

Human rights obligations of non-state actors in conflict situations

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Abstract

The threat to human rights posed by non-state actors is of increasing concern. The author addresses the international obligations of belligerents, national liberation movements and insurgent entities, looks at the growing demands that such armed groups respect human rights norms and considers some of the options for holding private military companies accountable with regard to human rights abuses. The argument developed throughout this article is that all sorts of non-state actors are increasingly expected to comply with principles of international human rights law.

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Rebels, insurgents, and belligerents

Rebels, insurgents and belligerents are sometimes depicted by international lawyers as being positioned on a sliding scale according to degrees of control

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over territory and recognition by governments.¹ International law originally only considered rebels as having international rights and obligations from the time they graduate to insurgency. Traditionally, insurgents were considered to have international rights and obligations with regard to those states that recognized them as having such a status. According to Antonio Cassese, to be eligible for such recognition insurgents need only satisfy minimal conditions:

International law only establishes certain loose requirements for eligibility to become an international subject. In short, (1) rebels should prove that they have effective control over some part of the territory, and (2) civil commotion should reach a certain degree of intensity and duration (it may not simply consist of riots or sporadic and short-lived acts of violence). It is for states (both that against which the civil strife breaks out and other parties) to appraise – by granting or withholding, if only implicitly, recognition of insurgency – whether these requirements have been fulfilled.²

With regard to an insurrectional group recognized as such by the relevant state, it is clear that there are certain international rights and obligations that flow from this status, depending on the terms of the recognition.³ Under this traditional international law, insurgents who were recognized by the state against which they were fighting not only as insurgents but also expressly as belligerents, became assimilated to a state actor with all the attendant rights and obligations which flow from the laws of international armed conflict.⁴ Today, these recognition regimes have been replaced by compulsory rules of international humanitarian law which apply when the fighting reaches certain thresholds. Commentators such as Ingrid Detter have suggested that the idea that the application of the rules of armed conflict are related to the recognition of belligerency has been “abandoned”,⁵ and Heather Wilson has claimed that, since the First World War, the old law is “more theoretical than real”, since recognition has hardly occurred since that time.⁶

Although the theoretical possibilities remain for states to bestow rights and obligations on rebels by recognizing them as either insurgents or belligerents, it makes more sense today simply to consider rebels (unrecognized insurgents) as

1 E.g. Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements*, Oxford University Press, Oxford, 1988, p. 24. See also Lassa Oppenheim and Hersch Lauterpacht (eds.), *International Law: a Treatise (Disputes, War and Neutrality)*, 7th edn, Vol. II, Longman, London, 1952, pp. 209–16; Robert Jennings and Arthur Watts, (eds.), *Oppenheim’s International Law (Peace)*, 9th edn, Vol. I, part 1, Longman, London, 1996, pp. 161–83.

2 Antonio Cassese, *International Law*, 2nd edn, Oxford University Press, Oxford, 2005, at p. 125. See also Antonio Cassese, *International Law in a Divided World*, Oxford University Press, Oxford, 1986, pp. 81–5.

3 Eibe H. Riedel, “Recognition of Insurgency”, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV, Elsevier, Amsterdam, 2000, pp. 54–6.

4 *Ibid.*, pp. 47–50.

5 Ingrid Detter, *The Law of War*, 2nd edn, Cambridge University Press, Cambridge, 2000, p. 43.

6 Wilson, above note 1, p. 27.

addressees of international obligations under contemporary international humanitarian law, especially the obligations contained in Common Article 3 to the four Geneva Conventions of 1949, in Additional Protocol II of 1977 to the Geneva Conventions and in Article 19 of the Hague Convention on Cultural Property of 1954. These obligations are considered in more detail below. Today, international law imposes obligations on certain parties to an internal armed conflict irrespective of any recognition granted by the state they are fighting against or by any third state. The problem is that governments are often loath to admit that the conditions have been met for the application of this international law, for to admit such a situation is seen as an admission that the government has lost a degree of control and as an “elevation” of the status of the rebels.

In some cases written agreements have been entered into during and after armed conflicts. These may contain mutual commitments to respect not only the laws of armed conflict but human rights as well.⁷ Such agreements are less focused on the old questions of recognition and simply aim to build confidence, placing the protection of the individual at the centre of such measures. Such agreements are nevertheless sometimes predicated on the actual capacity of the rebels to fulfil the obligations in question. The preamble to the San José Agreement on Human Rights, between El Salvador and the Frente Farabundo Martí para la Liberación Nacional (FMLN), included the following paragraph: “Bearing in mind that the Frente Farabundo Martí para la Liberación Nacional has the capacity and the will and assumes the commitment to respect the inherent attributes of the human person.”⁸ In this case the agreement was also signed by the Representative of the UN Secretary-General (Alvaro de Soto), and this fact, together with the arrangements for UN monitoring, suggests that this would constitute an agreement governed by international law between entities recognized as having the requisite international status to assume rights and obligations under international law.⁹ This example shows how international law has moved beyond recognition of insurgency during armed conflict to a new type of recognition for human rights purposes. The obligations of the non-state actor in such situations stretch beyond both the duration of armed conflict and the laws of armed conflict.

7 See the San José agreement between El Salvador and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) signed by both sides on 26 July 1990. UN Doc. A/44/971-S/21541 of 16 August 1990, Annex.

8 *Ibid.*, p. 2.

9 See Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, pp. 49–51. See more generally, with regard to all agreements witnessed by the UN, Emmanuel Roucouas, “Non-State Actors: Areas of International Responsibility in Need of Further Exploration”, in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Brill, Leiden, 2005, pp. 391–404, esp. p. 397. For a discussion of other agreements which may not have such a status, see Pieter H. Kooijmans, “The Security Council and Non-State Entities as Parties to Conflicts”, in Karel Wellens (ed.), *International Law: Theory and Practice*, Martinus Nijhoff, The Hague, 1998, pp. 333–46.

National liberation movements

An additional category of international actor to be considered in this context is the national liberation movement (NLM). In some ways it is clumsy to list NLMs as non-state actors. Their representatives may reject the label of non-state actor, since not only may they wish to stress their putative state-like aspirations and status, they may sometimes already be recognized as a state member in certain regional intergovernmental organizations. One difference between such groups and the recognized belligerents and insurgents discussed above is that such NLMs may be able to claim rights, and will be subject to international obligations, even in the absence of control of territory or express recognition by its adversary. Article 1(4) of the 1977 Protocol I to the Geneva Conventions classifies three types of war of national liberation as international armed conflict, so that all the rules applicable to those conflicts apply. It covers “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination”.¹⁰ Under Article 96(3) of Protocol I, the authority representing the people struggling against the colonial, alien, or racist party to the Protocol can undertake to apply the Conventions and the Protocol by making a declaration to the depository (the Swiss Federal Council).¹¹

Furthermore, such a liberation authority could make a declaration under the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.¹² Such a declaration can bring into force not only the Weapons Convention and its protocols, but also the Geneva Conventions, even in the absence of the state against which the liberation movement is fighting being a party to Protocol I.¹³ In the absence of any declarations having been accepted, however, attention has turned to the customary status of these rules.¹⁴

10 See also General Assembly Resolution 3103 (XXVIII) of 12 December 1973.

11 A number of declarations of this kind have been deposited with the ICRC by groups such as the African National Congress (ANC), South-West Africa People’s Organisation (SWAPO), the Palestine Liberation Organization (PLO), and the Eritrean People’s Liberation Front (EPLF). See also the other examples given by Michel Veuthey, *Guérilla et droit humanitaire*, ICRC, Geneva, 1983, p. xxvi.

12 10 October 1980, see Article 7(4).

13 Article 7(4)(b).

14 Although certain declarations have been sent to the International Committee of the Red Cross the procedure demands a communication with the Swiss authorities. The table of ratifications compiled by the ICRC contains the following note: “Palestine: On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto.” On 13 September 1989, the Swiss Federal Council informed the states that it was not in a position to decide whether the letter constituted an instrument of accession, “due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine”. This was not a declaration under either Article 96(3) of Protocol I or Article 7 of the Conventional Weapons Convention 1980, so the issue was not whether the PLO represented an authority which represented an NLM, but whether it could be considered a state. For full discussion of the state practice and the history of these provisions, see Antonio Cassese, “Wars of National Liberation”, in Christophe Swinarski (ed.), *Studies and Essays in International*

Suffice it to say that no government faced with a liberation movement accepts that it is colonial, racist or in alien occupation. Arguments before South African and Israeli judges that liberation movements are entitled to privileges under international law have not met with success,¹⁵ although the thrust of the ideas expressed in Article 1(4) of Protocol I seemed at one point to be relevant when it came to sentencing certain South West Africa People's Organisation (SWAPO) fighters in Namibia.¹⁶ Attempts by the Red Army Faction and the Republic of New Afrika to invoke the rule as customary also failed before the courts of the Netherlands and the United States respectively.¹⁷ The category of national liberation movements highlights the fact that non-state actors can become bound by international law pursuant to the terms of international humanitarian law treaties. It also leads us to consider below more closely the situation where armed groups are bound by the laws of internal armed conflict and where they make declarations or enter into agreements to abide by certain international standards.

Rebel groups, unrecognized insurgents, armed opposition groups, or parties to an internal armed conflict

Where there is no recognition of insurgency or belligerency, and the group in question is not a national liberation movement that has successfully triggered the application of the rules of international armed conflict, one is left with an internal armed conflict involving rebels or what are sometimes termed "armed opposition groups". The humanitarian law which applies during internal armed conflict gives rise to certain duties for these rebels.¹⁸ The minimum protection offered by Common Article 3 to the four Geneva Conventions of 1949 contains obligations for "each Party to the conflict".

Humanitarian Law and Red Cross Principles: Essays in Honour of Jean Pictet, Martinus Nijhoff, The Hague, 1984, pp. 314–24; L.R. Penna, "Customary International Law and Protocol I: An Analysis of Some Provisions", in Swinarski, pp. 201–25; Georges Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols", 165 *Recueil des Cours de l'Académie de Droit International de la Haye* (1979), pp. 357–455. See also Zegveld, above note 9, p. 14, for further references regarding failed attempts to adhere to the Conventions by the Provisional Revolutionary Government of Algeria and the Smith Government in Rhodesia.

