

Accountability of Armed Opposition Groups in International Law

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1 Legal restraints on armed opposition groups as such

The first question is that of applicable law. It is only when the law to be applied has been settled that one can examine its content, which will be done in the next chapter.

Practice of international bodies convincingly demonstrates that international humanitarian law applicable to armed opposition groups extends well beyond Common Article 3 of the Geneva Conventions and Additional Protocol II to the Geneva Conventions. It remains the case, however, that the 'new' humanitarian law applicable to armed opposition groups concerns principles rather than detailed rules. It is unclear whether armed opposition groups are bound by human rights law. International criminal law as it currently stands does not apply to armed opposition groups as such, and probably rightly so.

Common Article 3 and Protocol II

Treaty law

International bodies have uniformly affirmed the applicability of Common Article 3 and Protocol II to armed opposition groups as a matter of treaty law.

Common Article 3 provides: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply as a minimum the following provisions.' Despite the clarity of this provision, both states and commentators have sometimes suggested that Common Article 3 does not bind armed opposition groups or that it applies only to the individual members of these groups, rather than to the group as

a whole.¹ The proponents of this argument may support their view by pointing to Protocol II which does not refer to 'parties to the conflict', but only mentions the High Contracting Parties to the Protocol, which are states.²

Wide international practice confirms, however, that armed opposition groups are bound by Common Article 3 and Protocol II, and that they are so as a group. In *Military and Paramilitary Activities In and Against Nicaragua*, the International Court of Justice observed that the acts of the *Contras*, fighting against the Nicaraguan Government, were governed by the law applicable to armed conflict not of an international character, i.e. Common Article 3.³ Similarly, in the so-called *Tablada* case, the Inter-American Commission considered:

Common Article 3's mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government and dissident forces. Moreover, the obligation to apply Common Article 3 is absolute for both parties and independent of the obligation of the other. Therefore, both the MTP attackers [the armed opposition group fighting in the conflict under consideration] and the Argentine armed forces had the same duties under humanitarian law.⁴

¹ During the First Periodical Meeting on Humanitarian Law in 1998, several states re-emphasized their objections to the qualification of armed opposition groups as a party to the conflict within the meaning of international humanitarian law. In their view, the better way to deal with internal conflicts is through international criminal prosecution of individuals. The conclusions of the conference drawn up by the chairman avoid any reference to armed opposition groups as bearers of obligations under international humanitarian law, Chairman's Report of the First Periodical Meeting on International Humanitarian Law (Geneva, 19–23 January 1998) in ICRC, International Federation of Red Cross and Red Crescent Societies, *Compendium of Documents*, prepared for the 27th International Conference of the Red Cross and Red Crescent 31 October – 6 November 1999, Annex II (1999) (hereafter, *Compendium of Documents*); see also D. Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts' (1990) 30 *IRRC* 409, at 416 (hereafter, 'Penal Repression').

² See G.I.A.D. Draper, 'Humanitarian Law and Human Rights' (1979) *Acta Juridica* 199–206, reprinted in M. A. Meyer and H. McCoubrey (eds.) *Reflections on Law and Armed Conflicts*, (Kluwer Law International, The Hague, 1998) pp. 145–6 (hereafter, *Reflections on Law and Armed Conflicts*) ('The rules established in the Protocol [II] . . . are not express obligations imposed upon the parties to the internal conflict, but are established as between the States which are parties to the Protocol, limited to the States Parties to the Geneva Convention of 1949') (hereafter, 'Humanitarian Law and Human Rights').

³ *Nicaragua v. US* (Judgment of 27 June 1986) (Merits) 1986 ICJ Rep. 14, at 114, para. 119 (hereafter, *Nicaragua Case*).

⁴ Report No 55/97, Case No 11.137 (Argentina), para. 174 (30 October 1997) (hereafter, *Tablada case*) (footnotes omitted); see also Report No 26/97 Case No 11.142 (Colombia), para. 131 (30 September 1997).

The UN Security Council and the UN Commission on Human Rights, in the context of various internal conflicts, have frequently called upon all parties to the hostilities, namely the government armed forces and armed opposition groups – to respect fully the applicable provisions of international humanitarian law, including Common Article 3.⁵

Similar practice can be found with regard to Protocol II. In *Prosecutor v. Akayesu*, the Rwanda Tribunal indicated that the Protocol states ‘norms applicable to States and Parties to a conflict’.⁶ Similarly, in resolution 1987/51, the UN Commission on Human Rights requested the armed opposition groups involved in the conflict in El Salvador to observe the Geneva Conventions and the Protocols, which includes Protocol II.⁷ The Commission’s Special Representative on the Situation of Human Rights in El Salvador observed:

The Republic of El Salvador is a party to the four Geneva Conventions of 1949 and the Additional Protocols of 1977 on the protection of victims of war. Since the current conflict in El Salvador is an ‘armed conflict not of an international character’ within the meaning of the Conventions and Protocols, the relevant rules apply, particularly those contained in Article 3 of each of the Conventions and in Protocol II, *and must be observed by each of the parties to the conflict – in other words, by the Salvadorian regular armed forces and the opposition guerrilla forces.*⁸

⁵ UN Security Council, Res. 1193 (1998), para. 12 (28 August 1998) (on Afghanistan); UN Security Council, Res. 812 (1993), para. 8 (12 March 1993) (on Rwanda); UN Security Council, Res. 794 (1992), para. 4 (3 December 1992) (on Somalia); UN Commission on Human Rights, Res. 1999/18, para. 17 (23 April 1999) (‘condemns abuses by elements of the Kosovo Liberation Army, in particular killings in violation of international humanitarian law’); UN Commission on Human Rights, Res. 1997/59, para. 7 (15 April 1997) (on Sudan); Commission on Human Rights, Res. 1998/67, para. 6 (21 April 1998) (on Sudan); see also UN Commission on Human Rights, E/CN.4/1985/21, at 43, para. 161 (Report of the Special Rapporteur, 19 February 1985) (hereafter, 1985 Report of the Special Rapporteur on Afghanistan).

