Introduction

This study examines the international accountability for acts committed by armed opposition groups during internal armed conflict. It aims to contribute to the improvement of the protection of civilian populations from abuses committed by these groups.

Armed opposition groups, as defined in this study, operate in internal armed conflict. These groups generally fight against the government in power, in an effort to overthrow the existing government, or alternatively to bring about a secession so as to set up a new state. The objectives of these groups may also include the achievement of greater autonomy within the state concerned. In other situations, where the existing government has collapsed or is unable to intervene, armed groups fight among themselves in pursuit of political power.

The degree of organization of armed opposition groups, their size, and the extent to which they exercise effective authority vary from one situation to the next. At one extreme, such groups resemble de facto governments, with control over territory and population. At the other extreme, they are militarily and politically inferior to the established government, exercising no direct control over territory and operating only sporadically. Some armed groups operate under clear lines of command and control; others are loosely organized and various units are not under effective central command.

Today, the majority of armed conflicts are internal, as opposed to international. In its 1998 Yearbook, the Stockholm International Peace Research Institute reported that of the twenty-five major armed conflicts that were waged in 1997 all but one were internal.[1] During mid-1997 to

[1] The Stockholm International Peace Research Institute (SIPRI), *SIPRI Yearbook 1998: Armaments, Disarmament and International Security*, (Oxford University Press, Oxford, 1998), cited in A. McDonald, 'The Year in Review' (1998) 1 *YIHL* 113, 121.

mid-1998 alone, there were fourteen internal conflicts, in each of which more than 1,000 people were killed, and which have, cumulatively, led to approximately 5 million deaths[2] since the conflicts first broke out, which, in some cases, was many years ago.

While in many cases the government is responsible for the greatest number of deaths, surveys of Amnesty International and Human Rights Watch show that armed opposition groups have also created many victims, primarily civilians. This is even clearer in conflicts where the government has collapsed, as occurred, for example, in Somalia in 1991, and in Afghanistan in 1992.

Neither the Charter of the United Nations, nor any other rule of international law, prohibits the use of force by armed opposition groups within a state. The mere fact of starting or engaging in an internal armed conflict does not entail the responsibility of the armed groups concerned. International law does, however, contain rules on the prevention, regulation, and punishment of violence committed by these groups against civilians. The applicable law is commonly divided into three specialized fields of international law: international humanitarian law, international criminal law and international human rights law.

Prior to 1949, in certain circumstances, customary *humanitarian* law applicable to international conflicts was also applied to large-scale internal conflicts. Armed opposition groups were then equated with governments. Such recognition of belligerent status has been very infrequent, however. The reason is that the criteria for applicability of the humanitarian rules were high. The armed opposition groups had to control and govern a substantial part of the state territory and engage in a widespread armed conflict. Even then, in practice, the consent of the government of the state against which they were fighting was required for the humanitarian rules to be applied. Also today, there are few situations to which these criteria apply. The adoption, in 1949, of Article 3 common to the four Geneva Conventions was meant to change the legal situation in internal conflicts. While recognition of belligerency was also concerned with the interests of third states (the wish to protect their property and economic relations in territory controlled by armed opposition groups) and their right to intervene in the armed conflict on behalf of one side or the other, the Geneva Conventions placed greater emphasis on the interests of humanity.

[2] So-called 'high intensity conflicts', conflict level 5 on the PIOOM scale, PIOOM (Interdisciplinary Research Program on Causes of Human Rights Violations) *World Conflict and Human Rights Map* (Leiden University, The Netherlands, 1998).

International law has a legitimate and increasing interest in armed opposition groups but is inadequate to this task. The aim of this study is to deal with a major question which arises in all internal armed conflicts and which has not been addressed before: Who is accountable under international law for the acts committed by armed opposition groups or for the failure to prevent or repress these acts?

The problem of accountability is that, in order to have effective enforcement of international law relevant to the acts of armed opposition groups, we should be able, so to speak, to climb up a chain of command, so as to reach to the top. It is easily seen how this is done on the government side, i.e. in traditional international law. Then there are three levels of accountability. At the first and lowest level, individuals who actually committed the crime can be held accountable. At the second level, superiors are potentially accountable on the basis of the principle of command responsibility. At the third level, the state itself may be accountable, in that it is responsible for acts committed by its agents. My concern is to discuss the extent to which there is – or can be – a parallel chain of accountability on the insurgent side which is a counterpart to the one just outlined, applicable to the government side. The first question then is whether members and leaders of armed opposition groups can be held criminally accountable for violations of international law. The second level of accountability would be the accountability of the armed opposition groups as such. A final possibility is to make the state accountable in certain cases for acts committed on its territory by armed opposition groups.