- 15 *S v. Mogoerane* (unreported), Transvaal Provincial Division of the South African Supreme Court, 6 August 1982, discussed by Christina Murray, "The 1977 Geneva Protocols and Conflict in Southern Africa", *International and Comparative Law Quarterly*, Vol. 33, 1984, pp. 462–270; *S v. Petane* [1988] 3 SALR 51; see also the rejection of combatant status for members of the Organisation of the Popular Front for the Liberation of Palestine caught in military uniform in *Military Prosecutor v. Kassem and others* [1971] 42 ILR 470.
- 16 See Christina Murray, "The Status of the ANC and SWAPO in International Humanitarian Law", *South African Law Journal*, Vol. 100, 1983, p. 402; *S v. Sagarius* [1983] 1 SA 833 (SWA).
- 17 *Public Prosecutor v. Folkerts* [1987] 74 ILR 695; *US v. Marilyn Buck* US District Ct for the Southern District of New York, [1988] 690 F Supp. 1291; both excerpted and discussed in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?* ICRC, Geneva., 2006, pp. 1435–48.
- 18 See Zegveld, above note 9; Lyndsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon, Oxford, 1989; Yves C. Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Nijhoff, Geneva/Dordrecht, 1987; Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Grotius, Cambridge, 1987.

These obligations are to “Persons taking no active part in the hostilities” as well as to the “wounded and sick”. The actual prohibitions include murder, violence to the person, cruel treatment, the taking of hostages, humiliating and degrading treatment, and sentences or executions without judicial safeguards. Lastly, the Article includes a positive obligation to collect and care for the sick and wounded.

The designation of a situation as “an armed conflict not of an international character”, so as to trigger the application of Common Article 3 to the Geneva Conventions of 1949, is obviously an act of considerable political importance for all sides to the conflict. The rebels will often welcome the designation of their attacks as constituting armed conflict, since this confers a curious sort of international recognition on them,¹⁹ and the applicability of Common Article 3 reinforces the special role of the International Committee of the Red Cross (ICRC).²⁰ On the other hand, as already noted, the government may be less willing to acknowledge the situation as one of armed conflict, preferring instead to portray it as a fight against criminals and terrorists. To be clear, the application of the obligations does not depend on any acceptance by the government that the threshold for the applicability of humanitarian law has been reached. In some cases the situation is put beyond doubt by UN resolutions stating that the humanitarian rules contained in Common Article 3 are to be respected by both sides in a particular conflict.²¹ Most recently the US Supreme Court has pointed to the applicability of Common Article 3 with regard to the procedural guarantees offered by military commissions due to try individuals captured in Afghanistan during the conflict there between the United States and Al Qaeda. The Court held that Common Article 3 was applicable to that conflict.²² Deputy Secretary of Defense Gordon England later issued a memorandum which stated, “The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda.” The memorandum then requested defence commands and departments to start a prompt review of policies and procedures “to ensure that they comply with the Standards of Common Article 3”.²³ For our purposes it is worth simply recalling that if Common Article 3 is indeed applicable, then the terms of Common Article 3 refer to obligations for each “Party” to the conflict; in this case this means international obligations not only for the United States but also for Al Qaeda (and its members to the extent that their actions constitute war crimes). It would not seem that the US administration considers the conflict to be confined to the period of fighting in Afghanistan.²⁴ The statement of the State Department Legal Advisor,

19 This is despite the fact that Common Article 3 ends with the sentence: “The application of the preceding provisions shall not affect the legal status of the Parties to the conflict”.

20 Common Article 3 includes the paragraph: “An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.”

21 See e.g. the UN Commission on Human Rights Resolution on El Salvador, 1991/71, preambular para. 6 and operative para. 9. See also General Assembly Resolutions 45/172 and 46/133 on El Salvador.

22 *Hamdan v. Rumsfeld* 548 U. S. (2006), p. 66 of the slip opinion.

23 Memorandum of 7 July 2006.

24 For details see <<http://www.defenselink.mil/home/dodupdate/documents/20060711.html>> (visited on 23 October 2006).

John Bellinger III, to the UN Committee against Torture on 8 May 2006 is worth repeating here:

The United States is engaged in a real, not rhetorical, armed conflict with al Qaeda and its affiliates and supporters, as reflected by al Qaeda's heinous attack on September 11, 2001, an attack that killed more than 3000 innocent civilians.

It is important to clarify the distinction we draw between the struggle in which all countries are engaged in a 'global war on terrorism' and the legal meaning of our nation's armed conflict with al Qaeda, its affiliates and supporters. On a political level, the United States believes that all countries must exercise the utmost resolve in defeating the global threat posed by transnational terrorism. On a legal level, the United States believes that it has been and continues to be engaged in an armed conflict with al Qaeda, its affiliates and supporters. The United States does not consider itself to be in a state of international armed conflict with every terrorist group around the world.²⁵

The protection offered by Protocol II to the Geneva Conventions goes beyond the minimum standards contained in Common Article 3 although the minimum standards contained in Common Article 3 remain in effect even when Protocol II is applicable. The Protocol supplements these standards with extra protection for civilians, children, and medical and religious personnel. It also details the procedural guarantees that must be afforded to people interned or detained. The important point in the present context is that it applies this wide range of duties to both sides fighting the internal armed conflict.

However, in order to trigger the application of Protocol II, the intensity of fighting has to be greater than that traditionally required for the application of Common Article 3. According to Article 1(2) of the Protocol, the Protocol does not apply to situations of internal disturbances, riots and sporadic acts of violence. In addition Article 1(1) of the Protocol requires that the dissident armed groups are under responsible command and exercise such control over part of the territory that they are in a position to carry out military operations and implement the guarantees in the Protocol. This is generally considered to constitute a higher threshold for applicability than Common Article 3. It also suggests that the rebels themselves become bound through their willingness to apply the Protocol.²⁶ As will be discussed, various theories have been advanced in the past to explain how the rebels as such become bound under the Protocol. Some of these are today less relevant as the key provisions come to be seen as customary international law for the purposes of individual prosecutions. For the moment it suffices to note that in 2004 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,

25 Statement available at <<http://www.state.gov/documents/organization/66174.pdf>> (visited on 23 October 2006).

26 Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts", *International and Comparative Law Quarterly*, Vol. 30, 1981, pp. 416-39, pp. 424-6.

are bound by international humanitarian law, even though only states may become parties to international treaties²⁷.

At the time of the drafting of Protocol II to the Geneva Conventions, several states explained their conviction that insurgents engaged in a civil war were simply criminals, and that the protocol conferred no international legal personality on them.²⁸ However, this treaty is today assumed to contain obligations for rebels who fulfil the criteria in the Protocol and where the fighting has passed the Protocol's threshold. Various theories have been suggested to explain how a treaty such as Protocol II entered into by states can create international duties for the rebel group as such.²⁹ Today, even in the absence of a consensus on a theoretical justification, it has become clear that, not only are rebels bound as parties to the conflict by Common Article 3 to the Geneva Convention, but they are also bound by the provisions of Protocol II. Indeed, from early on the ICRC Commentary to the Protocol simply asserted this to be the case:

The deletion from the text of all mention of 'parties to the conflict' only affects the drafting of the instrument, and does not change its structure from a legal point of view. All the rules are based on the existence of two or more parties confronting each other. These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character.³⁰

The Commentary highlights the theories which allow for the imposition of international duties on individuals and groups and asserts that the fact of application is not challenged by states in practice.

The question is often raised as to how the insurgent party can be bound by a treaty to which it is not a high contracting party. It may therefore be appropriate to recall here the explanation given in 1949:

[T]he commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State. Although this argument has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested.³¹

It may be useful to consider the existing legal arguments for the application of these obligations to armed opposition groups under four headings. First, private individuals and groups are bound as nationals of the state that has made the international commitment. Second, where a group is exercising government-like functions it should be held accountable as far as it is exercising

27 *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, para. 22.

28 Cassese, above note 26.

29 *Ibid.*

30 Sandoz, Swinarski, and Zimmermann, above n. 18, para. 4442.

31 *Ibid.* at 4444, footnotes omitted.

the de facto governmental functions of the state.³² Third, the treaty itself directly grants rights and imposes obligations on individuals and groups. Fourth, obligations such as those in Common Article 3 are aimed at rebel groups, and it has been argued by Theodor Meron that the effective application of these rules should not depend on the incorporation of duties under national law. In Meron's words, "Therefore, it is desirable that Article 3 should be construed as imposing direct obligations on the forces fighting the government."³³

While these theories could all justify the application to individuals and non-state actors of certain human rights obligations found in treaties,³⁴ the focus has remained on international humanitarian law.³⁵ The theoretical basis for the application of the laws of internal armed conflict remains misty. Such theories have rarely been articulated by governments or international organizations in their application of international law to rebel groups. For example, in 1998 with regard to Afghanistan the UN Security Council simply reaffirmed that "all parties to the conflict are bound to comply with their obligations under international

32 Rüdiger Wolfrum and Christiane E. Philipp, "The Status of the Taliban: Their Obligations and Rights under International Law", *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, pp. 559–601, who recall that *de facto* regimes exercising effective control over parts of territory may enjoy limited rights and duties under international law (at p. 585). Their enquiry concerns the rights and obligations regarding the use of force and they conclude that as a de facto regime (albeit unrecognized) the Taliban are considered an international subject, and their complicity with the terrorist group Al Qaeda meant they could be targeted in order to bring them into compliance with their international law obligations (at p. 601).

33 Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Grotius, Cambridge, 1987, p. 39. For a discussion of the other approaches see *ibid.*, pp. 33–40, Zegveld, above note 9, pp. 15–16, and Richard Baxter, "Jus in Bello Interno: the Present and Future Law", in John N. Moore (ed.), *Law and Civil War in the Modern World*, Johns Hopkins University Press, Baltimore, 1974, pp. 518–36.

