Non-state armed groups under international law
Some legal aspects of engaging with non-state armed groups

LL.M. Thesis in International Law, 20 credits
(Examensarbete med praktik 20 p)
Author: Hannes Berts
Supervised by: Professor Iain Cameron
Spring 2005
# Table of Contents

Abbreviations .................................................................................................................................. 4

1 Introductory notes ....................................................................................................................... 6
  1.1 Introduction ............................................................................................................................. 6
  1.2 Identifying the problem .......................................................................................................... 7
  1.3 Purpose and scope .................................................................................................................. 9
  1.4 Structure and method ............................................................................................................ 10

PART I – The international legal framework relating to non-state armed groups ............................................. 11

2 The international legal framework binding non-state armed groups .............................................. 11
  2.1 The concept of recognition .................................................................................................... 11
    2.1.1 Recognition of states and governments and the concept of statehood .................. 12
    2.1.2 Recognition of belligerency ....................................................................................... 14
  2.2 International humanitarian law in internal conflicts and human rights law ....................... 17
    2.1.2 International humanitarian law relating to internal conflicts .................................. 17
      i) The 1949 Geneva Conventions .................................................................................... 18
      ii) The 1977 Protocol II additional to the 1949 Geneva Conventions ......................... 19
    2.2.1 International human rights law .................................................................................. 21
  2.3 International criminal law ...................................................................................................... 24
  2.4 The UN Security Council and non-state groups ..................................................................... 26
  2.5 Articles on State Responsibility ......................................................................................... 28
  2.6 Summary ............................................................................................................................... 31

3 The status of non-state armed groups under international law ....................................................... 32
  3.1 International legal personality .............................................................................................. 33
    3.1.1 Determination of international legal personality ....................................................... 34
    3.1.2 Treaty-making capacity of non-state armed groups ................................................... 35
  3.2 State sovereignty and challengers of governmental authority ............................................ 36
    3.2.1 Democratic entitlement as a human right ................................................................... 37
    3.2.2 Rereading sovereignty ............................................................................................... 42
    3.2.3 A defence of the moderate view on state sovereignty .............................................. 43
  3.3 Summary ............................................................................................................................... 44

PART II – Engaging with armed groups in practice ............................................................................. 46

4 Engaging with armed groups – a legal perspective ....................................................................... 46
  4.1 Armed groups as de facto governments ................................................................................. 47
    4.1.1 Protection of foreign nationals and international security .......................................... 48
    4.1.2 Protection of human rights and humanitarian principles ........................................... 50
  4.2 Military entities active in combat .......................................................................................... 52
    4.2.1 Extending application of IHL ..................................................................................... 53
    4.2.2 International reactions to violations of IHL ................................................................. 54
  4.3 Armed groups as political entities key to peaceful solution .................................................. 56
    4.3.1 International recognition of group status ................................................................. 57
    4.3.2 The status of peace agreements ................................................................................. 59
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and Peoples Rights</td>
</tr>
<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
</tr>
<tr>
<td>ASR</td>
<td>Articles on State Responsibility</td>
</tr>
<tr>
<td>AYIL</td>
<td>American Yearbook of International Law</td>
</tr>
<tr>
<td>BYIL</td>
<td>British Yearbook of International Law</td>
</tr>
<tr>
<td>Doc.</td>
<td>Document</td>
</tr>
<tr>
<td>ed./eds.</td>
<td>editor/editors</td>
</tr>
<tr>
<td>e.g.</td>
<td>exempli gratia; for example</td>
</tr>
<tr>
<td>EJIL</td>
<td>European Journal of International Law</td>
</tr>
<tr>
<td>EPIL</td>
<td>Encyclopaedia of Public International Law</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>et al</td>
<td>et alii; and others</td>
</tr>
<tr>
<td>GA</td>
<td>United Nations General Assembly</td>
</tr>
<tr>
<td>Ibid</td>
<td>ibidem; in the same place (as the previous footnote)</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
</tr>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal For Rwanda</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for former Yugoslavia</td>
</tr>
</tbody>
</table>
\textit{i.e.} \textit{id est}; that is

