further challenge with regard to ensuring reparation for actions committed by non-state armed groups is related to the uncertainties surrounding the international law applicable to these actors. While it is relatively well settled that international humanitarian law applies to non-state armed groups, controversy remains with regard to human rights law, thus casting doubt on the extent to which an armed group itself would be directly and legally bound by the victims’ “right to reparation.”.

International humanitarian law only applies in times of armed conflict. The applicable law differs depending on whether the conflict is between states (also called “international armed conflict”) or between non-state armed groups and a state or between such groups themselves.\(^{57}\) As spelled out by the International Criminal Tribunal for the former Yugoslavia,

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.\(^{58}\)

According to case law, two conditions are necessary to the existence of a non-international armed conflict: protracted violence and the level of organization of the non-state armed group. Protracted refers to the intensity of the armed violence and not merely its duration, the ordinary meaning of the word notwithstanding.\(^{59}\) The level of organization required for the applicability of international humanitarian law to non-state armed groups, also spelled out in case law, includes elements such as the existence of a command structure, disciplinary rules, and mechanisms within the group, and the existence of a headquarters or control over certain territory.\(^{60}\)

While the precise legal means by which non-state armed groups are bound by international humanitarian law have been debated,\(^{61}\) state practice, international case law, and scholarship


\(^{58}\) ICTY, Tadic, para 70.


\(^{60}\) ICTY Haradinaj, 3 April 2008, para 360.

\(^{61}\) For example, in 2004, dodging the issue, the Appeals Chamber of the Sierra Leone Special Court simply held that “it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.” Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E)), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, at para. 22, www.unhcr.org/refworld/docid/49abc0a22.html. For the different theories on the applicability of IHL to armed
have confirmed that Common Article 3 of the 1949 Geneva Conventions, Additional Protocol II of 1977 to the 1949 the Geneva Conventions (AP II), and customary international humanitarian law apply to armed non-state actors that are party to non-international armed conflicts. Article 91 of the 1977 First Additional Protocol to the Geneva Conventions requires that “a Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” This treaty is only applicable to international armed conflicts, however, and no similar provision is stipulated in the second protocol, which applies to non-international armed conflicts.

A customary international humanitarian law study conducted by the International Committee for the Red Cross has nevertheless shown that a state that has been found responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused both in international and non-international armed conflicts (Rule 150). But whether this applies to reparation sought from non-state armed groups remains unclear. Citing some existing practice, the Commentary of this rule underlines that:

Even if it can be argued that armed opposition groups incur responsibility for acts committed by persons forming part of such groups (…), the consequences of such responsibility are not clear. In particular, it is unclear to what extent armed opposition groups are under an obligation to make full reparation, even though in many countries victims can bring a civil suit for damages against the offenders (…).

Human rights law also applies in situations of armed conflicts, whether international or non-international, as formally confirmed on several occasions by the International Court of Justice. However, the existence of human rights obligations of non-state armed groups in situations of non-international armed conflicts or in other situations of violence is controversial. The main refutation of the applicability of this particular body of international norms to these groups is linked to the structure and alleged philosophy underlying international human rights law. Human rights treaties can be characterized as setting out norms meant to regulate the relationship between a state and the individuals living under its jurisdiction. Thus, such treaties can be argued to be “neither intended, nor adequate, to govern armed conflict between the state and armed opposition groups.” This interpretation has a direct impact on transitional justice processes, since because it means that the right to an non-state actors, see Sandesh Sivakumaran, “Binding Armed Opposition Groups,” International and Comparative Law Quarterly 55 (2006): 381; and Antonio Cassese, “The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts,” International & Comparative Law Quarterly 30, no. 2 (1981): 429.