⁶ No. ICTR-96-4-T, at 248, para. 611 (2 September 1998) (hereafter, *Akayesu* case).

⁷ Para. 3 (11 March 1987); see also UN Commission on Human Rights, Res. 1997/59, para. 7 (15 April 1997) (on Sudan).

⁸ UN Commission on Human Rights, E/CN.4/1985/18, at 37 (Report of the Special Representative, 1 February 1985) (hereafter, 1985 Final Report of the Special Representative on El Salvador) (emphasis added); see also UN Commission on Human Rights, E/CN.4/1984/25, at 34 (Final Report on the Situation of Human Rights in El Salvador of J. A. Pastor Ridruejo, 19 January 1984); UN Commission on Human Rights, E/CN.4/1995/111, para. 129 (Joint Report of the Special Rapporteur on Question of Torture, N.S. Rodley, and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Bacre Waly Ndiaye, 16 January 1995) (hereafter, 1995 Joint Report of the Special Rapporteur on Question of Torture, and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions); Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Colombia,

This practice, demonstrating that armed opposition groups are bound by Common Article 3 and Protocol II,⁹ also shows that international bodies have assumed competence to determine the applicability of these norms in specific cases. Commentators have often raised the problem of the absence of an international machinery competent to characterize the conflict and therewith the applicability of the relevant law.¹⁰ Were such machinery to exist, they suggest, the common state practice of denying the applicability of Common Article 3 and Protocol II to situations in which they clearly should be applied, might be reversed.

It is true that, in principle, states are free to interpret their rights and duties under international humanitarian law, as under general international law, without such interpretation having binding force upon other states.¹¹ Accordingly, during the drafting of Protocol II, several states emphasized that it is a matter solely for the state affected by a conflict to determine whether the conditions for applicability of the Protocol were fulfilled.¹² International bodies generally acknowledge the relevance of states' views, in particular the view of the territorial state, on the question whether the norms apply to a particular situation.¹³

OEA/Ser.L/V/II.102, Doc. 9, rev. 1, at 77–8, para. 20 and accompanying footnote 11, at 81–111, paras. 36–150 (26 February 1999) (hereafter, Third Report on Colombia) (applying Protocol II to the Colombian armed opposition groups).

⁹ See also J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, Geneva, reprint 1994) (1958) p. 37 (hereafter, *Commentary 4th Geneva Convention*); S-S. Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, eds. Y. Sandoz et al. (Martinus Nijhoff, Geneva, 1987), p. 1345 (hereafter, *Commentary Additional Protocols*).

¹⁰ F. Kalshoven, *Constraints on the Waging of War* (International Committee of the Red Cross, Geneva, 2nd edn., 1991), p. 138 (hereafter, *Constraints*); T. Meron, *Human Rights in Internal Strife: their International Protection* (Grotius Publications Limited, Cambridge, 1987) p. 43–4 (hereafter, *Internal Strife*).

¹¹ P. Weil, 'Le droit international en quête de son identité' (1992) 237–VI *Recueil des Cours* at 222.

¹² F. Kalshoven, 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: the Diplomatic Conference Geneva 1974–1977' (1997) 8 *NYIL* 107, at 112 (hereafter, 'Reaffirmation').

¹³ Commission on Human Rights, E/CN.4/1998/87, para. 79 (Analytical Report of the Secretary General on Minimum Humanitarian Standards, 5 January 1998) (hereafter, UN Secretary-General 1998 Report on Minimum Humanitarian Standards); compare also Commission on Human Rights, E/CN.4/1994/31, para. 13 (Report of the Special Rapporteur on Question of Torture, N. S. Rodley, 6 January 1994) (asking whether, in determining whether an armed conflict exists and what entities may be appropriately considered as parties to the conflict, he should be guided by the view of the Government of the member state concerned) (hereafter, 1994 Report of the Special Rapporteur on Torture).

The freedom of states is, however, limited when courts and tribunals exist that are competent to interpret the law. There is no doubt that the International Court of Justice, the Yugoslavia and Rwanda Tribunals, and the future International Criminal Court, can make a legally binding declaration as to whether a conflict is an 'armed conflict not of an international character' and thereby as to the applicability of international humanitarian law to the parties involved in the conflict.¹⁴ Moreover, the UN Security Council, when acting under Chapter VII, has claimed the authority to make a legally binding decision as to whether an armed conflict exists and whether the humanitarian rules apply to these situations. The effect of decisions of these bodies is to have a minimum legal standard apply, independently of the desire of the government, as soon as the violence and the armed opposition groups pass a certain threshold as to their organization and military power.

Other bodies, such as the Inter-American Commission, the UN Commission on Human Rights, and its rapporteurs, have also regularly qualified situations as internal armed conflicts within the meaning of international humanitarian law. Significantly, in some cases these bodies made such declarations contrary to the views of the governments concerned.¹⁵ The views of these bodies are, however, not binding upon states.

Thus, while the determination of applicability of Common Article 3 and Protocol II is largely left to auto-interpretation, international bodies increasingly play a role in this determination. A different question,

¹⁴ In the *Nicaragua* case, the International Court of Justice held that the conflict between the *Contras* and the Government of Nicaragua was an armed conflict not of an international character in terms of international humanitarian law; it made this decision in defiance of the position of the Government of Nicaragua, which refused to formally acknowledge the applicability of Common Article 3, Americas Watch Committee, *Violations of the Laws of War by Both Sides in Nicaragua 1981-1985* (New York, March 1985), p.16.

