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حماية التعليم في ظروف النزاع والعدم الأمن



**FRESHFIELDS BRUCKHAUS DERINGER**

# **Redressing Violations of International Law: The Role of Non-State Actors in Relation to Education**

**London - 22 May 2013**

## **Event Report**

On 22 May 2013, the British Institute of International and Comparative Law (BIICL) held a seminar on the role of non-State actors in redressing education-related violations. This event, chaired by Dr Duncan Fairgrieve, was part of an ongoing research project at the Institute on the Law and Practice of Reparations. More information about this project can be found here:

[www.biicl.org/research/reparations](http://www.biicl.org/research/reparations)

Participants included Professor Math Noortmann (Oxford Brookes University), Jonathan Somer (Geneva Call) and Professor Robert McCorquodale (BIICL). Their respective presentations were followed by a Q&A session with the audience. This Report contains the main points of each presentation.

The event was kindly supported by Protect Education in Insecurity and Conflict (PEIC) and Freshfields Bruckhaus Deringer, where the event took place.

## Non-state actors, international law and education; educating non-state actors?

**Professor Math Noortmann (Oxford Brookes University)**

Professor Noortmann showed a photo of a child soldier with a backpack full of hand grenades that read 'let's go to school' and explained how he would try and combine both international law and international relations in his presentation.

The Oxford English Dictionary defines a non-state actor as "an individual or organizations that has significant political influence but is not allied to any particular country or state."

Phillip Alston, the Special Rapporteur for the United Nations (UN) on extrajudicial, summary or arbitrary executions once said that we suffer from a 'not-a-cat syndrome', to explain why international lawyers and scholars are state-centric. The BIICL, Geneva Call, the UN, Apple corporation, essentially every known international organization is not a state. Non-state groups and opposition groups are also non-state actors. Since the seminar is specifically focused on education, Professor Noortmann explained that education has a huge influence as there are a number of non-governmental organizations (NGO's) that deal with education such as universities, teachers without borders etc. These are all non-governmental. Furthermore one should not exclude businesses when it comes to education. Be it through the manufacture of computers, NIKE's partnership with some universities, or Western Union setting up a school in the US, education is often present as a business or a corporate social responsibility.

Professor Noortmann continued to explain that when we speak of the responsibilities of non-state actors we should not exclude NGO's. There is a tendency to focus on the liability of the 'bad guys', but it should not be forgotten that the 'good guys', no matter how good their intentions may be, can yield bad results. As an example of how far reaching their influence can be it should be noted that the Global Partnership for Education has an interest in over 30 countries. Partners in education can be donors or the civil society itself. The question for an academic becomes: who is not a partner in education? The armed opposition groups are the ones actually tearing down schools; leading us to believe that the majority of armed groups could not possibly contribute to protect and enhance the right to education. Bigger armed groups (e.g. Palestine Liberation Organisation (PLO), Hezbollah, Polisario) are significant non-state actors, which should be, and to some extent already are part of a global educational framework.

International law should acknowledge non-governmental interest and stakeholdership. Formal participatory and normative exclusiveness of armed non-state actors is unlikely to further education in conflict areas. 'Soft law' mechanisms and notions, which basically defines everything that does not fall into the definition of being international 'law', do only a very partial and limited job. Professor Noortmann restated the importance of bringing this notion into play. Social corporate responsibility is not really covered by the law, so we must ask ourselves: 'how do we bring non-legal/quasi-legal responsibility into the existing legal framework?' Or alternatively: 'should we even bring it in?'

With regard to the legal status of non-state armed groups, Professor Noortmann purports that this issue is still contested. Non-state armed groups are not part to the Geneva Conventions. We value and uphold agreements between states and non-state armed groups and it is common to view cease-fires repeatedly signed and broken. Are these agreements according to law? Is there an international legal component to them? Can we legally recognize armed groups? Can we legally recognize a rebel group, and what does it mean if we do? Do they receive a new set of rights or legal criminal, contractual and public responsibilities?