- **ILM**: International Legal Material
- **ILR**: International Law Reports
- **LNTS**: League of Nations Treaty Series
- **NJIL**: Nordic Journal of International Law
- **p./pp.**: page/pages
- **para./paras.**: paragraph/paragraphs
- **Rep.**: Report(s)
- **Res.**: Resolutions(s)
- **SC**: United Nations Security Council
- **Suppl.**: Supplement
- **UN**: United Nations
- **UNC**: Charter of the United Nations
- **UNCIO**: United Nations Conference on International Organization
- **UNTS**: United Nations Treaty Series
- **US**: United States of America
- **YBILC**: Yearbook of the International Law Commission
- **vol.**: volume(s)
1 Introductory notes

1.1 Introduction
Armed conflicts affect millions of people around the world and many of these conflicts involve non-state armed groups. Conflicts are often characterized by non-state armed groups fighting governments or other armed groups for power over territory or control of government institutions. In fact, a majority of contemporary armed conflicts are internal in nature, i.e. are fought within the borders of one single state.\(^1\) Understanding armed groups and the way in which they operate and behave is crucial for achieving peaceful settlement of internal disputes and reconciliation in many war-torn societies.

International law and the laws of war were not originally designed to deal with matters occurring within states, but rather to regulate the interaction between state entities.\(^2\) As the reality of international politics is changing, it is appropriate to evaluate the relevance of the international legal order. Is the present international legal system sufficient to deal with the challenges of non-state armed groups? Is it even relevant for practitioners involved in negotiations or other interactions with armed groups? Theoretically inclined international lawyers often have a rather dogmatic approach to international law based on principles and doctrines. Practitioners on the other hand take a more pragmatic view, focusing on the functionality and the practicality of rules in each given situation. Can these views be combined and would such a combination facilitate the efforts to reach peaceful solutions to internal conflicts and reconciliation in the wake of civil wars?

---


1.2 Identifying the problem
Non-state armed groups, for the purposes of this thesis, are non-state entities involved in internal armed conflicts. These groups may fight the established government of a state or other non-state groups and their political motives vary from one situation to another. Armed groups may or may not be in effective control over territory and the internal dynamics of different groups range from strictly hierarchically structured entities to loosely organized networks. What they have in common is the use of military force to reach political objectives, whatever these might be, and they are of sufficient strength to be their own authority outside the authority of any state.\(^3\)

Public international law, in its traditional sense, is the framework of legal rules governing the relationship between sovereign states and thus, the primary actors of international law are states.\(^4\) During the second half of the 20\(^{th}\) century, however, the reality of international relations has changed drastically. Commercial globalisation and the increased focus on individual rights in international politics have led to the emergence of new important actors on the international arena\(^5\) and the nature of war has been altered. Of the 116 conflicts in 78 countries recorded between 1989-2003, only seven were international in character.\(^6\) Thus, 109 conflicts, or close to 95% of the conflicts since the end of the cold war were fought inside the borders of one state, between one state party and a non-state entity or between different non-state groups.

The fact that wars to an increasing degree are fought by and against actors without apparent ties to states and government authority has led to increased relevance for questions relating to the international legal status and responsibility of armed non-state actors. Negotiations over claims of territory, the safe entry and access of humanitarian aid and efforts to enforce respect for human rights

---

\(^3\) The importance of a clear definition for legal purposes is discussed in Chapter 6.1 of this paper.


\(^5\) For a more comprehensive analysis of the emergence of new authorities on the international arena, see *inter alia*: Hall, R. B. and Biersteker, T. J. The Emergence of Private Authority in Global Governance, Cambridge (2002); and Lindblom, A-K, The Legal Status of non-governmental organisations in international law, Uppsala, 2001.

\(^6\) Eriksson / Wallensteen, *supra*, at p. 625.
norms are some examples of situations in which states and other international actors need to engage with armed groups. Yet there is no uniform set of rules on how interaction with these groups is to be conducted or on what legal status the groups have. This means that the manner in which these interactions take place is determined by political considerations often based on the strength of the group in question in relation to the state in which it operates. In the long run this situation runs a risk of undermining respect for, and the feeling of legitimacy of, the international legal order.