¹⁵ Both the Governments of El Salvador and Afghanistan refused to acknowledge the applicability of Common Article 3 to the respective conflicts. Nonetheless, the UN Commission on Human Rights' Special Representative on the Situation of Human Rights in El Salvador, Pastor Ridruejo stated that the conflict in El Salvador was governed by Common Article 3 and Protocol II, 1985 Final Report of the Special Representative for El Salvador, see above, n. 8, at 37. Similarly, the UN Commission on Human Rights' Special Rapporteur on Afghanistan, Ermacora, considered that the conflict in Afghanistan 'must be considered as one of a non-international character within the meaning of Article 3 of the Geneva Conventions', 1985 Report of the Special Rapporteur on Afghanistan, above, n. 5, at 43; see also A/40/40 at 122 (1985), General Assembly of the United Nations (the Government of Afghanistan denying that the situation in that country constituted an armed conflict within the meaning of Common Article 3).

which will be addressed later, is whether third party monitoring can be improved by the creation of machinery specifically mandated to decide on the applicability of international humanitarian law in specific cases.

Origin of the obligations of armed groups under inter-state treaties

A difficult question remains, namely the origin of the obligations of armed opposition groups under multilateral treaties to which they are not a party. The Geneva Conventions and Protocol II are international agreements concluded between states. Armed opposition groups have not ratified or acceded to these treaties, nor are they able to become parties to the Geneva Conventions or Protocol II. The Geneva Conventions admit only states as 'High Contracting Parties'.¹⁶ The same holds for Protocol II, since only the State Parties to the Geneva Conventions can become parties to the Protocol.¹⁷ Furthermore, the applicability of Common Article 3 and Protocol II to armed opposition groups does not depend on their express declaration that they consider themselves bound by these rules.

Several armed opposition groups have tried to adhere to the 1949 Geneva Conventions. However, they have been challenged by their opponents and also by Switzerland, the depository of the Conventions.¹⁸ Third states take the traditional view that when two authorities claim to

¹⁶ Article 1 common to the Geneva Conventions stipulates that 'the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'; the notion 'High Contracting Parties' refers to the states for which the Conventions are in force, S-S. Junod, *Commentary Additional Protocols*, see above, n. 9, p. 1338; see also M. Takemoto, 'The 1977 Additional Protocols and the Law of Treaties', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (International Committee of the Red Cross, Martinus Nijhoff, Dordrecht, 1984) pp. 247-60 (hereafter, *Pictet*).

¹⁷ Articles 20 and 22 of Protocol II.

¹⁸ Both France and Switzerland challenged efforts by the Provisional Revolutionary Government of Algeria to adhere to the Conventions. Switzerland also challenged the attempted adherence by the Smith government in Rhodesia, D. P. Forsythe, 'Legal Management of Internal War: the 1977 Protocol on Non-International Armed Conflicts' (1978) 72 *AJIL* 272, 292, n. 93; also the Kosovo Liberation Army (KLA) has expressed its wish to sign the Geneva Conventions and other humanitarian instruments, 'Spokesman Explains Structure of Rebel Army', BBC Summary of World Broadcast, from Koha Ditore in Albania, 12 July 1998, and 'Koha Ditore Interview with Jakup Krasniqi, KLA Spokesman - Part II', *Arta* 12 July 1998, cited in: Human Rights Watch, 'Violations of the Rules of War by the Insurgent Forces', in *Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo*, vol. X, No 9(D).

represent the government, only the authority that existed before the conflict, may bind the state to the Geneva Conventions and the Additional Protocols. When the established authority is challenged by another de facto authority, the latter will not be accepted as new accessor to the treaties.¹⁹

As armed opposition groups cannot become parties to the Geneva Conventions or Additional Protocols, and are not required to declare themselves bound by the relevant norms, they derive their rights and obligations contained in Common Article 3 and Protocol II through the state on whose territory they operate.²⁰ Once the territorial state has ratified the Geneva Conventions and Protocol II, armed opposition groups operating on its territory become automatically bound by the relevant norms laid down therein. The question arises as to the origin of the obligations of armed opposition groups under multilateral treaties. There is no international practice explicitly dealing with this question. However, in view of the fact that humanitarian law has great difficulty in regulating the behaviour of armed opposition groups, it is appropriate to give this question some consideration.

Two arguments, reflecting different conceptions of the international legal status of armed opposition groups, have been put forward to explain their obligations under interstate treaties. First, one may argue that they are bound as de facto authorities in a particular territory.²¹ Armed opposition groups are then regarded as independent entities that exist side-by-side with the established authorities. This argument recognizes the reality of the internal conflict and the politically weakened position of the established authorities. It abandons the traditional conception of the state as an impermeable whole. This argument can, however, only apply to those groups which actually exercise de facto authority over persons or territory. It is unable to explain the obligations of groups lacking such authority, but which are, nonetheless bound by Common Article 3.²²

¹⁹ See S-S. Junod, *Commentary Additional Protocols*, above, n. 9, p. 1338.

²⁰ A/7720, para. 171 (Report of the Secretary General 'Respect for Human Rights in Armed Conflicts' 20 November 1969); see also S-S. Junod, *Commentary Additional Protocols*, see above n. 9, p. 1345.

²¹ R. Baxter, 'Jus in Bello Interno: the Present and Future Law', in J. Moore (ed.), *Law and Civil War in the Modern World* (Johns Hopkins University Press, Baltimore, 1974), pp. 518, 527-8.

²² Unlike Protocol II, Common Article 3 does not require armed opposition groups to exercise territorial control in order to be bound by the provisions set forth in this article, see below, Chapter 4, Section 1.