34 See Meron, above note 33, pp. 34–5, who highlights direct obligations imposed on individuals by Articles 5(1) and 20 of the International Covenant on Civil and Political Rights and under the heading "human rights instruments" he highlights the international individual criminal responsibility under the International Convention on the Suppression and Punishment of *Apartheid* (1973) and the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

35 Zegveld, above note 9, p. 52, questions whether (i) there indeed exists a protection gap which is not addressed by humanitarian law; (ii) whether human rights principles would lead to a different result from the application of humanitarian law principles; and (iii) the threshold for the application of humanitarian law is arguably not as high as is presumed so that efforts should concentrate on the application of humanitarian law. Zegveld concludes that "There is widespread international practice demonstrating that armed opposition groups can be held accountable for violations of international law" (at p. 151). But she wishes to minimize the application of human rights law to these groups. With regard to the practice she concluded, "International practice is thus ambiguous on the question of conditions for accountability of armed opposition groups for violations of human rights law. There is some authority for the proposition that human rights instruments could govern armed opposition groups exercising governmental functions. However, this conclusion is mitigated by practice holding armed opposition groups apparently lacking any effectiveness accountable for human rights violations" (at p. 151). Her recommendation points towards a cautious application of human rights law: "since the accountability of armed opposition groups is a direct consequence of their status as parties to the conflict, there should be a close link between their accountability and their status. This is also why international bodies are and should be very cautious about holding armed opposition groups accountable for violations of human rights norms. These norms presume the existence of a government, or at least, an entity exercising governmental functions. Armed opposition groups rarely function as de facto governments" (at p. 152).

humanitarian law and in particular under the Geneva Conventions” of 1949.³⁶ Interestingly, the resolution goes on to state that “persons who commit or order the commission of breaches of the Conventions are individually responsible in respect of such breaches”. This confirms at the highest level that individual responsibility attaches to violations of international humanitarian law in internal armed conflicts (even outside the contexts of Yugoslavia, Rwanda and the regime of the International Criminal Court). It is also of interest that Security Council resolutions in this context demand that “Afghan factions” put an end to violations of human rights. In the context of Afghanistan, the demand was focused on discrimination against girls and women, but the resolution also demands that the factions “adhere to the international norms and standards in this sphere”.³⁷ Moreover, the Security Council went on to suggest that local authorities that did not respect human rights should be denied reconstruction assistance.³⁸

In the context of Guinea-Bissau the Security Council called on “all concerned” to respect relevant provisions of humanitarian law and human rights, as well as to ensure unimpeded access by humanitarian organizations.³⁹ With regard to Liberia, the resolution first mentions the use of child soldiers and then simply demands that “that all parties cease all human rights violations and atrocities against the Liberia population, and stresses the need to bring to justice those responsible”.⁴⁰

36 Resolution 1214 (1998), 8 December 1998, preambular para. 12.

37 *Ibid.*, para. 12; in full the paragraph reads: “12. *Demands* that the Afghan factions put an end to discrimination against girls and women and other violations of human rights, as well as violations of international humanitarian law, and adhere to the international norms and standards in this sphere”. See also S/RES/1193 (1998) para. 14, which “*Urges* the Afghan factions to put an end to discrimination” and other violations of human rights. Following the attack on the Taliban by the United States and others the Security Council stated that it was “*Deeply concerned* by the grave humanitarian situation and the continuing serious violations by the Taliban of human rights and international humanitarian law” (preambular para. 10 of S/RES/1378 (2001)); whereas it *called* “on all Afghan forces to refrain from acts of reprisal, to adhere strictly to their obligations under human rights and international humanitarian law”. (Operative para. 2.) See also S/RES/1528 (2004) preambular para. 6, which called on the parties and the Government “to prevent further violations of human rights and international humanitarian law and to put an end to impunity”. Although the Council’s resolution on weapons of mass destruction and non-state actors offers a definition of non-state actor for the purposes of the resolution, it does not address the non-state actors as such, but calls on states to take certain measures. S/RES/1540 (2004). A non-state actor is defined “or the purpose of this resolution only” as an “individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution”.

38 S/1471 (2003), para 4. “Stresses also, in the context of paragraph 3 above, that while humanitarian assistance should be provided wherever there is a need, recovery or reconstruction assistance ought to be provided, through the Transitional Administration, and implemented effectively, where local authorities demonstrate a commitment to maintaining a secure environment, respecting human rights and countering narcotics.”

39 S/RES/1216 (1998) Para 5. “Calls upon all concerned, including the Government and the Self-Proclaimed Military Junta, to respect strictly relevant provisions of international law, including humanitarian and human rights law, and to ensure safe and unimpeded access by international humanitarian organizations to persons in need of assistance as a result of the conflict.”

40 S/RES/1509 (2003) para. 10. See also regarding Côte d’Ivoire S/RES/1479 (2003) para. 8. “Emphasizes again the need to bring to justice those responsible for the serious violations of human rights and international humanitarian law that have taken place in Côte d’Ivoire since 19 September 2002, and reiterates its demand that all Ivorian parties take all the necessary measures to prevent further violations of human rights and international humanitarian law, particularly against civilian populations whatever their origins.”

The negotiations over the former Yugoslavia involved the participation of the various parties and the formulae used by the Council in the Resolutions with regard to the former Yugoslavia included demands on various parties to *inter alia* facilitate humanitarian assistance and cease “ethnic cleansing”, leading Theo van Boven to conclude, “The responsibility of Non-State Actors and their duties to respect and to comply with international law, must be regarded as inherently linked with the claim that they qualify as acceptable parties in national and international society.”⁴¹

The human rights demands with regard to the treatment of girls and women, access to humanitarian assistance, the use of child soldiers and respect for the civilian population are situation-specific; but the Security Council presumes that non-state actors have international obligations under the international humanitarian law of armed conflict and human rights law. The alternative explanations – that the Security Council is itself recognizing the non-state actor as a belligerent⁴² or “creating” the obligations for the factions – seem unconvincing and unworkable. The idea that the Security Council creates the obligation for the specific non-state actor being targeted has been specifically dismissed by Christian Tomuschat, who, having reviewed the practice of the Security Council with regard to the former Yugoslavia, Afghanistan, Sudan, Sierra Leone, Ivory Coast, the Democratic Republic of the Congo, Angola, Liberia and Somalia, concluded that:

When pronouncing on the duty of parties to armed conflict to respect human rights standards, the Security Council does not intend to create new obligations. It just draws the attention of the addressees to the obligations incumbent upon them under international human rights law, as interpreted by it. For that purpose, no specific order is necessary.⁴³

For Christian Tomuschat the non-state actors are bound by international human rights law, whether or not they have consented to the relevant human rights rule:

A movement struggling to become the legitimate government of the nation concerned is treated by the international community as an actor who, already at his embryonic stage, is subject to the essential obligations and responsibilities every State must shoulder in the interest of a civilized state of affairs among nations. The rule that any obligation requires the consent of

41 Theo C. van Boven, “Non-State Actors; Introductory Comments [1997]”, in Fons Coomans, Cees Flinterman, Fred Grünfeld, Ingrid Westendorp, and Jan Willems (eds.), *Human Rights from Exclusion to Inclusion; Principles and Practice: An Anthology from the Work of Theo van Boven*, Kluwer, The Hague, 2000, pp. 363–9. See especially the compilation of parties addressed by the Security Council and list of demands made, p. 368; Paola Gaeta, “The Dayton Agreements and International Law”, *European Journal of International Law*, Vol. 7, 1996, pp. 147–63.

42 This question is examined by Wolfrum and Philipp (above note 32, pp. 583–4) with regard to the Taliban; they conclude that Security Council statements concerning the application of humanitarian law were declaratory rather than constitutive and that no recognition as belligerents by the Security Council can be implied.

43 Christian Tomuschat, “The Applicability of Human Rights Law to Insurgent Movements”, in Horst Fischer, Ulrika Froissart, Wolff Heintschel von Heinegg, and Christian Raap (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berliner Wissenschafts-Verlag, Berlin, 2004, pp. 573–91, p. 586.

the party concerned has long been abandoned. The international community has set up a general framework of rights and duties which every actor seeking to legitimize himself as a suitable player at the inter-State level must respect.⁴⁴

But Tomuschat's underlying rationale for this approach is based on a recognition that "elements of governmental authority have fallen into the hands of a rebel movement".⁴⁵ This leaves open the possibility that, where rebels are not seen as exercising government authority, they may avoid international human rights obligations. It is well-known that neither governments nor international organizations will readily admit that rebels are operating in ways which are akin to governments. Linking rebel obligations to their government-like status is likely to result in there being few situations where human rights obligations can be unequivocally applied to insurgents.⁴⁶ One effectively returns to the position of those commentators who dismiss the applicability of human rights obligations for insurgents on the grounds that non-state actors rarely operate as *de facto* governments,⁴⁷ and in any event are incapable of protecting human rights. Lindsay Moir accepts the full application of humanitarian obligations for insurgents but is adamant that such non-state actors have no human rights obligations:

Human rights obligations are binding on governments only, and the law has not yet reached the stage whereby, during internal armed conflict, insurgents are bound to observe the human rights of government forces, let alone of opposing insurgents. Non-governmental parties are particularly unlikely to have the capacity to uphold certain rights (e.g. the right to due process, being unlikely to have their own legal system, courts, etc.).⁴⁸

Rather than focusing on the obligations that insurgents cannot fulfil (fair trial with legal aid and interpretation, progressive implementation of access to university education), it is preferable to stress that the obligations apply to the extent appropriate to the context. Even conventional human rights law demands that a state take steps "to the maximum of its available resources" to fulfil progressively its human rights obligations in the context of economic and social rights.⁴⁹

Zegveld in her review of international practice sets out a theoretical basis for the creation of obligations on non-state actors:

44 Ibid., p. 587.

45 Ibid., p. 588.

46 An interesting early example of the UN applying the rights of the child in an agreement with rebels in Southern Sudan emerges from the account by Iain Levine who reveals the rationale that convinced the humanitarian agencies to apply human rights in such a context: "While it was not for OLS (Operation Lifeline Sudan) to determine the political future of south Sudan, members felt that control of territory brought with it serious responsibilities for the well-being of the rights of people living there". *Promoting Humanitarian Principles: The Southern Sudan experience*, Overseas Development Institute (ODI), Humanitarian Practice Network Paper 21, 1997, p. 14.

47 Zegveld, above note 9, p. 152, discussed above.

48 Moir, above note 18, p. 194.

49 Article 2(1) International Covenant on Economic, Social and Cultural Rights.

International bodies have generally considered the ratification of the relevant norms by the territorial state to be 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.⁵⁰

While this approach is considered legitimate for humanitarian law, Zegveld does not consider it appropriate for human rights law due to an assumption that “The main feature of human rights is that these are rights that people hold against the state only.”⁵¹

It is suggested that this assumption is no longer valid. The issue of the human rights obligations of non-state actors has arisen as a very practical problem in the context of truth commissions and for UN human rights monitors. The issue arose starkly in the context of the Guatemalan Historical Clarification Commission.⁵² It was determined that at times when there was no armed conflict the insurgents were bound by certain international law principles common to human rights and humanitarian law. The report of the Guatemalan Historical Clarification Commission referred to human rights violations by the insurgents. The legal analysis is perhaps more developed, since it refers to “general principles common to international human rights law”, thus suggesting that the insurgents could not be burdened with all the human rights obligations of the state:

127. The armed insurgent groups that participated in the internal armed confrontation had an obligation to respect the minimum standards of international humanitarian law that apply to armed conflicts, as well as the general principles common to international human rights law. Their high command had the obligation to instruct subordinates to respect these norms and principles.