It has further proved difficult to get non-state groups to adhere to international norms relating to the conduct of hostilities, protection of human rights in territories under their control, and to admit the safe passage of humanitarian assistance etc.\(^7\) The issue is not, however, so simple that a remedy could be sought in increasing the volume of rules relating to armed groups and the efficacy of the enforcement mechanisms available to influence the behaviour of the groups. The roots of many of the difficulties involved in relating to non-state armed groups are inherent in the nature of internal conflict and the state-centric international system. Armed groups often find themselves fighting an enemy of many times its own strength and being treated as mere criminals rather than a serious contender for authority. States on their part are often reluctant to admit to the existence of armed groups on their territory and even more adverse towards granting any status to groups challenging their authority.

Contemporary international law shows considerable ambition to meddle in what has classically been considered matters “essentially within the domestic

---

\(^7\) See Policzer, P., *Human Rights and Armed Groups: Toward a New Policy Architecture*, July 2002, available at: [wwwarmedgroups.org](http://wwwarmedgroups.org), as of 25 February 2005, at p. 2: “[s]ome of the most serious human rights violations today are not committed by states but by non-state armed groups.” This is not to say that states always abide by these rules or that it is any easier to influence their behaviour in this respect. The international legal framework relating to such efforts is much more advanced, however, and there are considerably easier to establish and maintain diplomatic relations with states than non-state entities; see e.g. Policzer, 2002, *supra*, at p. 3; Bruderlein, C., *The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars*, Geneva: Center for Humanitarian Dialogue, 2000, as available at: [www.hdcentre.org](http://www.hdcentre.org), as of 25 February 2005, p. 6. The extent to which international norms bind non-state entities and the means by which armed groups can adhere to these norms will be discussed further in chapter 2 of this thesis.
jurisdiction” of states. As we shall see however, it is not clear how far this development has gone. It is in this context that the present thesis finds its relevance.

1.3 Purpose and scope
The present thesis aims at presenting an overview of the framework of public international law relating to internal conflicts and non-state armed groups. It further aims to provide an analysis of the efficacy of the international framework from a theoretical as well as a practical outlook. Problems identified by practitioners in the field of engaging with non-state groups have are analyzed from a legal perspective. It is furthermore the aspiration of the author to provide constructive thoughts on the future development of international instruments and practices in the field of internal conflicts and interaction with non-state groups.

The scope of the topic of the present thesis is immense. As the aim of the thesis is to paint a picture of the landscape of applicable rules and examine the efficacy of the system as a whole, I have chosen to include as many aspects as possible, sometimes at the cost of depth of analysis. However, I hope that the reader will appreciate the width of the thesis and the discussion in the concluding chapters.

Nevertheless, it has been necessary to limit the scope of the paper. I have therefore chosen to focus on armed groups involved in active armed conflicts with governments or other armed groups. With the exception of a short introduction to the concept of statehood and recognition in Chapter 2.1, issues concerning recognition of new states and governments and their international status have therefore been left aside, as have issues regarding succession. Another issue ending up outside of the scope of the paper is that of humanitarian intervention, or the

---

8 See e.g. discussion in Chapter 2.3 and 2.4 of this paper; see also language in article 2(7) of the Charter of the United Nations, UNCTO XV 335 (hereinafter cited as Charter of the United Nations or UNC).
9 Recognition of states and governments generally will be briefly touched upon in the context of theories on recognition of insurgency and belligerency, but the subject as such will not be dealt with separately.
responsibility to protect. All questions relating to armed intervention by foreign states have been left out. Instead I have focused on the more general principle of non-intervention and its relevance for interactions with non-state groups.

1.4 Structure and method
Following this introductory chapter, the thesis is divided into three parts. Part I, containing chapters two and three will provide the legal framework concerning the status of non-state armed groups in international law. In part II, divided into chapters four and five, I will discuss the various ways in which the legal rules identified can be and are used in engaging with armed groups. Finally in Part III, containing chapter six and seven, I will point to ways forward and summarise my conclusions.

In researching the area of international law relating to internal armed conflict and non-state armed groups I have consulted primary sources, such as international conventions, official documents from the legislative history of such conventions, official documents of governments and international organizations and case law from international courts and tribunals. Since the topic is one that, to a large extent, has evolved through developments in the practice of states, I have had to rely on the compilation of material and analysis of other scholars. The material written on some aspects of the topic of relevance to the thesis is very comprehensive. I have therefore had to choose sources selectively. The writers on whom I rely have been chosen primarily on my view of the merits of their arguments.