The obligations of this latter type of group can only be clarified by the second argument, namely that they are bound by humanitarian norms because they are inhabitants of the state that has ratified the relevant conventions.²³ This explanation views the relationship between the established government and armed opposition groups as hierarchical in nature. However, this is difficult to uphold. Armed opposition groups seek to exercise public authority, and in doing so they question the authority of the established government, including the government's laws. In this regard it must also be pointed out that armed groups must be distinguished from individuals. Like armed opposition groups, individuals cannot accede to international treaties, they derive their international rights and obligations through the state under which jurisdiction they live. However, the international rules applicable to individuals are limited to prohibitions on committing a limited number of international crimes. Common Article 3 and Protocol II do not merely require armed opposition groups not to commit the most serious crimes. In their position as a de facto authority, these groups are required to make a much greater effort to comply with international humanitarian law.²⁴

There is some evidence that international bodies acknowledge the problem of the origin of the obligations of armed opposition groups under multilateral treaties. They have occasionally recognized the relevance of consent by armed opposition groups to the applicability of international norms to these groups. The Rwanda Tribunal, in its decision on the applicability of Protocol II to the conflict in Rwanda, took into account that the Rwandan Patriotic Front (RPF) had expressly declared that it considered itself bound by the rules of international humanitarian law.²⁵ The Human Rights Division of the United Nations Observer Mission in El Salvador (ONUSAL), in reviewing the legality of the acts of Frente Farabundo Martí para la Liberación Nacional (FMLN), generally referred to the San José Agreement on Human Rights, concluded

²³ Above, n. 21.

²⁴ For example, Protocol II prescribes various measures that armed opposition groups must take to ensure humane treatment of interned and detained persons, including separate accommodation of men and women and provision of medical examinations, Article 5(2)(a), and (d); see below, Chapter 2, discussing the substantive obligations of armed opposition groups.

²⁵ *Akayesu* case, above n. 6, at 248, para. 627; see also *Prosecutor v. Clément Kayishema and Obed Ruzindana*, No. ICTR-95-1-T, para. 156 (Judgment of 21 May 1999) (hereafter, *Kayishema* case); Inter-American Commission on Human Rights, Third Report on Colombia, above, n. 8, at 78, para. 20, n. 11 (noting that the ELN [Army of National Liberation] had specifically declared that it considered itself to be bound by the 1949 Geneva Conventions and Protocol II).

between the Salvadorian Government and FMLN, in which FMLN agreed to comply with Common Article 3 and Protocol II. ONUSAL thus preferred the Agreement to the Geneva Conventions and Protocol II, which were also binding upon FMLN. In the next section (Other rules of humanitarian law), I shall deal with special agreements concluded by armed opposition groups.

Special agreements and *ad hoc* declarations by armed opposition groups by which they expressly agree to comply with Common Article 3 and Protocol II do indeed remedy their failure to ratify these treaty rules.²⁶ Such agreements and declarations serve two purposes. First, they compel these groups to explicitly state their will and capacity to adhere to the relevant norms.²⁷ Secondly, they induce the state to accept the applicability of the relevant norms to the conflict in question.

However, the consent by armed opposition groups to rules imposed on them has played only a small role in international practice. International bodies have generally considered the ratification of the relevant norms by the territorial state to be a sufficient legal basis for the obligations of armed opposition groups. These bodies thereby establish the conception of international law as a law controlled by states, under which states can simply decide to confer rights and impose obligations on armed opposition groups.

It is noteworthy that a different construction applies to national liberation movements.²⁸ Like armed opposition groups, national liberation movements are not entities that are able to become a party to the

²⁶ M. Bothe *et al.*, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff, The Hague, 1982) p. 608 (hereafter, *New Rules*).

²⁷ The following example in the practice of the UN Mission in El Salvador, ONUSAL, shows the pertinence of this aspect. FMLN had detained an ambulance, while it knew that it was transporting a wounded man. The FMLN Political and Diplomatic Commission informed ONUSAL 'that no agreement existed between the parties for the evacuation of armed forces wounded and dead by road from war zones'. It added 'that a pledge is needed that armed forces and ambulances will not be used for military purposes and that the army will not obstruct the evacuation of FMLN wounded and disabled by the ICRC'. ONUSAL responded that, according to international humanitarian law, wounded persons, whether or not they have taken part in the armed conflict, must be respected and protected. It referred to Article 7, Protocol II. However, apparently, the FMLN did not consider itself bound by Protocol II, unless it had concluded an agreement to this effect, Second Report of ONUSAL, A/46/658, S/23222, paras. 64–5 (Human Rights Division, 15 November 1991) (hereafter, Second Report of ONUSAL), reprinted in United Nations, *The United Nations and El Salvador 1990–1995* (UN Blue Book Series, United Nations, New York, 1995) p. 179, vol. IV (hereafter, *UN and El Salvador*).

²⁸ These movements are covered by Article 1(4) of Additional Protocol I, which stipulates that the Protocol shall also apply to 'armed conflicts in which peoples are fighting

Geneva Conventions and the Protocols. However, unlike armed opposition groups, national liberation movements only become subject to Additional Protocol I on an equal footing with a High Contracting Party if they make a special declaration to this effect.²⁹ Apparently, it was thought that to give effect to the relevant rules, an explicit declaration by national liberation movements that they considered themselves bound was necessary.

The difference, at least formally, between national liberation movements and armed opposition groups is that the former are considered to fight in an *international* conflict. Armed groups on the other hand are a party to an *internal* conflict. Inclusion in Common Article 3 or Protocol II of a clause requiring armed opposition groups to make a declaration in which they agree to comply with the relevant norms would add to the internationalization of the conflict. The reason is that the applicability of these norms would then depend on the consent of an armed opposition group, which puts these groups on an equal footing with the state. This consequence has clearly been unacceptable for states and international bodies.