62 The customary international humanitarian law study conducted by the ICRC has identified 161 Rules of which a great majority are also applicable in non-international armed conflicts. See www.icrc.org/customary-ihl/eng/docs/v1_rul

63 See the ICRC CIHL database available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule150

64 Ibid.

65 See the Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004, ICJ Reports 2004. The applicability of international human rights law in situations of armed conflict was also confirmed by the ICJ in the Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment of 9 December 2005, ICJ Reports 2005.

effective remedy, as enshrined in article 2 of the International Covenant for Civil and Political Rights, could only be claimed against the state.

The fact that human rights law is, in theory at least, not applicable to non-state armed groups has a number of negative consequences for victims of human rights violations. First, in some situations, human rights law is the only relevant framework. This is the case when international humanitarian law is not applicable—for instance, when the level of the intensity of violence is not high enough or when a group is not sufficiently organized. While it is true that a state remains bound by its human rights obligations in the territory under its jurisdiction and control, there are situations, even outside of the context of armed conflicts, where it may lose control over its territory and population and/or where state institutions are failing. Second, even when international humanitarian law is applicable, certain norms, such as freedom of expression or more generally every right concerned with the everyday life of a person, will not be covered, as the ambit of humanitarian law is limited to those acts with the necessary nexus to the armed conflict.67

Recent practice by states and international organizations, in particular the United Nations, however, has challenged the assumption that non-state armed groups do not hold human rights obligations. It is not possible within the framework of this chapter to further develop this issue, but for our purpose it suffices to note that it is increasingly accepted that human rights law is applicable to non-state armed groups that exercise de facto control over a territory and population and exercise governmental functions.68 As such, similarly to the state, one could argue that a de facto authority or non-state armed group that controls territory would also be under the obligation to ensure effective remedy to victims of human rights violations it commits.

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of

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67 The scope of IHL extends throughout the territory where hostilities are taking place (rationae loci) and must involve a person protected by the instruments (rationae personae). ICTY, Prosecutor v. Tadic, paras. 69–70; ICTR, Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment and Sentence, 21 May 1999, para. 189. International tribunals have, however, developed slightly different tests to determine the requisite nexus between alleged crimes and the conflict. According to the judgment in the Tadic case: “It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.” ICTY, Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 573. According to ICTY, Prosecutor v. Kunarac, Kovac and Vukovic, Case No. IT-96-23, Appeals Chamber Judgment, 12 June 2002, para. 57: “As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.” According to ICTR, Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para. 260: “[T]he alleged crimes ... must be closely related to the hostilities or committed in conjunction with the armed conflict.”

68 For instance, the Office of the High Commissioner for Human Rights has consistently taken the position that “non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.” A/HRC/8/17, para 9; A/HRC/12/37, para. 7. See also Nigel Rodley, “Can Armed Opposition Groups Violate Human Rights?,” in Human Rights in the Twenty-first Century, ed. Kathleen E. Mahoney and Paul Mahoney (Dordrecht: Martinus Nijhoff, 1993). The International Commission on Libya noted that “since the NTC has been exercising de facto control over territory akin to that of a Governmental authority, it will examine also allegations of human rights committed by its forces.” Report of the International Commission on Libya Established by the Human Rights Council Resolution S-15/1 of February 2011, para. 72.
International Humanitarian Law,\(^69\) for their part, take a “victim-oriented” approach to reparations for human rights and international humanitarian law violations. In that sense, they apply to both international humanitarian law and human rights law, irrespective of the perpetrators of the violations. Article II (c) thus requires states to “provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation.”

In addition, the UN Basic Principles foresee two ways to ensure that victims of violations committed by non-state armed groups have access to reparation. Article 15 provides that “in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.” Article 16 encourages states “to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.”