PART I – The international legal framework relating to non-state armed groups

2 The international legal framework binding non-state armed groups

A number of international legal regimes are relevant to the study of non-state armed groups and in this chapter an overview of these regimes will be given. The purpose is to establish under which international regimes armed groups operate, to better understand the mechanisms governing their behaviour and the potential impact of international norm setting in this field. The overview starts with the concept of recognition in traditional and contemporary international legal theory in Chapter 2.1. It then goes on to discuss the framework of international humanitarian law (IHL) relating to internal conflicts and international human rights law in Chapter 2.2; the development of international criminal law in Chapter 2.3; the UN sanctions regime in Chapter 2.4 and some aspects of the law on state responsibility in Chapter 2.5. In Chapter 2.6 the conclusions of the survey of the international legal framework relating to non-state armed groups are summarized.

2.1 The concept of recognition

In researching the legal framework surrounding non-state armed groups and their potential status under international law, the first thing to come to the surface is the traditional theory on recognition of insurgency and belligerence status in situations of internal armed conflict. Even though the actual practice of recognition of belligerency has been nonexistent for half a century the theories can serve as a useful “conceptual framework for analyzing the dilemmas that internal armed conflicts poses for the international community.” The theory of recognition of belligerency is also closely related to that of recognition of states and governments. Since the present thesis evolves around the relationship between

armed groups and states I have also found it relevant to briefly introduce the concept of statehood. For these reasons it is my intention to give a brief presentation of the concept statehood and that of recognition, in relation to states as well as non-state groups, and its position in contemporary international law.

2.1.1 Recognition of states and governments and the concept of statehood

The legal implications of recognition or non-recognition of states has been a matter of debate. The better and most widely accepted view appears to be that recognition of a state is merely declaratory in character. This means that recognition of one state by another should be seen as an indication that the latter considers the international law requirements of statehood are met.

Article 1 of the Montevideo Convention on Rights and Duties of States from 1933 lays down four requisites for statehood:

“The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States.”

The convention was adopted at the 7th International Conference of American States and its direct application is thus geographically limited. However, it is commonly accepted that these requirements of statehood have been established as a part of customary international law. The rules on statehood do not take any other factors, such as respect for human rights or democratic principles under consideration. Even a government, which is not recognized as legal by other states, has the ability to conclude legally binding agreements on behalf of its

14 Harris, supra, p. 102.
15 The United States and fifteen Latin American states are parties.
16 Harris, supra, p. 102.
As Harris notes however, there are some evidence to suggest that new requirements of independence achieved i) in accordance with the principles of self-determination regarding *inter alia* situations of liberation from colonial rule and ii) not in pursuance of racist policies. The relevance of these new requirements would be limited to recognition of newly established states or recognition of new governments.

Recognition of new governments of existing states should not be confused with recognition of states. A state does not cease to exist or lose its status as a state merely because one government is replaced with another or even when, for a shorter period of time, there is no internationally recognized government at all. The conclusion to be drawn from the literature on the matter is that recognition of governments is also merely declaratory in nature:

“As with recognition of new states, so also with recognition of governments the decision is not one determined solely by political considerations on the part of the recognising state. A government which is in fact in control of the country and which enjoys the habitual obedience of the bulk of the population with a reasonable expectancy of permanence, can be said to represent the state in question and as such to be deserving of recognition.”

A potentially serious consequence, however, of widespread non-recognition of a new government of a state is that the unrecognized government will not be able

---

17 The *Tinoco Claims Arbitration* (Great Britain vs. Costa Rica), (1923) RIAA I, 369, at p. 375, as quoted in Lysén, *supra*, p. 42.
18 SC Res. 211 (1966). Following the declaration of independence of Southern Rhodesia in 1965, an attempt by a white minority group to stay in control of the country after a long period of colonial (British) rule, the Security Council called upon all states not to recognise the independence of Southern Rhodesia and its “racist minority regime”, as cited in Harris, *supra*, p. 111; see also the case of *Transkei* in footnote 19 below.
19 *Ibid*; see also GA Res. 31/6 (1976), G.A.O.R., 31st session, supp. 39, p. 10. The Genera Assembly disqualified South Africa’s establishment of independent the Bantustan *Trensei* for indigenous South Africans as “designed to consolidate the inhumane policies of apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights.” The GA therefore called upon all nations not to recognise the independence of *Transkei*. The resolution was adopted 134 to 0 with one abstention (USA), see Harris, *supra*, pp. 110-111.
20 As with the cases of *Southern Rhodesia* and *Transkei* referred to in footnotes 18 and 19 above.
22 Jennings and Watts, *supra*, § 45.
to interact officially with states refusing to recognize it. As regard recognition of governments the additional requirements referred to above are even more pertinent. Even though state practice shows recognition of governments based on effective control and “habitual obedience”\(^2\), debate on the legitimacy of revolutionary governments and requirements of popular support for new governments is not a new occurrence.\(^2\)