Customary law

Having demonstrated the applicability of Common Article 3 and Protocol II to armed opposition groups as treaty law, the question should be addressed as to the applicability of these norms as a matter of customary law. Until recently, there was only limited international precedent dealing with the customary law nature of international humanitarian law applicable in internal conflict.³⁰ However, since the

against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’.

²⁹ For that purpose, Article 96(3) provides: ‘The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depository. Such declaration shall, upon its receipt by the depository, have in relation to that conflict the following effects: (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect; (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict’.

³⁰ In fact, it was widely believed that no customary rules applied to internal conflicts. That is why the short version of the Martens Clause in Paragraph 4 of the Preamble of Protocol II, unlike the Martens Clause in Article 1(2) of Additional Protocol I, does not

establishment of the Yugoslavia and Rwanda Tribunals this situation has changed.³¹

There is ample evidence of international bodies having accepted the applicability of Common Article 3 and major parts of Protocol II to armed opposition groups as customary law. In the case of the *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice pointed out that Common Article 3 reflects 'elementary considerations of humanity'.³² The Court subsequently pointed out that the *Contras* were bound by Common Article 3.³³ In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the Court reinforced its view, stating that the fundamental rules of the Geneva Conventions, which undoubtedly include Common Article 3, are principles of customary law.³⁴ Similarly, in *Prosecutor v. Duško Tadić* (Appeal on Jurisdiction) the Yugoslavia Tribunal observed:

The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for Common Article 3 of the 1949 Geneva Conventions.³⁵

In *Prosecutor v. Akayesu*, the Rwanda Tribunal affirmed the above observation of the Yugoslavia Tribunal, accepting the customary law status of Common Article 3.³⁶

It is reasonable to assume that the Tribunals regarded the customary rules identified to be applicable to all parties to an internal conflict, including armed opposition groups. Although the criminal tribunals

refer to established custom. A commentary to the Protocol explains that 'this is justified by the fact that the attempt to establish rules for a non-international conflict only goes back to 1949 and that the application of Common Article 3 in the practice of States has not developed in such a way that one could speak of "established custom" regarding non-international conflicts', M. Bothe *et al.*, *New Rules*, above, n. 26, p. 620.

³¹ Mention must be made here of the ICRC study being prepared on customary humanitarian law applicable in, *inter alia*, non-international armed conflicts. The study reflects on practice of states and international bodies. Publication is scheduled for 2002, *Compendium of Documents*, above, n. 1, Annex I, at 3.

³² *Nicaragua Case*, n. 3, para. 218. ³³ *Ibid.*, para. 219.

³⁴ Opinion of 8 July 1996, 35 ILM 809, para. 79 (1996) (hereafter, *Advisory Opinion on Nuclear Weapons*).

³⁵ No. IT94-1-AR72, para. 98 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995), (hereafter, *Tadić Interlocutory Appeal*).

³⁶ *Akayesu case*, above, n. 6, para. 608.

are concerned with individual rather than group accountability, they have developed substantive humanitarian norms applicable to internal conflict. Since international humanitarian law applicable in internal conflict generally applies to all parties to the conflict, including armed opposition groups, it is reasonable to assume that the law as developed by the criminal tribunals also applies to armed opposition groups. The relevance of the jurisprudence of the Yugoslavia and Rwanda Tribunals is also evidenced by the fact that, in their analysis of the law applicable to internal conflict, these tribunals have often referred to agreements concluded by, and the conduct of, armed opposition groups.³⁷

While the customary law status of Common Article 3 is generally of limited relevance because of the universal acceptance of the Geneva Conventions *qua* binding treaties,³⁸ this is different with regard to Protocol II. With 150 States Parties,³⁹ the customary law status of the rules contained in the Protocol is important with regard to armed opposition groups operating in the territory of states that have not ratified the Protocol.

There is ample evidence that various articles of Protocol II constitute customary law. Thus, in the *Tadić* appeal case, the Yugoslavia Tribunal considered: 'Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles'.⁴⁰ The Tribunal did not specify which

³⁷ Also, the fact that other international bodies have taken the jurisprudence of these criminal tribunals as a guide for the international accountability of armed opposition groups indicates the relevance of this practice to the law applicable to armed opposition groups, Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Colombia, above, n. 8, at 82, para. 39

³⁸ In the *Nicaragua* case the customary law status was relevant because the 'multilateral treaty reservation' of the United States might have precluded the International Court of Justice from considering the applicability of the 1949 Geneva Conventions, above, n. 3. For the Yugoslavia Tribunal the customary law status of Common Article 3 also has practical importance because the principle of *nullum crimen sine lege* requires that the tribunal only applies rules of international humanitarian law which are beyond any doubt part of customary law, *Tadić Interlocutory Appeal*, above, n. 35, para. 143, and Report of the UN Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, para. 34 (3 May 1993) (hereafter, 1993 Report of the UN Secretary-General); see further T. Meron, 'The Geneva Conventions as Customary Law' (1987) 81 *AJIL* 348, 361 (discussing the additional reasons for the relevance of the customary law status of the Geneva Conventions) (hereafter, 'Geneva Conventions as Customary Law').

³⁹ www.icrc.org (visited, 1 January 2001).