This study thus assumes the perspective of the *subjects* of the law relevant to the conduct of armed opposition groups in internal armed conflict. In doing so, it deviates from the common approach to internal conflicts focusing on the rights of victims. So far, the victim-oriented approach has not provided satisfactory answers to the problem of the protection of civilians from armed opposition groups. It has been established that civilians caught up in internal conflicts have fundamental rights and that these rights are apt to be abused by armed opposition groups. However, it remains unclear in relation to whom these rights apply, or, formulated differently, who is obliged to respect or ensure respect of these rights.

The term 'armed opposition groups' is preferred to other expressions such as 'rebels' or 'terrorists', as the former expression has the merit of being less emotive. The word 'group' points to a collectivity, being more than the sum of its members. While the word 'opposition'

refers primarily to the conflict against the established government, it is proposed to use the same term even when the government does not participate in the hostilities, i.e. when armed opposition groups are fighting among themselves.

This study will evaluate the law relevant to armed opposition groups as applied and developed by *international bodies*. International bodies play an important role in the application and development of the law on armed groups. Various international bodies (international courts and tribunals and other bodies whose creation is related to specific treaties or the UN Charter) have been and are being confronted with abuses by armed opposition groups and, in response, have dynamically interpreted and developed the relevant law. In doing so, these bodies have exercised considerable influence on international treaty and customary law. Although Article 38 of the Statute of the International Court of Justice does not mention the practice of international bodies as a separate source of law, the practice of these bodies can provide decisive evidence of the law.

The focus on international bodies as important initiators of the development of the law relevant to armed groups implies that this study does not search for detailed rules relevant to the conduct of armed opposition groups. Such rules actually exist only to a limited extent. Applicable treaties contain only general norms rarely dealing in so many words with the acts of armed opposition groups. Relevant customary law is undeveloped and still in a state of development. A better approach is to identify trends in decision making in international law in the light of treaty and customary law which are relevant to the acts of these groups.

Fifteen internal armed conflicts serve as frame of reference throughout this study. The selection of these conflicts is based on the fact that they have been qualified as internal armed conflicts in terms of international humanitarian law, either by one or more international bodies, or by (specialized) non-governmental organizations, or authoritative commentators.

These conflicts are: the conflict in Afghanistan (1978–present); Algeria (1992–present); Cambodia (1980–present); Chechnya, Russian Federation (1994–96, and 1999–present); Colombia (1964–present); El Salvador (1981–92); Lebanon (1975–90); Nicaragua (1978–79 and 1981–90); Rwanda (1990–94); Somalia (1991–present); Sri Lanka (1983–present); Sudan (1983–present); Turkey (1983–present); Northern Ireland, United Kingdom (1969–present); and finally, the internal aspects of the conflict in the former Yugoslavia (1991–95), including the conflict in Kosovo, Federal Republic of Yugoslavia (1998–99).

The conflicts selected provide sufficient geographical coverage and diversity as regards their intensity and duration. In addition, together the chosen conflicts cover a wide period of time, namely from 1964 until the present. These conditions allow me to draw conclusions that are relevant for each of the conflicts or categories of conflicts examined, notwithstanding the fact that substantial differences exist between them, and between different periods within one conflict. It also allows me to comment on the law relevant to other internal conflicts not covered in detail by this study.

Accountability is an overarching term, which covers both the substantive obligations of the relevant actors and their responsibility for breaches of these obligations. The applicable substantive rules and the rules on responsibility operate as a coherent body of law. The standard for accountability of the leaders of armed opposition groups, armed opposition groups themselves, and the territorial state has thus to be found in the applicable substantive law and in the rules that render their responsibility operational. Accordingly this book is divided into two parts. Part 1 analyses the substantive law applicable to armed opposition groups as such. Part 2 addresses the problem of accountability. Successively, the accountability of leaders of armed opposition groups, armed opposition groups themselves, and the accountability of the territorial state will be addressed.

PART 1 · THE NORMATIVE GAP

1 Legal restraints on armed opposition groups as such

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

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

Common Article 3 and Protocol II

Treaty law

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

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

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

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

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

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

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

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

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

The UN Security Council and the UN Commission on Human Rights, in the context of various internal conflicts, have frequently called upon all parties to the hostilities, namely the government armed forces and armed opposition groups – to respect fully the applicable provisions of international humanitarian law, including Common Article 3.[5]

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

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

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

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

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

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

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

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

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

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

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

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

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

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