John Ruggie, the Special Representative of the UN Secretary-General on business & human rights was contemplating how to bring legal and social obligations for multinational companies together when he came up with the term 'principled pragmatism'. Professor Noortmann mentioned that perhaps this concept could be useful when asking the question: 'how do we position armed non-state groups in international law?'

The right to education, included in article 13 of the International Convention on Economic, Social and Cultural Rights ('ICESCR') 1996, mentioned 'states parties' repeatedly. Non-state actors are nowhere to be found in this international legal framework dominated by states. Where exactly do non-state actors come in? They could deliver programs, publish materials, teach, train, award scholarships, protect schools. Whether they are a charity, a business or an armed non-state actor, ICESCR could be the logical place where these stakeholders could fall into place. Protection for schools is an interesting topic that has been discussed profusely; it would be an interesting development to see these non-state actors take over this role from the state. It is a reiterated fact that in certain circumstances, where the state has been ineffective, non-state actors, including armed non-state actors, have set up their education systems.

One should differentiate the civil and political with regard to the right to education. We generally speak of social, cultural and economic rights, however the right or the obligation to refrain from hindering education should be included in the International Covenant on Civil and Political Rights ('ICCPR'). This is, of course, a different kind of obligation, but it could be a start. The PLO set up in the 1980s schools for secondary education in refugee camps in Lebanon, while the UN was in charge of guaranteeing primary education. The SPLA re-trained rebels who agreed to lay down their arms, a clear example of the SPLA actually taking responsibility. Polisario is training and teaching kids in refugee camps. On a negative note, Hamas is preventing students from accepting scholarships to study in the United States. This is yet another example of a non-state actor interfering with the individuals' right to education. Deciding whether or not to educate non-state actors should not be a question anymore and something needs to be done. We must engage with non-state armed actors, NGO's and multinational companies and make them aware of their social, if not legal, responsibility with respect to education.

Professor Noortmann borrowed John Ruggie's 'protect, respect and remedy' framework and added a twist affirming that 'protect, respect and promote' would be more effective. The first step is to 'protect and promote' and this could easily be done by leaving schools alone, not allowing any interference with the civil and political right to education: "if you do nothing it is fine". The second step would be to promote education; this can be done by providing for the human and educational resources to be used at schools and the concepts

of responsibility and accountability would, thus, become entwined. There is a need to engage, which means: getting non-state actors involved. It is not an easy job as they are hard to get in contact with, but it is something that must be pursued.

## Non-State Armed Groups and Reparations

### Jonathan Somer (Geneva Call)

Jonathan Somer started his presentation by quoting Ron Dudai, according to whom 'although the questions of the application of international law to armed groups has been a subject of much attention recently, there has been little attention as to the way the principle of reparations should apply to armed groups'.

His presentation was divided into three parts:

- The challenges of the legal framework,
- The policy and practice on reparations of armed groups, and
- Geneva Call and the Deeds of Commitment,

The notion of reparations, non-state armed groups and education might be a bridge too far in terms of knowledge and research, so he decided to focus his presentation on the general issue of reparations and armed groups, with reference to education where possible.

What is an armed group? People's first reaction is to imagine someone wreaking havoc in the jungle or in a desert or perhaps, alternatively, a freedom fighter going on to liberate societies from oppressive governments. Therefore, we can affirm that there are different answers to the question of what an armed group can be like. In terms of compliance with IHL, it is always a good idea to first take a look at what non-state armed groups actually do, instead of pre-judging them and decide whether they are good or bad. Regardless of their objective, one could focus on their actions and ask questions such as: are these actions compliant with IHL?

#### The challenges of the legal framework

Jonathan Somer quoted Emmerich de Vattel to explain that in international state-hood it does not matter what the size of the state is as you have one vote and therefore you have the rights and obligations of a subject in international law: "A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom."

What about a giant non-state armed group? One could argue that there are non-state armed groups that are more powerful than a state. How does the law approach this notion? Even though we can all agree that the law has developed in many areas, including IHL, there are still structural conditions that make it difficult to deal with these issues.