⁴⁰ *Tadić Interlocutory Appeal*, above, n. 35, para. 117; see also *ibid.*, para. 98; *Prosecutor v. Dario Kordić, Mario Cerkez*, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional

provisions of Protocol II it considered to be customary law. On closer analysis, it appears that the Tribunal particularly referred to the norms in the Protocol which overlap with Common Article 3, and which the Tribunal for that reason considered to be customary law.⁴¹ These norms include Article 4(2) of Protocol II, providing fundamental guarantees to persons taking no active part in the hostilities. The Tribunal possibly also regarded Articles 5 and 6 of Protocol II as customary law, as these norms are also reflected in Common Article 3. These articles prescribe humane treatment of persons whose liberty has been restricted and provide rules on penal prosecution. In *Prosecutor v. Kordić and Others*, the Yugoslavia Tribunal extended the list of customary law provisions with Article 13(2) of Protocol II, concerning unlawful attacks on civilians.⁴² The Inter-American Commission, in its Third Report on the Situation of Human Rights in Colombia, considered Articles 4(2) and 13 of Protocol II to reflect customary law.⁴³ In addition, the Commission identified as customary law the prohibition of recruitment of children under the age of fifteen or allowing them to take part in the hostilities, prohibition of starvation of civilians as a method of combat, attacks against cultural objects and places of worship and forced movement of civilians, rules which are laid down in Articles 4(3), 14, 16 and 17 of Protocol II, respectively.⁴⁴

The Rwanda Tribunal took a more cautious position as to the customary law status of Protocol II. In *Prosecutor v. Jean-Paul Akayesu*, the Tribunal, following the UN Secretary-General, found that Article 4(2) of Protocol II reflects custom. However, it did not recognize the Protocol as a whole to be customary law:

As aforesaid, Protocol II as a whole was not deemed by the Secretary-General to have been universally recognized as part of customary international law . . . Whilst the Chamber is very much of the same view as pertains to Protocol II as a whole, it should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Protocol II. All of the guarantees, as enumerated in Article 4 reaffirm and supplement Common Article 3 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law.⁴⁵

Reach of Articles 2 and 3, No. IT95-14/2-PT, para. 30 (2 March 1999) ('while both Protocols [I and II] have not yet achieved the near universal participation enjoyed by the Geneva Conventions, it is not controversial that major parts of both Protocols reflect customary law') (hereafter, *Kordić* case).

⁴¹ *Tadić Interlocutory Appeal*, above, n. 35, para. 117.

⁴² Above, n. 40, para. 31.

⁴³ Above, n. 8, at 83, para. 42, and at 94-5, para. 82.

⁴⁴ *Ibid.*

⁴⁵ Above, n. 6, paras. 609-10 (footnotes omitted).

However, the viewpoint of the Rwanda Tribunal is isolated in international practice.

Attention should also be paid to the practice of the UN Commission on Human Rights. The Commission applied Protocol II to armed opposition groups operating in states that have not ratified the Protocol. For example, in resolution 1993/66, the Commission urged 'all the Afghan parties' 'to respect accepted humanitarian rules, as set out in the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 1977'.⁴⁶ Afghanistan has not accepted Protocol II as binding upon it. The reference to the 'accepted humanitarian rules' may suggest that the Commission regards Protocol II in its entirety as reflecting customary law.⁴⁷ In any case, this and other resolutions of the Commission point towards a development of international humanitarian law, so that, in the course of time, international bodies may regard the entire Protocol II as having acquired the status of customary law.

Finally, a brief remark on how international bodies consider the customary law examined above to be made and changed is in order. Tribunals that have addressed the issue of customary humanitarian law have generally taken a rather liberal approach in this matter. More particularly, they have tended to avoid the difficult question of state practice, concentrating primarily on *opinio iuris*.⁴⁸ The Yugoslavia Tribunal affirms this trend:

Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse,

⁴⁶ Para. 6 (10 March 1993).

⁴⁷ See also UN Commission on Human Rights, Res. 1998/67, para. 6 (21 April 1998) (on Sudan) (calling on all parties to the hostilities to respect Common Article 3 and the Additional Protocols). The Commission on Human Rights' Special Rapporteur for Sudan, Gáspár Bíró, recommended that the Government sign Protocol II, E/CN.4/1995/58, para. 63(c) (30 January 1995). The Commission referred to the 'applicable provisions of international humanitarian law' (emphasis added), which included Protocol II.

⁴⁸ T. Meron, 'Geneva Conventions as Customary Law', above, n. 38, at 361.

often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.⁴⁹

In effect, the Tribunal considered not only official pronouncements of states, military manuals and judicial decisions relevant to the formation of customary law, but also resolutions of the UN General Assembly and the UN Security Council.

The Tribunal's assertion that, because of the 'inherent nature of the subject-matter', the formation of customary humanitarian law is different from the formation of customary law in other fields of international law, should be questioned. The peculiarity of international humanitarian law would lie, according to the Tribunal, in the fact that soldiers withhold information on the military conduct so that the Tribunal is unable to determine the actual behaviour of the troops in the field. In view of the numerous detailed reports on internal conflicts produced by non-governmental organizations such as Amnesty International and Human Rights Watch, as well as extensive media services, giving detailed accounts of the events in today's armed conflicts, this statement should be questioned. Rather the peculiarity of international humanitarian law seems to lie in the gap that exists between the actual behaviour on site and the behaviour prescribed by international legal standards. This discrepancy between the actual and the prescribed conduct forced Kalshoven to express his 'misgivings about the notion of customary law of armed conflict and about the frequency and occasional lightheartedness [with which] the phrase is currently used'.⁵⁰

I do not intend to examine in detail all the problems relating to the making of customary humanitarian law. An extensive literature has already been devoted to these problems.⁵¹ Suffice it to say that

⁴⁹ *Tadić Interlocutory Appeal*, above, n. 35, para. 99. See also Yugoslavia Tribunal *Prosecutor v. Kupreskić et al.*, Case No. IT-95-16-T, para. 527 (14 January 2000) (hereafter, *Kupreskić case (2000)*) ('Principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even when State practice is scant or inconsistent').