While these principles are not embedded in a treaty but in a soft law instrument, and as such are not legally binding on states, and articles 15 and 16 are phrased in non-binding language (using the word “should”), they are nevertheless based on some state practice and may inform future practice. Past examples include the African National Congress in South Africa, the Irish Republican Army in Northern Ireland, and the United Self-Defence Forces of Colombia, all non-state armed groups that not only provided symbolic forms of reparation, but also helped to clarify the fate and recovery of the disappeared or were asked to contribute to the rehabilitation of child soldiers.\(^70\)

**Guarantees of non-recurrence**

Guarantees of non-recurrence of human rights violations are an essential part of transitional justice processes. Of course, there is no way to ensure the absolute prevention of human rights and international humanitarian law violations. Prevention and non-recurrence will necessarily require the implementation of different tools and mechanisms, touching different sectors of a society, dealing with issues of development, education, health, rule of law, and democratization. From a transitional justice perspective, guarantees of non-recurrence are aimed at re-establishing the rule of law and restoring the confidence of victims and society at large in state institutions after conflict—for example, through vetting processes.\(^71\) In that regard, the UN Basic Principles require states to “take appropriate legislative and administrative and other appropriate measures to prevent violations.”\(^72\)

Disarmament, demobilization, and reintegration (DDR) programs and measures aimed at the transformation of non-state armed groups into political parties are important steps in diminishing the risks of the resurgence of conflict and abuse.\(^73\) While DDR is certainly a key element of post-conflict reconstructions, however, it is aimed at security rather than

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\(^{69}\) UN Doc. A/RES/60/147, adopted by the UN General Assembly on 21 March 2006.


\(^{72}\) Article 3,a.

\(^{73}\) See EU Factsheet, “Mediation and Dialogue.”
accountability or redress, and on its own is insufficient to ensure the return of stability in post-conflict settings. Indeed, from the point of view of the non-state armed group,

the concept of DDR is considered deeply flawed because it implies that non-state actors represent the only threat to security. From the perspective of these actors, however, their renunciation of force is interdependent with, and hence cannot precede, the transition of power towards more accountable and legitimate state institutions that can provide a more secure environment for all.  

In order to ensure successful transitions to peace, experts tend to agree that it is important to consider non-state armed groups not only as possible perpetrators of international humanitarian law and human rights violations, but also as actors that can play a positive role in the transition, if only because they are often very close to their constituencies. In addition, one should keep in mind that members of non-state armed groups can also be victims of armed conflict and violations. In that sense, they should be allowed to take ownership of peacebuilding processes, as “[they] will be more likely to be sustained if it is owned and driven by all relevant conflicting actors and their constituencies, and if it addresses their respective needs and interests.” In the context of Northern Ireland or South Sudan, for instance, former combatants were not only subjects of transitional justice measures, they were also involved in implementing them.

Engaging non-state armed groups in peace and transitional processes has proven more problematic since September 11, 2001, with the adoption in many states of antiterrorism legislation. In the United States, engaging with an armed group listed as a terrorist organization can trigger criminal responsibility. The use of the term terrorist to designate non-state armed groups is problematic, as states will tend to label any armed group that opposes it as a terrorist group. As noted by the International Committee of the Red Cross,

a recent challenge for IHL has been the tendency of States to label as terrorist all acts of warfare against them committed by armed groups, especially in non-international armed conflicts. This has created confusion in differentiating between lawful acts of war, including such acts committed by domestic insurgents against military targets, and acts of terrorism.