### 2.1.2 Recognition of belligerency

Under traditional international law, the laws of war are brought into play by international recognition of a state of civil war; a recognition of the non-state party of the conflict as belligerents. The traditional rule of recognition of belligerency, as developed by custom, contains a requirement that there is a conflict in which a recognized, lawful government fights insurgents on its territory, as well as a qualitative requirement regarding the character of the insurgents involved in the conflict. The armed opposition group must be under a responsible and “organized command, which actually control and administer a sizeable portion of the territory”\(^2\) of the state. Further the hostilities must be carried out in accordance with the laws of war. A third requirement for recognition of belligerency is that recognizing states must be “compelled to determine their attitude towards the conflict in question.”\(^2\) This means that the rule does not contain an obligation to recognize the belligerence status of an insurgent group once the objective criteria are met. On the contrary, a state is not able to do so until the subjective requirement of being “compelled to determine its attitude” is met.\(^2\)

---

\(^2\) Ibid, at § 45.  
\(^2\) A comparison between the some 120 democratic states in the world with the 191 member states of the United Nations (http://www.un.org/Overview/unmember.html, after update on the 24 Feb 2005) shows the acceptance by the international community of at least 70 undemocratic states. For a relevant criticism of the concept of “habitual obedience”, see D’Amato, A., The Invasion of Panama was a Lawful Response to Tyranny, AJIL 84 (1990), pp. 516-524.  
\(^2\) See e.g. the contrasting Tobar- and Estrade Doctrines in Central America in the first half of 20\(^\text{th}\) century. Further, the revolutionary government of China, after the revolution in 1949, did not receive international recognition and UN membership until 1971; see Jennings and Watts, supra, § 44-45.  
\(^2\) Riedel, supra, at p. 47.  
\(^2\) Ibid at p. 47. The entire paragraph is based on Riedel’s definition of “belligerency” in EPIL. See also Sir Hirch Lauterpacht, Recognition in International Law, Cambridge, 1947, p. 176, as cited in Roth, supra, p. 178.  
\(^2\) Riedel, supra, at p. 47.
Roth identifies three categories of internal armed conflict, with varying legal implications, under traditional international law: rebellion, insurgency and belligerency.\(^{29}\) Rebellion is defined as an internal armed conflict not reaching the level of intensity necessary for the international community to have to react at all, and not necessarily posing a real threat to the authority of the existing government.\(^{30}\) Insurgency is identified as the middle stage of armed conflict occurring when the group violently challenging the government in a state has gained control over certain territory and is organized in such a manner as to be able to carry out hostilities with respect for international standards relating to warfare.\(^{31}\) Recognition of insurgency does not alter the status of any of the parties to the conflict, nor does it provide for any right to diverge from the principle of non-intervention.\(^{32}\) Roth further points out that states nowadays recognize insurgency “individually rather than collectively, implicitly by their conduct rather than expressly by declaration, on an ad hoc basis rather than in accordance with articulated principles, and as a matter of convenience rather than as of perceived duty.”\(^{33}\)

As regards recognition of belligerency status, the requirements are laid out above. In contrast to recognition of insurgency, such recognition does affect the relationship between the non-state group and the state significantly and it brings the laws of war into operation. Recognition of belligerency imposes an obligation of neutrality on the international community. “Non-intervention norms, which, […] traditionally operate only in favor of the established government, upon such recognition operate in favor of the armed opposition as well.”\(^{34}\) Another implication on the other hand, in most imaginable cases favourable to the state, is that once insurgents are recognized as belligerents the responsibility of the govern-

\(^{29}\) Roth, supra, p. 173

\(^{30}\) Ibid, p. 173. Compare with limitations of applicability in Protocol II additional to the Geneva Conventions in article 1(2).