⁵⁰ F. Kalshoven, 'Development of Customary Law of Armed Conflict' (Asser Colloquium, 27 November 1998) p. 1 (on file with author).

⁵¹ T. Meron, 'Geneva Conventions as Customary Law', above, n. 38; T. Meron, 'Is International Law Moving Towards Criminalization?' (1998) 9 *EJIL* 18, 28-30 (hereafter, 'Criminalization').

the Tribunal's approach to identifying customary law, relying mainly on *opinio iuris* and largely disregarding actual practice, does not differ from that taken by other courts and tribunals. Further, the primary role international bodies play in articulating *opinio iuris* fits in with the current trend that the practice of international bodies is becoming increasingly important at the expense of the actual practice of states.⁵²

Related to the question how customary law is made and changed is the question how international bodies disentangle customary law from treaty obligations. It is difficult, if not impossible, to distinguish Common Article 3 as customary from these norms as treaty law and to separately determine customary law as to its content. This is so because 188 states have ratified the Geneva Conventions. This may have been the problem Judge Sir Robert Jennings hinted at when he questioned, in his dissenting opinion on the *Nicaragua* case, the customary law status of Common Article 3.⁵³ The problem with identifying practice, which is not, or not only, based on treaties, is also prevalent in the practice of the Yugoslavia Tribunal. In the *Celebici* case, the Yugoslavia Tribunal recognized this problem:

The evidence of the existence of such customary law – State practice and *opinio juris* – may, in some situations, be extremely difficult to ascertain, particularly where there exists a prior multilateral treaty which has been adopted by the vast majority of States. The evidence of State practice outside of the treaty, providing evidence of separate customary norms or the passage of the conventional norms into the realms of custom, is rendered increasingly elusive, for it would appear that only the practice of non-parties to the treaty can be considered as relevant. Such is the position of the four Geneva Conventions, which have been ratified or acceded to by most States. Despite these difficulties, international tribunals do, on occasion, find that custom exists alongside conventional law, both having the same substantive content.⁵⁴

⁵² T. Meron, 'Criminalization', above, n. 51, at 28.

⁵³ Above, n. 3, at 537 (Jennings, J., dissenting) ('there must be at least very serious doubts whether those conventions [the 1949 Geneva Conventions] could be regarded as embodying customary law. Even the Court's view that the Common Article 3, laying down a 'minimum yardstick' (para. 218) for armed conflicts of a non-international character, is applicable as 'elementary considerations of humanity' is not a matter free from difficulty). It was also the problem of separating customary law from treaty law that compelled Meron to argue that 'it cannot be said that the Court has succeeded in clarifying the status of the Geneva Conventions as customary law', T. Meron, 'Geneva Conventions as Customary Law', above, n. 38, at 358.

⁵⁴ *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, No. IT-96-21-T, paras. 302–3 (16 November 1998) (hereafter, *Celebici* case).

The Trial Chamber did thus not consider the difficulty of separate identification of customary law to be prohibitive for its finding of customary law. At the same time, it failed to indicate how it circumvents this difficulty. The problem of disentanglement raises pertinent questions as to the reality of customary law identified by international bodies. Consider the following example, which provided, according to the Yugoslavia Tribunal, evidence of the customary law status of Common Article 3 and Protocol II:

A more recent instance of this tendency [of the formation of customary law for internal armed conflicts] can be found in the stand taken in 1988 by the rebels (the FMLN) in El Salvador, when it became clear that the Government was not ready to apply the Protocol II it had previously ratified. The FMLN undertook to respect both Common Article 3 and Protocol II: 'The FMLN shall ensure that its combat methods comply with the provisions of Common Article 3 of the Geneva Conventions and Protocol II, take into consideration the needs of the majority of the population, and defend their fundamental freedoms.'⁵⁵

However, it can be questioned whether FMLN practice evidences customary law. Because this group was also bound by Common Article 3 and Protocol II *qua* treaty law, this practice could just as well involve the application of treaty law.⁵⁶ The fact that El Salvador refused to apply Protocol II does not affect the obligations of the FMLN under this Protocol, since the applicability of these norms does not depend on reciprocity.⁵⁷

A similar problem exists with the suggestion of the Yugoslavia Tribunal that the conclusion of special agreements by parties to an internal conflict, bringing into force articles of the Geneva Conventions other than Common Article 3, would evidence the customary law status of these articles. Common Article 3 expressly provides for the possibility to extend the applicable law to other provisions of the four Geneva Conventions through the conclusion of agreements. In consequence, it is difficult to establish whether a particular agreement to apply the remainder of the Geneva Conventions evidences the customary law status of these articles or merely shows the application of treaty law.⁵⁸

⁵⁵ *Tadić Interlocutory Appeal*, above, n. 35, para. 107 (FMLN, La legitimidad de nuestros metodos de lucha, ecretaria de promocion y proteccion de lo Derechos Humanos del FMLN, El Salvador, 10 October 1988, at 89) (unofficial translation).

⁵⁶ Several international bodies have indicated that the armed conflict between El Salvador and FMLN fulfilled the criteria for applicability of Protocol II.

⁵⁷ *Commentary 4th Geneva Convention*, above, n. 9, p. 37.

⁵⁸ *Tadić Interlocutory Appeal*, above, n. 35, para. 103.

Origin of the obligations of armed groups under customary law

The question of the origin of the obligations of armed opposition groups under customary law needs to be addressed. This is similar to the question posed earlier with regard to the obligations of armed opposition groups under inter-state treaties. Do armed opposition groups derive their obligations through the state on whose territory they are established or is their consent to these norms necessary in order for the norms to be binding upon them?