128. Acts of violence attributable to the guerrillas represent 3% of the violations registered by the CEH[Commission]. This contrasts with 93% committed by agents of the state, especially the Army. This quantitative difference provides new evidence of the magnitude of the state’s repressive response. However, in the opinion of the CEH, this disparity does not lessen

50 Zegveld, above note 9, p. 17.

51 Ibid., p. 53.

52 See the discussion by Christian Tomuschat: “For a long time it seemed to be an unassailable axiom that it is incumbent upon governments only to respect and ensure human rights, so that it was inconceivable that groups without any official position could also violate human rights. Here again, the argument of reciprocity is of great weight. Not to subject insurgent movements to any obligation owed to the international community before an armed conflict may be found to exist would leave them exclusively under the authority of domestic law, favouring them, but also discriminating against them at the same time. It was one of the great challenges of the Guatemalan Historical Clarification Commission to determine the legal yardstick by which conduct of the different guerrilla groups could be measured even in times when one could hardly speak of an armed conflict”. Christian Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University Press, Oxford, 2003, p. 261. He goes on to refer to the paragraphs cited below.

the gravity of the unjustifiable offences committed by the guerrillas against human rights.⁵³

The full Spanish version of the report details the principles. A rough translation would mean that these included the prohibition on torture, inhuman and degrading treatment, a prohibition on hostage-taking, guarantees of fair trial and physical liberty for the individual.⁵⁴

More recently in the Truth and Reconciliation Commission of Sierra Leone had a mandate which read as follows:

6. (1) The object for which the Commission is established is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.⁵⁵

The Commission's Report contains detailed examinations of activity by multiple actors, including not only the insurgents, rebels and international peacekeepers, but also the private security firm, Executive Outcomes. This time the violations by the non-state actors are significant compared with those committed by state actors. The Commission "found the RUF [Revolutionary United Front] to have been responsible for the largest number of human rights violations in the conflict".⁵⁶ The Commission used the expression "human rights violations" with regard to all actors including multinational forces and private security companies.

With regard to internationally legally binding human rights obligations we have seen that these are currently presumed by the United Nations to apply when they are being flagrantly denied by a faction, a party to a conflict, or an armed opposition group.⁵⁷ For Dieter Fleck it is simply "logical" that if the

53 *Guatemala Memory of Silence*, Executive Summary Conclusions and Recommendations, UN Doc. A/53/928 Annex, 27 April 1999. For the relevant part of the Spanish full report see paras. 1699–1700 in volume II, pages 312–3. Christian Tomuschat chaired the Commission and has highlighted the way in which the Commission determined that outside times of armed conflict the insurgents were bound by these common principles. See Tomuschat, above note 52, p. 261.

54 See the full Report of the Commission, available only in Spanish, paras 1698–1700. Available from <<http://shr.aas.org/guatemala/ceh/mds/spanish/>> (last visited on 23 October 2006).

55 Supplement to the Sierra Leone Gazette Vol. Cxxxi, No. 9 dated 10th February, 2000.

56 Para 15 of the "Overview" accessible at: <www.nuigalway.ie/human_rights/publications.html> (visited 23 October 2006). See also Vol. 2, Chapter 2, paras 106 and 107, where the Commission found that the RUF was "the primary violator of human rights in the conflict" and responsible for 60.5 per cent of the violations (24,353 out of 40,242 violations). See further paras 115–172. The RUF was not the only non-state actor dealt with in the report. ECOMOG (the Ecomog Cease-Fire Monitoring Group and Executive Outcomes (the Military Security Company) are both considered. With regard to ECOMOG, the Report points to "human rights violations" including summary executions of civilians. At para. 396. With regard to Executive Outcomes, the Report states that the Commission recorded no "allegation of any human rights violation against the mercenaries". At para. 402.

57 Zegveld, above note 9, p. 48, highlights the Security Council Afghanistan Resolution 1193 (1998) and also mentions the resolution on Angola (S/RES1213 (1998)) which is addressed not only to the government of Angola but also to UNITA.

insurgents can have obligations under humanitarian law they should also be able to bear human rights obligations.⁵⁸ From here it is a small step to suggest that such international human rights obligations apply at all times to all armed opposition groups (even before the appeals of the Security Council). The resolution adopted by the distinguished expert body the Institute of International Law, at its Berlin session in 1999, stated that “All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status ... have the obligation to respect international humanitarian law as well as fundamental human rights.”⁵⁹ With regard to disturbances short of armed conflict the resolution includes an Article X to similar effect concerning fundamental human rights: “To the extent that certain aspects of internal disturbances and tensions may not be covered by international humanitarian law, individuals remain under the protection of international law guaranteeing fundamental human rights. All parties are bound to respect fundamental rights under the scrutiny of the international community.”⁶⁰

To those who would still prefer to rely simply on humanitarian law I would respond as follows: first, humanitarian law does not usually apply in the absence of protracted armed conflict; second, even when there is a reasonable claim that there is a protracted armed conflict, governments have often denied the existence of a conflict, making dialogue with the parties about the application of humanitarian law rather problematic; and, third, the human rights framework allows for a wider range of accountability mechanisms, including monitoring by the Special Rapporteurs of the UN Commission of Human Rights and the field offices of the High Commissioner for Human Rights.

Most recently, the UN’s Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, grappled with the question in the context of his report on Sri Lanka. Alston concluded in the following terms:

25. Human rights law affirms that both the Government and the LTTE [Liberation Tigers of Tamil Eelam] must respect the rights of every person in Sri Lanka. Human rights norms operate on three levels – as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community. The Government has assumed the binding legal obligation to respect and ensure the rights recognized in the International Covenant on Civil and Political Rights

58 According to Dieter Fleck “If non-state actors have human rights, it appears logical that they also must have responsibilities, no different from the obligations insurgents have under international humanitarian law. There is a clear trend to subject non-state actors to human rights law”. Dieter Fleck, “Humanitarian Protection Against Non-State Actors”, in *Verhandeln für den Frieden – Negotiating for Peace: Liber Amicorum Tono Eitel*, Springer, Berlin, 2003, pp. 69–94, p. 79.

59 “The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties”, resolution adopted at the Berlin Session, 25 August 1999, Article II.

60 Ibid., Article X. According to the Commentary fundamental rights are assimilated to those rights that are applicable in states of emergency. Institute of International Law, *L’application du droit international humanitaire et des droits fondamentaux de l’homme dans les conflits armés auxquels prennent part des entités non étatiques: résolution de Berlin du 25 août 1999 – The application of international humanitarian law and fundamental human rights in armed conflicts in which non-state entities are parties: Berlin resolution of 25 August 1999 (commentaire de Robert Kolb) Collection “résolutions” n° 1*, Pedone, Paris, 2003, p. 43.

(ICCPR). As a non-state actor, the LTTE does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.⁶¹

26. I have previously noted that it is especially appropriate and feasible to call for an armed group to respect human rights norms when it ‘exercises significant control over territory and population and has an identifiable political structure’. This visit clarified both the complexity and the necessity of applying human rights norms to armed groups. The LTTE plays a dual role. On the one hand, it is an organization with effective control over a significant stretch of territory, engaged in civil planning and administration, maintaining its own form of police force and judiciary. On the other hand, it is an armed group that has been subject to proscription, travel bans, and financial sanctions in various Member States. The tension between these two roles is at the root of the international community’s hesitation to address the LTTE and other armed groups in the terms of human rights law. The international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to treat it like a State’.

27. It is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights.⁶² The LTTE and other armed groups must accept that insofar as they aspire to represent a people before the world, the international community will evaluate their conduct according to the Universal Declaration’s “common standard of achievement”.⁶³

Alston goes on to include specific human rights recommendations addressed to the non-state actor: “The LTTE should refrain from violating human rights, including those of non-LTTE-affiliated Tamil civilians. This includes in particular respect for the rights to freedom of expression, peaceful assembly, freedom of association with others, family life, and democratic participation, including the right to vote. The LTTE should specifically affirm that it will abide by the North-East Secretariat on Human Rights charter.”⁶⁴

61 Footnote in the original reads: “14. Consistent with this analysis, the LTTE created North East Secretariat on Human Rights released the final version of the NESOHR Charter of human rights in Oct 2005. Its stated objectives include promoting respect for human rights “according to the Universal Declaration of Human Rights and the International Covenants on human rights””, available at <<http://nesohr.org/charter/Charter-English.PDF>> (visited 23 Octobre 2006).

62 Footnote in the original reads: “SC Res. 1265 (1999), preamble; SC Res. 1193 (1998), paras. 12, 14; SC Res. 814 (1993), para. 13”.

63 UN Doc. E/CN.4/2006/53/Add.5, 27 March 2006 (footnote omitted).

64 Ibid., para. 85. See also the letter addressed directly to the LTTE concerning prevention of killings, investigation, and the application of the death penalty, “Allegation letter sent 21 November 2005, UN Doc. E/CN.4/53/Add.1, 27 March 2006, p. 320. Note the “Urgent appeal” sent to the Palestinian Authority regarding death sentences, on 28 February 2005, *ibid.*, p. 321.

This approach is applied in the joint report on Lebanon and Israel by a group of four special rapporteurs:

Although Hezbollah, a non-State actor, cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights. The Security Council has long called upon various groups which Member States do not recognize as having the capacity to do so to formally assume international obligations to respect human rights. It is especially appropriate and feasible to call for an armed group to respect human rights norms when it “exercises significant control over territory and population and has an identifiable political structure”.⁶⁵

The Office of the UN High Commissioner for Human Rights (OHCHR) has a human rights field operation in Nepal. The Office reports on the human rights situation. Reports include a special section on incidents involving the Communist Party of Nepal (Maoist) (CPN-M).⁶⁶ Often these cannot be expressed in terms of violations of international humanitarian law since they took place during the cease-fire outside the context of an armed conflict. At one level there is apparently a commitment to human rights by the CPN-M, but this does not really seem dispositive to the UN’s reporting. Another section in the report covered killings by an “illegal armed groups” known as Pratikar Samiti (retaliation groups) later renamed “Peace and Development Committees” as well as killings by a group known as the Special Tiger Force.⁶⁷ The UN report does not allege that these groups were supported by the state. Their killings are simply detailed as part of the human rights situation. One recent press release by the OHCHR Nepal Office illustrates the approach:

OHCHR has continued to emphasize in its meetings with CPN-M leaders that abductions of civilians for any reason are in violation of CPN-M’s commitment to international human rights standards. These abductions and related investigations and punishment fail to provide even minimum

65 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/2/7, 2 October 2006, para. 19. Footnotes omitted. Part of footnote 19 attached to the end of this paragraph reads: “Furthermore, the obligations of Lebanon under international human rights law continue to apply in territories under the control of de facto authorities. Their acts are classified, under the law on State responsibility, as acts of the State to the extent that such authorities are in fact exercising elements of governmental authority in the absence or default of the official authorities, and in circumstances which call for the exercise of such authority (see Article 9, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), in *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chap. IV.E.1.)” This suggestion implies a simultaneous complementary set of obligations on both the State and the non-state actor.