#### The policy and practice on reparations of armed groups

The International Committee of the Red Cross (ICRC), in its customary international humanitarian law study purports to compile 161 IHL rules that create obligations, all of which fall on states and most of them on non-state actors. Jonathan Somer went on to explain that reparations are one of those exceptions where the ICRC was not willing to go far enough and say that there is a customary international law obligation for armed groups to provide reparations. However, one could also argue that if there is a responsibility, the logical step is to say that there must be a consequence to that responsibility: reparations.

Another source adopted by the UN General Assembly (i.e. 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) on remedies and reparations and international humanitarian obligations, repeatedly uses the word 'state' throughout its text. It does not, however, address the responsibility of non-state armed groups, thus not helping with the engagement process. There seems to be a growing consensus that customary international law places responsibility on armed groups, but where are the consequences of this responsibility?

Geneva Call recently launched a database of primary source material containing IHL subject matter commitments from armed groups. The mixing of international humanitarian law style obligations with operational obligations is what most experts have defined as the most effective way for non-state actors to undertake obligations. An example of this was found in the unilateral treaty 'Viet Cong Code of Discipline, 1960'. None can argue that compliance is undoubtedly a very tricky issue.

### Geneva Call and the Deed of Commitment

Through its Deeds of Commitment, Geneva Call has engaged non-state actors who do not have the legal capacity to become party to international treaties on a range of issues such as landmines, the protection of children, sexual violence and discrimination etc. The signing of the Deed is only the first step, but whether we like it or not these non-state actors are now stakeholders.

The key is how we can get from a place where violations of international humanitarian law are taking place to where we are having discussions with non-state actors, to where they accept their obligations and responsibilities, and finally to where they implement their commitments.

## **Business, Human Rights and Education**

### **Professor Robert McCorquodale (BIICL)**

The presentation focused on different areas of law applying at the same time and includes an overview of the responsibilities held by corporations and businesses in relation to

human rights, in particular the right to education. It is important to remember that in many parts of the world relevant interactions take place with non-state actors and corporations. We may be used to the fact that education is provided mainly by states in certain parts of the world, but this is definitely not the norm.

The Committee on the Rights of the Child's General Comment 16 on State obligations regarding the impact of the business sector on children's rights at Para 1 states that "businesses can be an essential driver for change... However, the realization of children's rights is not an automatic consequence of economic growth and business enterprises can also negatively impact children's rights".

### Public/Private Engagement

Both notions, public and private, can fit together nicely. What seems to have happened is that after much time and debate, it has been decided that, indeed, corporations can violate human rights. As a reaction the UN framework developed by John Ruggie rests on three pillars:

- The state duty to protect human rights
- The corporate responsibility to respect human rights; and
- Access to remedy).

One of the key points that John Ruggie made was that corporations could violate every single human right. Professor McCorquodale went on to quote two of the core General Principles and said that they seem to indicate the way forward:

- Guiding Principle 1: States have a legal obligation towards everybody in their territory, and or jurisdiction, not just their own citizens. This guiding principle requires states to take action.
- Guiding Principle 2: States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. .

These are very clear obligations on states. With regard to actions and omissions, it is very often the case that the state will do nothing, but doing nothing is a breach. States must oversee national corporations within the range of means available to them in order to control the corporate activities. Does it extend extraterritorially? Examples of extra-territoriality can be seen in many areas of law, whether expressly or impliedly. For example when a merger by a German and a British company takes place, competition law applies, similarly the notion of extraterritoriality also applies in relation to sex offenders, corruption etc.

There are a range of significant steps particular to the corporate area where states do extend their jurisdiction extra territorially. Many of the Abu Ghraib violations were not perpetrated by states, but by private military contractors, therefore if we are already extending a state's obligation extra territorially, one can also extend it for a corporation. Even though this notion is still not clear, Professor McCorquodale argued that this seems to be the way forward, and that we should strive to achieve it.