\(^{31}\) Ibid, pp.173-177. It can be argued that the threshold for application contained in article 1 of the 1977 Protocol II additional to the 1949 Geneva Conventions contain the same criteria as the classical rule of recognition of insurgency.

\(^{32}\) On the principle of non-intervention, see e.g. GA Res. 2625 (XXV) 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, (hereinafter cited as the Friendly Relations Declaration), article 2(7).

\(^{33}\) Roth, supra, p. 175.

\(^{34}\) Ibid, p. 177.
ment for acts committed on parts its territory under the control of the armed opposition, turns into a duty to observe due diligence.\textsuperscript{35}

One of the main rationales behind granting belligerency status to insurgents has been to gain applicability of the laws of war.\textsuperscript{36} As indicated above, however, express recognition of belligerency in state practice is virtually non-existent and has been for a long time: “Recognition of belligerency has not […] been given since the American Civil War and there must be serious doubts whether the notion has not fallen into desuetude.”\textsuperscript{37} The “belligerency theory” has gradually been replaced with an approach relying on purely objective criteria.\textsuperscript{38} The origins of this development dates back to the Hague Convention IV of 1907\textsuperscript{39} and its preambular Martens’ clause\textsuperscript{40} reaffirming the customary law guaranteeing minimum humanitarian standards in all conflicts. The idea was further developed through the adoption of the 1949 Geneva Conventions\textsuperscript{41} and their common article 3, and subsequently the 1977 Protocol II\textsuperscript{42} additional to the Geneva Conventions.\textsuperscript{43}

Related to the issue of recognition of belligerency is that of national liberation movements (NLM). Recognition of NLMs rests on the idea of the right of peoples to self-determination, as encompassed in the Charter of the United Nations

\begin{flushright}
\textsuperscript{35} Riedel, supra, at p. 47; on due diligence in general, see Corfu Channel Case (Unite Kingdom v. Albania) Merits, ICJ Rep. 1949 p. 4.
\textsuperscript{36} Riedel, supra, at p. 47
\textsuperscript{38} Riedel, supra, at p. 49.
\textsuperscript{39} The 1907 Hague Convention Respecting the Laws and Customs of War on Land, 2 AJIL Supp. 90. (Hereinafter cited as: 1907 Hague Convention IV).
\textsuperscript{40} “[I]n cases not included in the Regulations […] the inhabitants and the belligerents remain under the protection of the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience”, Preamble of the 1907 Hague Convention IV, as cited in Riedel, supra, at p. 49.
\textsuperscript{41} 1949 Geneva Convention (I) for the Amelioration of the Condition for the Wounded and Sick in Armed Forces in the Field, UNTS vol. 75, p. 31 (hereinafter cited as: Geneva Convention I); 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, UNTS vol. 75, p. 85 (hereinafter cited as: Geneva Convention II); 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War, UNTS vol. 75, p. 137 (hereinafter cited as: Geneva Convention III); 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, UNTS vol. 75, p. 287 (hereinafter cited as: Geneva Convention IV).
\textsuperscript{42} 1977 Protocol II Additional to Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 609 (hereinafter cited as Protocol II).
\textsuperscript{43} These instruments and their implications as regards non-state armed groups and internal conflicts will be discussed in further detail in Chapter 2.2 of this paper.
\end{flushright}
(UN Charter or UNC), and the practice has roots reaching back to the period of decolonization following the Second World War.\textsuperscript{44} The rational for acceptance of such status under international law differs from that of recognition of “regular” belligerence in that the primary focus is put on the legitimacy of the group in question and its aims, rather than on its actual ability to challenge the established government’s claim of effective control.\textsuperscript{45} The issue of legitimacy as a basis for international status of a group will be discussed further in a broader context in Chapter 6.1.