Article 38 of the Statute of the International Court of Justice states that the Court will apply 'evidence of a general practice accepted as law'. This article does not state that 'general practice' must concern state practice that is accepted by states as law. While there is no evidence of the International Court applying rules based on practice of armed opposition groups,⁵⁹ there is such evidence in the practice of the Yugoslavia Tribunal. In the *Tadić* appeal case, the Tribunal considered the behaviour of insurgents as 'instrumental in bringing about the formation of customary rules'.⁶⁰ Accordingly, in order to identify the customary norms applicable in internal conflict, it reviewed the practice of FMLN engaged in the conflict in El Salvador.⁶¹ Similarly, the Tribunal considered agreements concluded by armed opposition groups to be evidence of customary law.⁶² Thus, although the practice is still limited, there is some evidence that the consent of armed opposition groups is relevant for their obligations under international customary law.

Other rules of humanitarian law

Multilateral treaties

Three humanitarian treaties, other than the Geneva Conventions and Protocol II, apply to armed opposition groups: Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the Conventional Weapons Convention, of 3 May 1996;

⁵⁹ In its Advisory Opinion on Nuclear Weapons, the Court decided that the substance of customary law must be 'looked for primarily in the actual practice and *opinio iuris* of States', above, n. 34, para. 64; R. Jennings, A. Watts, *Oppenheim's International Law* (Longman, London, 9th edn., 1996) p. 26 (stating that 'the substance of this source of international law is to be found in the practice of states') (hereafter, *Oppenheim*).

⁶⁰ *Tadić Interlocutory Appeal*, above, n. 35, para. 108. ⁶¹ *Ibid.*, para. 107.

⁶² *Ibid.*, para. 103.

the 1954 Cultural Property Convention; and the Second Protocol to the Cultural Property Convention of 26 March 1999 (not yet in force).

Article 1 of Amended Protocol II to the Conventional Weapons Convention provides that the Protocol applies to situations referred to in Common Article 3 and that each party to the conflict is bound by it. It expands Protocol II to the 1980 Conventional Weapons Convention, which does not apply to armed opposition groups.⁶³ Amended Protocol II has not yet been applied by international bodies. The Protocol, however, codifies the long-standing view of international bodies, that armed opposition groups are prohibited from using landmines against civilians. Section 2 of the next chapter (on the substantive obligations of armed opposition groups) examines this prohibition in more detail.⁶⁴

The Cultural Property Convention extends its core article to armed opposition groups. Article 19(1) requires armed opposition to implement the rules 'which relate to respect for cultural property'.⁶⁵ In the *Tadić*

⁶³ Article 1 of the 1980 Conventional Weapons Convention provides that the annexed Protocols shall apply to situations referred to in Article 2 common to the 1949 Geneva Conventions, including situations referred to in Article 1(4) of Additional Protocol I.

⁶⁴ Another recent treaty on the use of land mines, the Ottawa Convention on Prohibition of the Use of Anti-Personnel Mines of 18 September 1997, does not apply to armed opposition groups. This is noteworthy since this treaty is meant to apply specifically during internal armed conflicts. With the formulation that states shall 'never under any circumstances' use, develop, produce, acquire, stockpile or transfer anti-personnel mines, states secured the application of the Convention to internal conflicts, but circumvented its applicability to armed opposition groups. The treaty has been criticized for this, S. D. Goose, 'The Ottawa Process and the 1997 Mine Ban Treaty' (1998) 1 *YIHL* 269, 289; the International Campaign to Ban Landmines (ICBL) intends to press governments to improve the treaty on this point during the Annual Meetings of States Parties, the Review Conference and any Amendment Conference, *ibid.* An explanation for this omission may be that the Ottawa Convention has been negotiated by experts in the field of arms control rather than humanitarian law experts.

⁶⁵ While it is not entirely clear which rules are referred to, as a minimum it would seem that armed opposition groups are bound by Article 4 of the Convention, which provides: '1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property. 2. The obligations mentioned in paragraph I of the present Article may be waived only in cases where military necessity imperatively requires such a waiver. 3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party. 4. They shall refrain from any act directed by way of reprisals against cultural property. 5. No High Contracting

appeal case, the Yugoslavia Tribunal affirmed that this convention applies to internal armed conflicts.⁶⁶ However, otherwise, there is little practice applying the Cultural Property Convention to armed opposition groups.

The Second Protocol to the Cultural Property Convention, which aims to reinforce and supplement the Convention, applies in its entirety to armed opposition groups.⁶⁷ The Protocol refrained, however, from explicitly referring to armed opposition groups. While there is no doubt that armed opposition groups are bound by the rules in the Protocol, the absence of any reference to these groups reveals the trouble states had with the idea of armed opposition groups as bearers of international obligations. As said, this Protocol has not yet entered into force. It remains to be seen whether it will change the silence that has prevailed in international practice on the accountability of armed opposition groups for violations of norms relating to cultural property.

Special agreements

As explained earlier, special agreements concluded by armed opposition groups are another source of humanitarian obligations of these groups. These agreements are particularly important. Unlike multilateral treaties and customary law, the norms of which generally apply to armed opposition groups through the territorial state, the norms contained in special agreements have been explicitly consented to by them. This may contribute to greater willingness of armed opposition groups to comply with these norms. While by no means trying to provide a complete picture, I will touch upon some main points concerning international practice on special agreements.

Common Article 3 recognizes the legal capacity of armed opposition groups to conclude agreements, stipulating: 'The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present

Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3'; see below, Chapter 2, Section 2.

⁶⁶ *Tadić Interlocutory Appeal*, above, n. 35, para. 98; see also C. Greenwood, 'International Humanitarian Law' in F. Kalshoven (ed.), *The Centennial of the First International Peace Conference* (Kluwer Law International, Netherlands, 2000) pp. 161, 237, n. 138 (hereafter, 'International Humanitarian Law').

⁶⁷ Article 22.