66 See UN Doc. E/CN.4/2006/107 16 February 2006, paras 45–58.

67 *Ibid.*, paras 59–61.

guarantees of due process and fair trial. As a consequence, victims of abductions are vulnerable to other violations of their human rights, particularly their right to life and physical integrity, as in the noted cases. OHCHR concerns in this regard also apply to CPN-M cadres accused of crimes.⁶⁸

To conclude this section, the assumption of many humanitarian law experts that that human rights law applies only to governments, and not to unrecognized insurgents, is no longer a universally shared assumption.

Successful insurrectional and other movements

The articles of the International Law Commission (ILC) on “Responsibility of States for Internationally Wrongful Acts”⁶⁹ stipulate that the conduct of an insurrectional movement, which succeeds in becoming the new government, is conduct which gives rise to state responsibility under international law.⁷⁰ In addition to insurrectional movements, “other” movements that succeed in establishing a new state will also be held responsible, as a state, for their unlawful acts committed while they were a non-state actor.⁷¹ There is no need in such cases for any recognition until the insurgency succeeds. The new government is obviously recognized in the context of the eventual claim made against it. At that point the insurrectional (or other) movement’s behaviour is treated as if it were a government at the time of its internationally wrongful acts.⁷² The obligations at the time would include not only the rules of international humanitarian law, briefly referred to above, but also general rules of international law including, it is now suggested, international human rights law.⁷³

68 “OHCHR Urges The Investigation And Prevention Of Serious Human Rights Abuses By CPNM”, Press Release 27 June 2006. For a later fuller report see OHCHR *Human rights abuses by the CPN-M Summary of concerns*, September 2006. The Working Group on Enforced or Involuntary Disappearances has a limited mandate (UN Doc. E/CN.4/2006/56, 27 December 2005, para. 8): “In the context of internal armed conflict, opposition forces have reportedly perpetrated disappearances. While the mandate of the Working Group is limited to violations carried out by state agents or non-State actors acting with the connivance of the State, the Working Group condemns the practice of disappearance irrespective of who the perpetrators may be”. The report refers to the arbitrary use of disappearances by the Security Forces in Nepal and continued: “Maoist insurgents also commit widespread illegal deprivations of liberty” (at para. 386). In this context it is impossible to suggest that the Maoists are acting with the connivance of the state

69 See UN Doc. A/Res/56/83, adopted 12 December 2001. The Commentary is found in A/56/10, Report of the ILC, adopted at its 53rd session, 2001. The Commentary is also reproduced together with a helpful introduction and appendices in James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002.

70 Article 10(1) “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.”

71 Article 10 (2) “The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.”

72 It has been suggested that this responsibility arises “as from the beginning of the revolution”, Chittharanjan F. Amerasinghe, *State Responsibility for Injuries to Aliens*, Clarendon, Oxford, 1967, p. 54.

73 David Matas, “Armed Opposition Groups”, *Manitoba Law Journal*, Vol. 24, 1997, pp. 621–34.

The history of this rule of attribution in the context of state responsibility reflects state practice concerning claims made regarding “damage caused to foreigners by an insurrectionist party which has been successful”.⁷⁴ The background to the rule of attribution involves the substantive law concerning the protection of aliens rather than the laws of armed conflict (which historically were rather underdeveloped with regard to internal armed conflict). Today the substantive law regarding the protection of aliens has been overtaken by the international law of human rights,⁷⁵ and it makes sense simply to apply the law of human rights to the successful insurgents.

The definition of “dissident armed forces” is said to capture the “essential idea of an “insurrectional movement””.⁷⁶ The ILC Commentary suggests that a guide to the sort of groups which are covered by this rule can be found in the threshold criteria contained in Protocol II to the Geneva Conventions. Protocol II covers armed conflicts which take place between the forces of a party to the treaty and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. The ILC identifies certain situations that are not covered, with the result that groups engaged in such activity would not count as insurrectional movements.⁷⁷ Article 1(2) states, “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” The Commentary excludes from the article’s reference to “other movements” “the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State”.⁷⁸

Unsuccessful insurrectional movements fall outside the application of the rules of state responsibility, but the International Law Commission is careful to state that an unsuccessful insurrectional movement may be held responsible for its own breaches of international law.⁷⁹

Practical steps taken to ensure respect for human rights by non-state actors in times of armed conflict

It would be tempting to leave the issue here: international humanitarian law applies to all sides, in accordance with the thresholds outlined in that branch of

74 See para. 13 to Article 10, the ILC Commentary, above note 69, page 117, citing a document prepared for the 1930 Preparatory Committee for the Codification Conference.

75 See John Dugard, Special Rapporteur, ILC, First report on diplomatic protection, UN Doc. A/CN.4/506, 7 March 2000, “Contemporary international human rights law accords to nationals and aliens the same protection, which far exceeds the international minimum standard of treatment for aliens, set by Western Powers in an earlier era”. At para. 32.

76 ILC Commentary, above note 69, para. 9 to Article 10, page 115.

77 Ibid.

78 Para 10 of the Commentary to Article 10 at 115, above note 69.

79 See Para 16 of the Commentary to Article 10 at 118: “A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present Articles, which are concerned only with the responsibility of States.”

law, and human rights obligations can be discerned from the practice of the Security Council and applied more generally. Where an insurgent or other movement succeeds in becoming a new government or creating a new state, that new government will be internationally responsible for the violations of international law committed by the movement. But serious practical problems remain; the theory does not work in practice.

First, as mentioned above, by relying on the threshold criteria such as those found in Protocol II,⁸⁰ one is in reality asking a government to accept that rebels have control of territory and have achieved some sort of authority. Governments have been reluctant to do this or even recognize the arguably lower threshold in Common Article 3, namely that there is an “armed conflict not of an international character occurring within the territory of one of the High Contracting Parties”.⁸¹ Although the treaties are at pains to point out that the application of the rules confers no recognition or status on the rebels, governments nevertheless often deny the applicability of these norms. Does such a denial really matter? As Christopher Greenwood has emphasized, “the acceptance by a government that an armed conflict exists is not a legal prerequisite”, the obligations in Common Article 3 and Protocol II “are stated to be applicable provided that certain objective criteria are met”.⁸² So if the law applies should we worry about the attitude of the government? The attitude of the government is of course relevant, since it obviously becomes harder to convince the rebels that they should comply with rules that the government is refusing to acknowledge as the appropriate framework for their own troops. Despite the fact that the rules are designed to protect the victims of war, rather than create a level playing field, the reciprocity between government and rebels remains important – and that very suggestion of parity is part of the problem.

80 The Protocol applies to “all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. (2) This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”. Article 1(1) and (2). The Protocol has been applied in Russia (Chechnya), Colombia, El Salvador and Rwanda.

81 With regard to Article 3, the International Criminal Tribunal for the Former Yugoslavia’s definition of an armed conflict is increasingly applied. In *Prosecutor v. Tadić* (jurisdiction) IT-94-I-AR72, 2 October 1995, the Appeals Chamber posited a definition of the meaning of armed conflict and the scope of the obligations: “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 peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in 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”. At para. 70.

82 Christopher Greenwood, “International Humanitarian Law (Laws of War)”, in Frits Kalshoven (ed.), *The Centennial of the First International Peace Conference*, Kluwer Law International, The Hague, 2000, pp. 161–259, p. 231.

Second, turning to the rebels, theories concerning why they should comply with these norms are of more than academic interest. Arguments that rest on national commitments or international custom may be rejected by rebels who have neither participated in the process nor been allowed to adhere to the treaty.⁸³ Reliance on the binding nature of national law (even where this merely implements international law) may be met with a frosty response in situations where the rebels seek to challenge the legitimacy of the regime to adopt any law at all. While some rebel groups seeking to become the government of a state may be looking for international legitimacy, and could perhaps be convinced of the need to accept the application of norms accepted by the international community of states, other groups may have no such aspirations, being content with control of certain natural resources and the opportunity to run organized criminal activity.⁸⁴

Perhaps it is time for a radical rethink. Human rights organizations such as Amnesty International are reporting on armed groups and demanding respect for human rights obligations outside the framework of humanitarian law obligations (recruitment of under-18s, abuses of humanitarian workers, denial of freedom of expression through restrictions on journalists etc.).⁸⁵ Human Rights Watch has reported on the forced divorces and physical abuses inflicted by an armed opposition group on their own fighters.⁸⁶ In short, human rights monitors are expanding the traditional the traditional normative framework beyond humanitarian law. An interesting development in this field is the adoption of commitments, declarations, codes of conduct and memoranda of understanding by the armed groups themselves. Such texts increasingly refer to human rights

83 See generally Marco Sassòli, "Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law", Conference Paper, University of Quebec in Montreal, 2000, available through <<http://www.ihlresearch.org/ihl/>> (visited 23 October 2006); Zegveld, above note 9), p. 17, footnote 27.

84 See the discussion by Claude Bruderlein, "The role of non-state actors in building human security: the case of armed groups in intra-state wars", Centre for Humanitarian Dialogue, Geneva, 2000, p. 11. For a set of essays covering some of the initiatives designed to limit the harm in conflict situations caused by the economic activities of non-state actors such as corporations and financial institutions see Karen Ballentine and Heiko Nitzschke (eds.), *Profiting from Peace: Managing the Resource Dimensions of Civil War*, Boulder, Colo., Lynne Rienner, 2005.

85 See "Israel And The Occupied Territories And The Palestinian Authority: Without distinction – attacks on civilians by Palestinian armed groups", AI Index MDE 02/003/2002; regarding armed groups in Algeria: "Algeria: Steps towards change or empty promises?", MDE 28/005/2003 (to stop targeting civilians immediately and respect the most fundamental human right, the right to life; to stop immediately the practice of abducting women and girls and subjecting them to rape and other forms of torture. Regarding armed political groups in the Democratic Republic of Congo: "DRC: On the precipice: the deepening human rights and humanitarian crisis in Ituri", AFR 62/006/2003 (armed political groups should immediately cease unlawful killings and other human rights abuses against civilians and combatants who have ceased to take part in hostilities; all forces should immediately cease harassment of and human rights abuses against humanitarian NGO staff and human rights activists and ensure unhindered and safe access for humanitarian agencies to all areas under their control; all armed groups should end the recruitment into their forces of child soldiers under the age of 18 and cooperate with MONUC and other appropriate agencies for the disarmament, demobilization and reintegration of these children). See "DRC: Addressing the present and building a future", AFR 62/050/2003; and "Haiti: Abuse of human rights: political violence as the 200th anniversary of independence approaches", AMR 36/007/2003. See also "Iraq: In cold blood: abuses by armed groups", AI Index MDE 14/009/2005.