### 2.2 International humanitarian law in internal conflicts and human rights law

#### 2.1.2 International humanitarian law relating to internal conflicts

One of the main bodies of law relating to the conduct of armed groups is the framework of international humanitarian law (IHL), regulating the behaviour of the warring parties in armed conflicts. IHL is a vast body of law and it has been developed through conventions and in custom over centuries. The first international treaty of contemporary IHL is the 1864 Geneva Convention\textsuperscript{46} relating to the treatment of wounded on the battlefield. This was followed by a number of general conventions on the conduct of warfare in the late 19\textsuperscript{th} and early 20\textsuperscript{th} century\textsuperscript{47} and a protocol prohibiting the use of poisonous gas\textsuperscript{48} as well as a new convention on the treatment of prisoners of war\textsuperscript{49} in the aftermath of the First World War in the 1920s. After the atrocities of the Second World War, in the late 1940s, humanitarians around the world naturally turned the spotlight to the situa-

\textsuperscript{44} Shaw, M., International Law, 5\textsuperscript{th} ed., Cambridge, 2003, p. 220, with references in footnote 218; see also the UN Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514, 1960.

\textsuperscript{45} This conclusion follows naturally from the fact that the basis for recognition is the principle of self-determination; a qualitative assessment as regards the legitimacy of a group’s claim to a right to exercise self-determination is necessary.


\textsuperscript{48} 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, 94 LNTS 65.

\textsuperscript{49} 1929 Geneva Convention Relating to the Treatment of Prisoners of War, 118 LNTS 343.
tion of civilians in armed conflicts. The result of their efforts and an attempt at creating a comprehensive framework of rules relating to armed conflicts were the four 1949 Geneva Conventions.

**i) The 1949 Geneva Conventions**
The 1949 Geneva Conventions deal *almost* exclusively with international conflicts, *i.e.* conflicts involving two or more states. Before 1949, however, the standing treaty-based and customary international law did not include any minimum standards of protection for victims of non-international armed conflicts. In its historical context, this seems natural as nearly all major wars between 1864 and 1949 were of international character. As we have seen, the schematics of war have changed dramatically since.

The outcome of the extensive negotiations and compromises at the adoption of the 1949 Geneva Conventions, on the matter of applicability in non-international conflicts, was one single article in each of the conventions. Common article 3 is applicable to armed conflicts of non-international character occurring in the territory of a high contracting party, even if the conflict takes place entirely within the borders of one single state between government forces and non-state opposition groups, or between different non-state groups.

The principles contained in article 3 have been referred to as a “miniature convention”. However, the article only provides an absolute minimum standard of protection for persons not taking part in hostilities. It includes a prohibition of inhumane treatment and discrimination of non-combatants, even those who have laid down their arms or have been placed *hors de combat* (para 1 pt 1), obligation to collect and care for the wounded and sick (para 1 pt 2), allowance for interna-
ional humanitarian actors to offer its services to the parties (para 2)\textsuperscript{56}, obligations for the parties to do their utmost to agree by special agreement or otherwise to apply all or parts of the rest of the Geneva Conventions (1949)\textsuperscript{57}, and finally a note stating that the article does not alter the status of any of the parties to the conflict in question. It is generally accepted that the provisions contained in article 3 of the Geneva Conventions have passed into customary law and is thus binding upon all states and their subjects regardless of treaty obligations.\textsuperscript{58}

\textbf{ii) The 1977 Protocol II additional to the 1949 Geneva Conventions}

In 1977, after years of negotiations and tireless efforts from the humanitarian community\textsuperscript{59} the Geneva Conventions were amended by two additional protocols. The First Protocol\textsuperscript{60} (Protocol I) additional to the 1949 Geneva Conventions deals with the protection of victims of armed conflicts and has the same scope of application as the four conventions (see article 1(3)). Interestingly, article 1(4) of Protocol I refers to groups fighting against colonial rule or racist regimes and according to article 96(3) of the Protocol such groups can accede to the agreement.\textsuperscript{61}

The Second Protocol (Protocol II) additional to the 1949 Geneva Conventions on the other hand, relates to the protection of victims of non-international armed conflicts and effectively extended the application of IHL in such conflicts. Though it did not extend full applicability of IHL to internal contexts, Protocol II considerably increased the number of rules applicable to non-international armed conflicts.\textsuperscript{62} In relation to common article 3 of the Geneva Conventions, however,