We can find a further example in the case of a country starting trade agreements with another state. The government negotiates trade agreements, but when there are corporations who are interested in investing they are intimately involved in this process. Subsequently, the government may enter a bilateral treaty with another state, enabling the corporation to invest on an equal basis, albeit with a great deal of protection. The state is therefore closely involved in this process. Professor McCorquodale insisted that extraterritorial jurisdiction should apply in the aforementioned cases.

### Corporate responsibility to respect human rights

Corporate responsibility to respect human rights is not only about protecting but also about respecting human rights. This concept is based on the notion of social expectations and risk management. Professor McCorquodale went on to look closely at other two Guiding Principles:

- Guiding Principle 15: It is expected that corporations put in place a due diligence process. In particular in the human rights arena 'due diligence' covers the extent to which a state has undergone an investigation concerning the victims. It is clearly problematic to have this wording in the Guiding Principles. Three things are needed:
  - Impact assessment
  - Consultation
  - Reporting and tracking.
  
- Guiding Principle 13: This Principle clarifies what the 'responsibility to respect' means. It consists of two main actions: avoiding causing or contributing to adverse human rights impacts and seeking to prevent or mitigate adverse human rights impacts. Clearly the latter has a higher expectation than the other. We must remember that they are at the end of the day simply 'expectations', not binding norms.

### Access to remedy

How do you enforce a remedy which is based on a voluntary obligation? And of course there is the issue of whether these corporations will accept the costs, the standing, having a group of people telling them what to do and ultimately the involvement of lawyers. Should it use national or international law? Professor McCorquodale refers again to the Committee on the Rights of the Child's General Comment 16, Para 66-67 and asks; whom exactly are they complaining about in these paragraphs?

### What does this all mean in relation to education related violations?

UNICEF and Save the Children have tried to look at these Guiding Principles in relation children's rights. What they have concluded is that all businesses should contribute to the elimination of child labour in business activities and business relationships, and promote the education of children. There are 10 Principles in the 'Children's Rights and Business Principles' (2012), most of them are not specifically about education. Professor McCorquodale expressed his concern that this might be mainly about education as a means to produce good workers. Is this education set in place in order to reduce child

labour, or ultimately to employ more qualified working force? It is not, as Professor McCorquodale pointed out, about protecting and promoting the right to education *per se*. This also picks up from the notion of due-diligence, saying that one should consult the local community in respect to what is reckoned as the appropriate education for said community. A grievance mechanism also needs to be included, what is an appropriate grievance mechanism in issues of education?

### Reparations

The role of states in reparations is to put in place regulations and then create judicial remedies. On the other hand, in the corporate practice it is very hard to have any kind of redress or reparation if there isn't transparency. People need to feel that the corporation has some form of accountability, and engagement with the local community. Reparations need to be judicial and non-judicial, however it is important to be realistic and understand that in the majority of cases it is very hard to achieve a judicial remedy. Most importantly, the issue of the corporate responsibility to respect human rights being 'voluntary' still remains so it is extremely hard to create obligations and reparations which are voluntary. One could be imaginative and say to a corporation that they should not just give money: maybe they can build a school, or invest in capacity building in a community, especially since corporations tend to stay long-term in a given place and are ultimately much more engaged than any state.

### Ways Forward

Professor McCorquodale concluded his presentation by identifying two important points:

1. John Ruggie makes it clear that states need to act. It is not a surprise that corporations want clarity and certainty in this area, and therefore governments need to do more, rather than less.
2. This issue is not just a legal case, but it is also a business case. Nike CEO (1998) once stated that 'we do not like the fact that the Nike products have become synonymous of slave wages, forced overtime and arbitrary abuse'. In the long run this might actually be the type of pressure than can be placed on corporations - the fact that their reputation is on the line. This, of course, might not apply to all corporations. In conclusion it is very clear that there are state obligations, but still not clear if corporate obligations exist. Most importantly, there are ways to push corporations to understand the community's social expectations and to consider education as a core issue and incorporate grievance mechanisms, and consultation mechanisms.

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