86 Human Rights Watch, "No Exit: Human Rights Abuses Inside the MKO Camps" (May 2005).

standards and have been tailored to the particularities of the situation. The preliminary empirical work done in this area “suggests that where armed groups do commit themselves to written codes of conduct, this encourages them to respect human rights”.⁸⁷ Another study of eleven such codes, with regard to Burundi, Liberia, Somalia, Sierra Leone, Afghanistan, Sudan, Democratic Republic of the Congo, Angola, East and West Timor, Democratic People’s Republic of Korea and the Russian Federation revealed that “for non-State actors, the agreements refer to international human rights customary law”.⁸⁸ This study also notes that all the agreements state that the beneficiaries of humanitarian aid are to enjoy the following rights: “the right to live in security and dignity, the right to basic needs, the right to receive humanitarian assistance without discrimination and according to basic needs, the right to be involved in humanitarian activities of concern to them, the right to legal and effective human rights protection, and the right to protection against forced population transfer”.⁸⁹ Non-governmental organizations such as Geneva Call are engaging with non-state actors to monitor commitments made by non-state actors to Geneva Call in the area of anti-personnel mines, and the UN Secretary-General’s Special Representative for Children and Armed Conflict works by obtaining and monitoring commitments not to recruit or use children in armed conflict.⁹⁰

Interestingly, in the context of the Secretary-General’s reports on children and armed conflict we have seen how important it is to find practical solutions rather than present a picture based on specific violations of international humanitarian law. In one report the Secretary-General referred to attempts by his Special Representative to obtain commitments from armed groups in Northern Ireland “to refrain from recruiting or using children in the conflict”.⁹¹ Later the report stated that following a trip to the republic of Chechnya of the Russian Federation the Special Representative reported that “insurgency groups continued to enlist children and use them to plant landmines and explosives”.⁹² A few months later we find corrigenda to the report which explain, for example, that with regard to Chechnya the expression “insurgency groups” is to be replaced with “illegal armed groups” and the inclusion of the following phrase after the reference to Chechnya: “though the situation there is not an armed conflict within the meaning of the Geneva Conventions and the Additional Protocols thereto”.⁹³ A similar adjustment had

87 International Council on Human Rights Policy, “Ends and Means: human rights approaches to armed groups”, ICHRP, Versoix, 2000, p. 52.

88 Jean-Daniel Vigny and Cecilia Thompson, “Fundamental Standards of Humanity: What Future?”, *Netherlands Quarterly of Human Rights*, Vol. 20, 2002, pp. 185–99, p. 193.

89 *Ibid.*, p. 194.

90 Both initiatives are discussed in *Human Rights Obligations of Non-State Actors*, 2006, pp. 289–99. See further <<http://www.genevacall.org/home.htm>> (visited 23 October 2006) and <<http://www.un.org/special-rep/children-armed-conflict/>> (visited 23 October 2006).

91 UN Doc. A/58/546-S/2003/1053, 10 November 2003, para. 58.

92 *Ibid.*, para. 61.

93 UN Doc. A/58/546-Corr.2-S/2003/1053-Corr.2, 19 April 2004.

been made to the entry regarding Northern Ireland.⁹⁴ The heading in the Secretary-General's reports now refers not only to parties to armed conflicts but also to parties that recruit or use children "in other situations of concern".⁹⁵ The United Nations and non-governmental organizations will continue to find practical ways to expose those non-state actors that abuse the rights of children in conflict situations. Where the framework of international humanitarian law is precluded due to the lack of an armed conflict, or the perceived lack of an armed conflict, the UN and NGOs will have to rely on the idea that the non-state actors involved have human rights obligations.

Private security firms

A first immediate response to the issue of private security firms in the context of armed conflict is to label them mercenaries and hence suggest that they are tainted with illegality and illegitimacy. The modern international definition of a mercenary is problematic and operates in international humanitarian law simply to deprive captured individuals of any right to claim prisoner-of-war status in an international armed conflict.⁹⁶ Outside international humanitarian law, attempts to criminalize mercenary activity flounder on a series of definitions which are easy to evade. While the label of "mercenary" will continue to be applied to express the speaker's disapproval rather than to describe an individual satisfying the specific criteria under international law, it is suggested that human rights concern in this area is less likely to be about whether an individual fulfils the criteria for being a mercenary and more likely to be focused on issues of corporate accountability, contract law and individual criminal responsibility under the laws of armed conflict. Although treaty crimes concerning mercenaries have been in force for some time with regard to Africa,⁹⁷ prosecutions for the crime of mercenarism as defined in the Convention for the Elimination of Mercenarism in Africa treaty or other treaties are rare, even if some quite well-known trials of "mercenaries" have taken place based on violations of national law.⁹⁸

94 UN Doc. A/58/546-Corr.1-S/2003/1053-Corr.1, 20 February 2004.

95 Ibid. See also the new Report of the Secretary-General A/59/695-S/2005/72, 9 February 2005, Annex II.

96 See Article 47 of Protocol I to the Geneva Conventions of 1949. For an explanation of the background political debates at the UN and the OAU on the issue of mercenaries and the eventual adoption of Article 47 see Antonio Cassese, "Mercenaries: Lawful Combatants or War Criminals?", *ZaōRV*, Vol. 40, 1980, pp. 1–30.

97 Convention of the OAU for the Elimination of Mercenarism in Africa of 3 July 1977, which entered into force on 22 April 1985, and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries Mercenary Convention of 4 December 1989, entered into force 20 October 2001.

98 The trials in 2004 with regard to those accused of plotting a coup in Equatorial Guinea did not mention mercenarism. See Amnesty International, "Equatorial Guinea: Trial of alleged coup plotters seriously flawed", AI Index: AFR 24/017/2004, 30 November 2004, and similarly the charges in Zimbabwe with regard to the same plot were focused on firearms and immigration infractions: "Mercenaries' appeal in Zimbabwe", *BBC News*, 9 December 2004, details accessed at <<http://news.bbc.co.uk/1/hi/world/africa/4082481.stm>> (visited 23 October 2006). See further Eric David, *Mercenaires et volontaires internationaux en droit des gens*, Editions de L'Université de Bruxelles, Brussels, 1978, pp. 229–63. For a table depicting the various firms and their objectives, with regard to various African countries, see Appendix I "Mercenaries: Africa's Experience 1950s–1990", in Abdel-Fatau Musah and J 'Kayode Fayemi (eds.), *Mercenaries: An African Security Dilemma*, Pluto, London, 2000, pp. 265–74.

A second approach is to think about how private military companies may trigger state responsibility under international law. State responsibility applies where the company is either empowered by law to exercise elements of governmental authority or where the company is acting on the instruction of, or under the direction or control of a state.⁹⁹ But looking at state responsibility fails to capture the full picture. A more comprehensive approach demands that we ask to what extent there is direct accountability under international norms and procedures for the companies themselves?

The issue of the international accountability of the companies themselves was addressed at the level of the UN Human Rights Commission (now Council). The Council's Working Group on the use of Mercenaries has a dual mandate. On the one hand the Working Group is to monitor the effects of "private companies offering military assistance" on the "enjoyment of human rights", and on the other hand the Working Group is to "prepare draft international principles that encourage respect for human rights on the part of those companies in their activities".¹⁰⁰ In its 2006 report the Working Group agreed that private military and security companies providing assistance in a transnational context should apply the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights approved by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003.¹⁰¹ The Working Group also agreed to establish a "monitoring and complaint mechanism to address complaints regarding mercenaries" activities'.¹⁰²

The accountability discussion also involves consideration of the possibility of complaints under the US Alien Tort Claims Act. Genocide, slave trading, slavery, forced labour and war crimes have been said by the US courts to be actionable even in the absence of a state nexus.¹⁰³ And the *Kadic v. Kradžić* decision stated that where rape, torture and summary execution are committed in isolation, these crimes "are actionable under the Alien Tort Act, without regard to state action, to the extent they were committed in pursuit of genocide or war crimes".¹⁰⁴ The Supreme Court in the *Sosa v. Alvarez-Machain* case¹⁰⁵ pointed to a

99 See Articles 5 and 8 of the ILC's draft articles on state responsibility, A/Res/56/83, adopted 12 December 2001, discussed in Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 241–4.

100 Commission on Human Rights Resolution 2005/2.

101 UN Doc. E/CN.4/2006/11/Add.1, 3 March 2006, para 28. "In this respect, the members agreed that the normative provisions of the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (E/CN.4/Sub.2/2003/12/Rev.2) of 2003 approved by the Sub-Commission on the Promotion and Protection of Human Rights should apply to private companies in those cases where such companies were operating and providing military and security services in more than one country. The Norms should also apply when private companies operate as a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively."

102 *Ibid.*, p. 2.

103 *Wiwa v. Royal Dutch Shell Petroleum (Shell)*, US District Court for the Southern District of New York, 28 February 2002, p. 39. See also *Doe I v. Unocal Corporation*, 18 September 2002, paras. 3 ff.

104 *Kadic v. Karadžić*, 70 F. 3d 232 (2d Cir., 1995), pp. 243–244.

105 *Sosa v. Alvarez-Machain et al.*, 542 US 692 (2004).

1984 decision of the Court of Appeals for the District of Columbia Circuit that there was “insufficient consensus in 1984 that torture by private actors violates international law”.¹⁰⁶ However, the assumption that the crime of torture is confined to state officials has now been rebutted; as the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has more recently confirmed, there is no need for a public official to be involved in order for a private individual to be responsible under international law for the international crime of torture.¹⁰⁷

As to whether obligations can extend beyond states and individuals to corporations, this has been presumed in the cases pending in the US federal courts,¹⁰⁸ and was examined in some detail in at least one case. The determination in that case was that corporations do have obligations under international human rights law. In the preliminary stages of the case against Talisman Energy Inc., concerning human rights abuses in Sudan, Judge Schwartz concluded:

[S]ubstantial international and United States precedent indicates that corporations may also be held liable under international law, at least for gross human rights violations. Extensive Second Circuit precedent further indicates that actions under the ATCA [Alien Tort Claims Act] against corporate defendants for such substantial violations of international law, including *jus cogens* violations, are the norm rather than the exception.¹⁰⁹

In *Jama v. Esmor*, the Supreme Court’s new test developed in *Sosa v. Alvarez-Machain* was applied by the District Court dealing with claims made by asylum seekers against individual guards and the company for which they worked (Esmor). Senior District Judge Dickenson R. Debevoise quoted the Supreme Court’s new test and found that the individual allegations of sexual harassment and other mistreatment did not meet the rigorous threshold set by the Supreme Court:

A federal court applying the ATCA “should not recognize private claims under federal common law for violations of any international law norm with

106 Referring to *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (CADDC 1984) at footnote 20.

107 “The Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention”. *Prosecutor v. Kunarac, Kovac and Vukovic*, Case IT-96-23 & IT-96-23/1-A, Judgment of the International Criminal Tribunal for the former Yugoslavia (Appeals Chamber), 12 June 2002, para. 148.