76 Dudouet, Giessmann, and Planta, 12.
77 Ibid., 34.
78 In the controversial US Supreme Court decision of June 21, 2010, *Holder v Humanitarian Law Project* (2010) 130 S. Ct. 2705, the Court held that the training in international law for Kurdistan Workers’ Party (PKK) members planned to be given by a US NGO (the Humanitarian Law Project) could be used by the PKK “as a part of a broader strategy to promote terrorism, and to threaten, manipulate, and disrupt.” According to the Court, the planned training would thus rightly fall under the *Anti-terrorism and Effective Death Penalty Act of 1996* which criminalizes any material support given to terrorist groups. The fact that in the circumstances of the case such a training was prohibited by law was not found to be a violation of the First Amendment (freedom of expression) enjoyed by the NGO. See also the “The Supreme Court Goes too far in the Name of Fighting Terrorism,” *The Washington Post*, June 21, 2010, [www.washingtonpost.com/wp-dyn/content/article/2010/06/21/AR2010062104267.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/06/21/AR2010062104267.html); “What Counts as Abetting Terrorists?” *The New York Times*, June 21, 2010, [http://roomfordebate.blogs.nytimes.com/2010/06/21/what-counts-as-abetting-terrorists/](http://roomfordebate.blogs.nytimes.com/2010/06/21/what-counts-as-abetting-terrorists/).
From a peacebuilding perspective, the branding of almost all insurgents as terrorists, regardless of their nature and motivations, has created difficulties and dilemmas. It has been noted that associating non-state armed groups with terrorists has had “a direct impact on the EU and the international community’s capacity for mediation and dialogue in transition processes.” From the perspective of preventing the recurrence of violations of international human law and human rights law, therefore, there is a need to “look closely at the structural roots and political causes behind the motivation of non-state armed groups . . . as most insurgency movements cannot be defeated by force, and therefore have to be considered as key stakeholders in any negotiation or state-building process.

Conclusion

Non-state armed groups challenge the notion of transitional justice in different ways. First, the international legal framework, which remains state-centric, has not completely adjusted to the reality of the exercise of power and control that these actors may have over a population. For instance, while in the eyes of a victim it may not matter if a crime has been committed by a soldier or a member of an armed group, norms ensuring that reparations can be directly claimed from a non-state actor have not yet crystallized, nor has a forum where this could be done yet been invented. In that regard, international and national criminal law, focusing only on the individual criminal responsibility of the members of non-state armed groups, fails to address in its entirety the often complex dynamic between individuals and the armed groups to which they belong. To illustrate this point, one might recall the words of Dominic Ongwen, a former leader of the Lord’s Resistance Army (LRA) and former child soldier who is currently being tried at the ICC for multiple war crimes. In an impassioned speech, he told to the court: “I am not the LRA . . . It is the LRA who abducted people, in northern Uganda. It is the LRA who killed people.” Holding an individual criminally responsible for the international crimes he or she committed is necessary, but criminal trials are also reductive, tending not to account for the groups’ dynamic in inciting crimes. As we have seen, truth commissions, if well designed, with a more comprehensive and inclusive approach, give more space to this dimension.

Second, from an operational point of view, the rise in the number of non-state armed groups in contemporary armed conflicts, the widening territorial scope in which they operate, and the different ideologies they adopt present acute difficulties for the implementation of transitional justice measures. How can we ensure respect for the right to truth when several armed groups operate in the same region? How can we reach for reconciliation and guarantees of non-recurrence with groups, such as the Islamic State or Boko Haram, that profess an ideology that imply the rejection of international humanitarian law and human rights norms? To what extent can the victims of a suicide attack in one country claim reparation for acts committed by a non-state armed groups based in another one, as in the attacks committed in Kenya by the Al-Shabab, a group based in Somalia?

While this may paint a grim picture of the possibility to successfully support transitions to peace and justice in complex contexts of non-international armed conflicts, there is an emerging consensus that non-state armed groups can also in some instance play a positive role

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80 See EU Factsheet, “Mediation and Dialogue.”
81 Ibid.
and that they have in the past contributed to measures of reconciliation. Contrary to the vision embedded by antiterrorism policies adopted by many states, putting all non-state armed groups in one category does not allow for contextualized approaches and successful strategies of engagement.

More research is thus needed to ensure that measures related to transitional justice are better adapted to the reality of non-state armed groups in contemporary international relations. From a legal perspective, finding ways to more systematically address the collective responsibility of a non-state armed group and ensuring that individuals have a legal right to reparation when their rights are violated by these actors is one necessary development. From a policy point of view, establishing some degree of ownership among non-state armed groups and their members by collecting their views and connecting them to the elaboration of transitional justice norms and processes is another essential step.83