108 In addition to the case mentioned in the succeeding footnote, see also the following cases pending under this legislation at the time of writing: *Wiwa v. Royal Dutch Petroleum Co et al.* Case No. 96 CIV 8386 (KMW) (SDNY 2002); *Villeda et al. v. Fresh Del Monte Produce Inc, et al.* Case No 01-CIV-3300 (SD Fla. 2001); *Bowoto et al. v. Chevron et al.* Case No. C99-2506 (ND Cal 2000); *Arias et al. v. DynCorp et al.* Case No 01-01908 (DDC 2001); *John Doe I et al. v. Exxon Mobil Corp et al.*, Case No. 01CV01357 (DDC 2001); *Sinaltrainal et al. v. Coca-Cola et al.* Case No. 01-03208 (SD Fla 2001); *Estate of Rodrigues et al. v. Drummond Company Inc et al.* Case No. CV-02-0665-W (ND Ala 2002). For a detailed discussion of all of the decisions concerning corporations up to July 2004 see Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publishing, Oxford, 2004.

109 *The Presbyterian Church of Sudan et al. v. Talisman Energy Inc, Republic of the Sudan Civil Action 01 CV 9882 (AGS)*, US District Court for the Southern District of New York, p. 47 of the Order of 19 March 2003. We discuss this case and the arguments in detail in Clapham, above note 99, Chapter 6.7.1.

less definite content and acceptance among civilized nations than the historical paradigms when paragraph 1350 was enacted” [*Sosa* at 2765].¹¹⁰ None of the claims against the individual Esmor Guards can meet the rigorous *Sosa* requirements. Compare the conduct in which each individual Esmor Guard is alleged to have engaged with the torture and murder which was the subject of *Filartiga v. Pena-Irala* [630 F.2d 876 (CA 6 1980)].¹¹¹

But the Opinion determines that the Alien Tort case against the corporation Esmor itself could not be dismissed in a summary judgment, and that the *Sosa* strict requirements were satisfied with regard to customary international human rights law, in particular the right not to be subjected to inhuman and degrading treatment. The judge carefully took into account the Supreme Court’s reference to consider whether there might be alternative remedies to an Alien Tort Claim. In the present case, normal routes of complaint were closed off, either because the private corporation was not bound by the Constitutional and public law protections or because the aliens were ineligible to invoke certain remedies.¹¹²

This case represents a clear finding that proceedings may continue under the ATCA against a non-state actor for violations of human rights law. One could easily see the logic being applied to private security companies accused of human rights abuses in other situations.¹¹³

Are there less legalistic approaches that could be envisaged? P.W. Singer has suggested that a “body of international experts, with input from all stakeholders (governments, the academy, nongovernmental organizations, and the firms themselves) could establish the parameters of the issues, build an internationally recognized database of the firms in the industry, and lay out potential forms of regulation, evaluation tools, and codes of conduct that public-decision makers could then weigh and decide upon”.¹¹⁴ Singer foresees that the process would involve audits that would “include subjecting PMF personnel data bases to appraisal for past violations of human rights”.¹¹⁵ In addition, such a body could not only monitor compliance with international norms but also have “certain powers to suspend payments.¹¹⁶ The idea is that an approved and monitored firm could work for the UN and be in a position to win tenders from multinationals “concerned about their image”.¹¹⁷

110 The Court’s reference is to the reported version *Sosa v. Alvarez-Machain* 124 S. Ct. 2739 (2004).

111 *Jama v. Esmor*, Civ. No. 97-3093(DRD), 10 November 2004, p. 33 of the published transcript.

112 In a case concerning a Federal prison run by a private company, the Supreme Court decided that no constitutional tort for cruel and unusual punishments (Eighth Amendment to the US Constitution) could lie against a private corporation, (even though it can lie against individual federal guards where there is no other remedy) *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61 (2001).

113 Complaints remain before the US Courts concerning human rights abuses by contractors in Iraq; see *Salah et al. v. Titan Corp*, 353 F. Supp. 2d 1087 (2004); *Ibrahim et al. v. Titan Corp* 391 F. Supp. 2d 10 (2005).

114 Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, Ithaca, 2003, p. 241.

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*

It may seem strange to consider that the “murky” world of “mercenaryism” could be made accountable through market pressures. But two factors make this approach worthy of serious consideration. First, because these firms may be forced to rely on their contractual arrangements with governments to ensure payment, including respect for human rights and humanitarian law as “essential elements” of any contract would permit governments to withhold payment under certain conditions. The international arbitration under UNCITRAL rules and subsequent litigation concerning Sandline International and the government of Papua New Guinea ended in a settlement for US\$13.3 million. Although this contract did mention “conformance with the Geneva Convention”,¹¹⁸ a properly drafted contract term demanding full respect for international humanitarian law and internationally recognized human rights as well as guarantees regarding careful recruitment and discipline for human rights abuses would provide a real incentive to comply with international human rights law due to the prospect of future disputes and settlements.¹¹⁹ Second, private security firms themselves may be coming to see the advantages of human rights monitoring in order to enter the mainstream and the lucrative possibilities it offers.

Tim Spicer’s autobiography, *An Unorthodox Soldier: Peace and War and the Sandline Affair*, contains multiple references to human rights in its opening chapter. Some of these are worth reproducing here for what they reveal about the way in which respect for human rights is presented as part of the solution from the perspective of a non-state actor:

Given that a PMC [private military company] is a business, it is acknowledged that a fundamental law of successful business is that the supplier is only as good as his last contract. Ethical businesses first build a reputation and then work hard to protect it. If a particular PMC performed badly or unethically, exploited the trust placed in it by a client, changed sides, violated human rights or sought to mount a coup, then the company and its principals would find that their forward order book was decidedly thin. Discarding ethical and moral principles can therefore only be a one time opportunity. The chance will not recur and the company’s prospects would disappear.¹²⁰

One hears here echoes of the corporate social responsibility embrace of human rights. The difference may be that, in the context of armed conflict, the

118 Contract of 31 January 1997, the contract was made available on the Sandline International website: <www.sandline.com/site/> (visited 23 October 2006). It is also reproduced in Singer, above note 114, p. 245.

119 Françoise Hampson has suggested that the agreement between a company and a government should include *inter alia* “the circumstances in which they can open fire in defence of property and /or in defence of life” as well as obligations to cooperate in any investigation into the unlawful use of force. With regard to contracts between security companies and corporations she has suggested that the security company should be required to provide its personnel with training in the relevant domestic law and that it should be stipulated in the contract that security personnel will be subject to the domestic criminal law of the country in which they are operating. “The problem with mercenary activity”, working paper for the UN meeting of the Group of Experts, Geneva 13–17 May 2002, at 3

120 *An Unorthodox Soldier: Peace and War and the Sandline Affair*, Mainstream Publishing, Edinburgh, 1999, pp. 25–6.

abuse of human rights quickly translates into international criminal responsibility for the individuals concerned. There is no need to formulate elaborate arguments about conspiracy and complicity in the present context; the individuals themselves may be accused of the direct commission of international crimes. Many of those concerned are nationals of states parties to the Rome Statute of the International Criminal Court (ICC). Furthermore, several countries with internal armed conflicts have ratified the Rome Statute, including, the Democratic Republic of Congo, Afghanistan and Colombia. The prospect of criminal prosecution before an international tribunal has been registered by Tim Spicer as part of the incentive for private military companies to comply with the Geneva Conventions.

Spicer goes on to suggest field-based monitoring of the behaviour of private military companies (PMCs). He suggests that observer teams be deployed alongside the company; operating “in the same way as a referee at a football match” (but without the power to send players off, a task which should be left to local commanders). In this way “the PMC will be fully cognisant of the fact that their actions are being monitored and will not want to be banned from “playing in another game” in the future, or to find themselves in front of an international tribunal”.¹²¹ The threat of criminal sanctions may well be an effective form of regulation from a human rights perspective. Yet while many will be subject to the potential jurisdiction of the ICC or the prospect of national trials for crimes contained in the Rome Statute, others will fail to come within the scope of any effective criminal law.¹²²

The Abu Ghraib scandal has been addressed in various US official reports. Major-General Taguba’s Investigation recommended that Steven Stephanowicz, a contract US civilian interrogator, from Consolidated Analysis Centers Inc. (CACI), 205th Military Intelligence Brigade, “be given an Official Reprimand to be placed in his employment file, termination of employment, and generation of a derogatory report to revoke his security clearance for the following acts”, which included the fact that he “Allowed and/or instructed MPs, who were not trained in interrogation techniques, to facilitate interrogations by “setting conditions” which were neither authorized and in accordance with applicable regulations/policy. He clearly knew his instructions equated to physical abuse.”¹²³ The Schlesinger Report mentions a finding of inadequate training among 35 per cent of private contractors used for interrogation, and suggests that future contracts should specify the experience and qualifications needed.¹²⁴ From a human rights perspective, the response to the participation in abuse by private contractors has been rather feeble. There is no sense that any of the companies involved will suffer any disadvantage or have any new incentive to tighten their procedures to

121 *Ibid.*, p. 26.

122 See Peter W. Singer, “War, profits, and the Vacuum of Law: Privatized Military Firms and International Law”, *Columbia Journal of Transnational Law*, Vol. 42, 2004, pp. 521–49, pp. 537–8.

123 *Article 15–6 investigation of the 800th Military Police Brigade*, p. 48. Available at <www.globalpolicy.org/security/issues/iraq/attack/law/2004/2004tagubareport.pdf> (visited 23 October 2006).

124 Final Report of the Independent Panel to Review DoD Operations, p. 69. Available at <www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (visited 23 October 2006).

avoid future abuse and exclude those already implicated from any future contact with detainees.

A series of expert reports has argued for new regulation for this sector at the national, regional and international levels.¹²⁵ Part of the concern stems from perceived ambiguities in international law with regard to the status of the personnel:¹²⁶ when can they be considered combatants entitled to prisoner-of-war status on capture? when can they be prosecuted under military law? when does their activity amount to mercenarism? These and other questions concerning state responsibility were tackled in great detail by a group of experts convened by the University Centre for International Humanitarian law (soon Geneva Academy of International Humanitarian law and Human Rights). Space does not permit even a summary of the rich debate, and the reader is referred to the report of the meeting.¹²⁷ The general level of concern stems in part from the fact that so few prosecutions have been brought in home countries (such as the United States) for human rights abuses committed in Iraq,¹²⁸ given that it is impossible for the Iraqi national authorities to prosecute those working for the Coalition. Concern also comes from a more general suspicion that those engaged in armed conflict and interrogation should be democratically accountable in the public sphere.

In considering the impact of human rights law on various regimes for licensing private security companies, one may begin with the regulation of the private security companies by the Coalition Provisional Authority in Iraq. To comply with Iraqi Ministry of Interior vetting standards, employees of private security companies must “Be willing to respect the law and all human rights and freedoms of all Iraqi citizens”.¹²⁹ Note that companies have to submit a minimum refundable bond of \$25,000 and that “any breaches of Iraq or other applicable law by employees or companies may result in forfeiture of the bond”.¹³⁰ Prompt action with respect to “individual violations” is to be taken into account by the ministry

125 See e.g. Caroline Holmqvist, “Private Security Companies: The Case for Regulation”, Stockholm International Peace Research Institute Policy Paper No. 9, Stockholm, 2005; Fred Schreier and Marina Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies”, Geneva Centre for the Democratic Control of Armed Forces Occasional Paper No. 6, Geneva, 2005; Peter W. Singer, “The Private Military Industry and Iraq: What Have We Learned and Where to Next?”, Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2004; James Cockayne, “Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study”, International Peace Academy, New York, 2006; and Simon Chesterman and Chia Lehnardt *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (forthcoming).

126 E.g. Schreier and Caparini, above note 125; Singer, above note 125, pp. 11–14.

127 “Expert Meeting on Private Military Contractors: Status And State Responsibility For Their Actions”, 29–30 August 2005, available at <http://www.ucihl.org/communication/Private_Military_Companies_report.pdf> (last visited 23 October 2006). Readers may also be interested in the “Swiss Initiative in Cooperation with the International Committee of the Red Cross to Promote Respect for International Humanitarian Law and Human Rights Law with regard to Private Military and Security Companies Operating in Conflict Situations” and intergovernmental initiative organized by the Swiss Federal Department of Foreign Affairs; papers are available at <www.dv.admin.ch/psc> (last visited 23 October 2006).

128 Singer, above note 125, p. 13.

129 CPA/MEM/26 June 2004/17, Section 2(6)(b).

130 *Ibid.*, Section 3(3). I am grateful to James Stewart from the legal office of the ICRC for bringing this to my attention.

in determining whether the bond should be forfeited in whole or in part. This arrangement should be seen against the context of the situation in Iraq, where contractors are “immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto”.¹³¹ Although there is obviously a risk that a \$25,000 bond could be written off as an operating cost, this sum represents a minimum and one could imagine larger sums, proportionate to the actual contract, which could be used to compensate the victims of any human rights abuses committed by the company.

A further example is provided by the South African Regulation of Foreign Military Assistance Act, which states that government approval may not be granted if it would “result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered”.¹³² This clause is less about accountability after the fact than about seeking to force into the approval process a consideration of the human rights implications. A poor record on human rights issues would surely render unlikely the approval of any agreement to offer private military services. Operating without approval is a criminal offence which applies not only to natural persons but also to juristic persons, in other words, to the companies themselves.¹³³

The United Kingdom’s Green Paper entitled “Private Military Companies: Options for Regulation”¹³⁴ sets out various regulatory options, ranging from an outright ban, through registration and licensing to a voluntary code of conduct. Human rights obligations figure explicitly in the discussion of a Voluntary Code of Conduct. The Green Paper foresees that such a code would cover respect for human rights, as well as respect for international law including international humanitarian law and the laws of war.¹³⁵ It is suggested that a trade association, such as the British Security Industry Association, would police compliance with the code. It is also suggested that the code would include a provision allowing for external monitoring. For many observers, any regulation in this field must take into consideration international human rights obligations and ensure that the companies themselves abide by these obligations. According to Beyani and Lilley, “The UK Government should ensure that national legislation reflects relevant international human rights and humanitarian law, so UK mercenaries and private military companies do not violate these laws.”¹³⁶ On the other hand Walker and Whyte have suggested that “the relevant doctrines of human rights law and humanitarian law were not designed with private or corporate protagonists in

131 CPA/ORD/27 June 2004/17, Section 4(3).

132 Section 7(1)(b).

133 Section 8(1).

134 HC 577, 12 February 2002. For an overview of the situation in other countries, see Annex B to the Green Paper. Apart from South Africa and the United States regulation is almost entirely limited to outlawing mercenarism. For the United States see the US Arms Export Control Act 1968; licences have to be obtained from the State Department under the International Transfer of Arms Regulations and exports of defence services over \$50m have to be notified to Congress.

135 *Ibid.*, para. 76.

136 Chaloka Beyani and Damian Lilly, *Regulating private military companies: options for the UK Government*, International Alert, London, 2001, para. 61.

mind”.¹³⁷ They go on to conclude that “The opening of legitimate markets to PMCs looks less like a transfer of power from the public and the private sector than the re-regulation of security provision, a shift in the form of regulation from international human rights or humanitarian law to contract and civil law.”¹³⁸

It is, however, the voluntary code model which is currently most influential, the process which, in the field of security for companies in the extractive sector, led to the adoption of the Voluntary Principles on Security and Human Rights. This framework involves representatives from human rights organizations, trade unions, the oil companies and the governments of the United States, the United Kingdom, the Netherlands and Norway.¹³⁹ In normative terms, the Principles are helpful in outlining the international standards with which private security companies are expected to comply, and the human rights obligations for which the extractive industry companies should ensure respect when engaging such private security companies. For instance, the Guidelines state that:

Private security should act in a lawful manner. They should exercise restraint and caution in a manner consistent with applicable international guidelines regarding the local use of force, including the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials, as well as with emerging best practices developed by Companies, civil society, and governments ...

Private security should (a) not employ individuals credibly implicated in human rights abuses to provide security services; (b) use force only when strictly necessary and to an extent proportional to the threat; and (c) not violate the rights of individuals while exercising the right to exercise freedom of association and peaceful assembly, to engage in collective bargaining, or other related rights of Company employees as recognized by the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.

The approach of specifically referring to the UN Basic Principles and Code of Conduct as well as the Universal Declaration of Human Rights has been replicated in the Sarejevo Code of Conduct for Private Security Companies.¹⁴⁰ Such an approach seems to represent an appropriate translation of human rights standards to the private sector.¹⁴¹ With regard to the role of the extractive industry company itself the Guidelines state:

137 C. Walker and D. Whyte, “Contracting out war? Private military companies, law and regulation in the United Kingdom”, vol. 54 *International & Comparative Law Quarterly* (2005) 651–89, at 687 .

138 *Ibid.*, at 689.

139 See <<http://www.voluntaryprinciples.org/>> (visited 23 October 2006).

140 South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC, 2006) Principles 2.6 and 2.7. See also *SALW and Private Security Companies in South Eastern Europe: A Cause or Effect of Insecurity* (SEESAC: 2005) and “The Sarajevo Client Guidelines for the Procurement of Private Security Companies” (SEESAC: 2006).

141 On the concept of human rights “translation” see Craig Scott, “Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms”, Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, Hart Publishing, Oxford, 2001, pp. 45–63.

In cases where physical force is used, private security should properly investigate and report the incident to the Company. Private security should refer the matter to local authorities and/or take disciplinary action where appropriate. Where force is used, medical aid should be provided to injured persons, including to offenders ...

Where appropriate, Companies should include the principles outlined above as contractual provisions in agreements with private security providers and ensure that private security personnel are adequately trained to respect the rights of employees and the local community. To the extent practicable, agreements between Companies and private security should require investigation of unlawful or abusive behavior and appropriate disciplinary action. Agreements should also permit termination of the relationship by Companies where there is credible evidence of unlawful or abusive behavior by private security personnel.

The Principles may be included in contracts in a manner which would render them legally enforceable (under the law governing the contract) and there is some evidence that extraction companies are seeking to give the Principles a place, not only in their training schemes and 'discussions with stakeholders',¹⁴² but also in their contractual relations.¹⁴³

In closing this section we can point to a recent development. The British Association of Private Security Companies announces at the beginning of its website that it "aims to raise the standards of operation of its members and this emergent industry and ensure compliance with the rules and principles of international humanitarian law and human rights standards".¹⁴⁴ The Charter sets out a number of binding principles for members, including the following principle, which requires that members "Decline to provide lethal equipment to governments or private bodies in circumstances where there is a possibility that human rights will be infringed". It will be interesting to see the extent to which this form of self-regulation has an impact on the private military companies sector, and whether those who employ such companies start to inquire as to whether companies are members of such associations. There will be considerable interest in whether these associations successfully police and punish those members that transgress the rules. For our purposes the key point is that it is the normative framework of human rights that has caught the imagination of those concerned and surprised those who see such promises as "un-mercenary".¹⁴⁵

Final remarks

This paper has argued that non-state actors such as armed opposition groups and private security companies have human rights obligations. Other non-state actors

142 Christine Batruch, "Oil and conflict: Lundin Petroleum's experience in Sudan", in Alyson J. K. Bailes and Isabel Frommelt (eds.), *Business and Security: Public-Private Sector Relationships in a New Security Environment*, Oxford University Press, Oxford, 2004, pp. 148–60, pp. 154–5.

143 See, e.g., BP's *Sustainability Report*, 2003, p. 32.

144 <<http://www.bapsc.org.uk/default.asp>> (visited 29 August 2006).

145 *The Economist*, "Private military companies: Who dares profits", 20 May 2006, p. 38.

(that we have not been able to examine here) are present in times of armed conflict and have their own human rights obligations.¹⁴⁶ We should briefly mention international organizations and their associated peacekeeping operations as well as companies outside the security sector. It is becoming increasingly obvious to those interested in ameliorating the suffering which accompanies conflicts that the lawyers need to adjust their field of vision to encompass the human rights obligations of non-state actors. As pointed out above this has already happened in the context of specific reports on Guatemala, Sierra Leone, Sri Lanka, Lebanon and Nepal.

We have to be aware that the political obstacles to a general shift in thinking are considerable: governments will accuse the humanitarians of bestowing legitimacy on their enemies and threaten to withdraw co-operation. But this challenge has been overcome with humanitarian law. No one should be accused of backing terrorists by accusing them of violating Common Article 3 to the Geneva Conventions. It is time to do the same with regard to human rights law. Once we rid ourselves of the assumption that human rights only cover the relationship between individuals and governments there is no danger that accusing an armed group of human rights violations lends it automatic legitimacy or quasi-governmental status. If we fail to address our human rights concerns to these non-state actors we fail the victims of the abuses. It is time to feel comfortable talking about the human rights obligations of non-state actors.

146 See Clapham, above note 99, chs. 4 (UN), 5 (EU and WTO), 6 (corporations) and 7 (humanitarian organizations).