\begin{flushright}
\textsuperscript{56} The paragraph, however, does not provide for an express obligation put on the parties to the conflict to allow or facilitate such help. \\
\textsuperscript{57} In this respect, see also the discussion on the treaty-making capacity of non-state armed groups in Chapters 3.1.2 and 4.3.2 below. \\
\textsuperscript{58} Case concerning \textit{Military and Paramilitary Activities in and against Nicaragua} (Nicaragua v. United States) ICJ Rep. 1986, p. 14 at p. 113 (hereinafter cited as: \textit{Nicaragua Case}); See also Malanczuk, supra, p. 352. \\
\textsuperscript{59} For a comprehensive history of the development of the legal framework relating to internal conflicts and the work preceding the creation of the two additional protocols to the Geneva Conventions, see Suter, supra. \\
\textsuperscript{60} 1977 Protocol I Additional to Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (hereinafter cited as: Protocol I). \\
\textsuperscript{61} On National Liberation Movements, see Chapter 4.3.1 of this paper. \\
\textsuperscript{62} Malanczuk, supra, p. 352; Suter, supra, pp. 169-173.
\end{flushright}
Protocol II sets a considerably higher threshold for application. According to article 1 of Protocol II it applies to armed conflicts which:

1. [...] take place in the territory of a high contracting party between its armed forces ad 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.

There is thus a qualitative requirement relating to the armed group and its organization and command structure as well as on its ability to abide by the rules of the Protocol. The armed group also has to be in de facto control parts of the territory of the state for Protocol II to apply. In addition to this, the conflict, according to the second paragraph needs to reach a level of intensity, beyond mere disturbances, tensions and sporadic acts of violence.63

In addition to the regulation of hostilities Protocol II relates to the post-conflict situation. Article 6 provides for certain basic legal safeguards as regards prosecutions for participation in hostilities, such as the presumption of innocence, the right to be tried before a court guaranteeing independence and impartiality and limitations on the use of the death penalty.64 Article 6(5) provides for the “broadest possible amnesty” for those participating in hostilities. Notably however, governments have reserved the right to prosecute defeated rebels for treason.

In conclusion, the classical notion that international humanitarian law is applicable only to conflicts between states in absence of recognition of belligerency, has been replaced by applicability in internal conflicts of the basic rules of warfare through article 3 common to the Geneva Conventions and subsequently through Protocol II additional to the Conventions. However, the full scope of rules relat-

63 Compare this to the criterion in common article 3, which is applicable in the event of an “armed conflict”.
ing to armed conflicts is still not available in situations of intra-state violence.\(^{65}\)

The applicability of article 3 is universal and it is thus binding on all states as well as non-state actors. The customary character of Protocol II is not as clear, but with an impressive 159 state parties\(^{66}\), its application is nonetheless also far-reaching.

### 2.2.1 International human rights law

Alongside the development of international humanitarian law, the body of human rights law has emerged relating to state’s treatment of their populations. The inspiration for the parallel developments has been the same. The atrocities of the Second World War were to be prevented from happening in the future, in war as well as in peacetime.\(^{67}\) The area of international human rights law has developed rapidly during the course of the second half of the 20\(^{th}\) century. A reference to fundamental human rights was also inserted in the preamble and article 1(3) of the UN Charter\(^{68}\), and was thus recognized as one of the principles on which the organization rests. Since the adoption of the Universal Declaration of Human Rights and Fundamental Freedoms\(^{69}\) in 1948, a vast number of international human rights instruments\(^{70}\) and various regional instruments\(^{71}\) have been adopted and implemented with various successes.

---

\(^{65}\) In this respect, the study from the ICRC relating to the customary development of IHL will be very interesting, forthcoming from Cambridge University Press by end of March 2005, by Henckaerts, Jean-Marie, *Customary International Humanitarian Law* vol. I & II.


\(^{67}\) Status referred to valid as of 22 February 2005.


\(^{69}\) Charter of the United Nations, *preamble*: “We the Peoples of the United Nations Determined to […] reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”; *article 1(3)*: “[t]o achieve international cooperation in […] promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”.

\(^{70}\) GA Res. 217 A (III) 1948, *Universal Declaration on Human Rights and Fundamental Freedoms*.


Human Rights law is designed to protect individuals from the authority of the state.\(^{72}\) Like humanitarian law, it has been developed under a system of international law governing the relations between states. Individuals are the bearers of rights under human rights law, but it is the state that is in position to ensure the realization of these rights.\(^ {73}\) There is no express obligation of any other authority, such as e.g. non-state armed groups in control over territory, to secure human rights for those living under their authority.\(^ {74}\) “The rationale was simple: states are expected to protect their citizens’ basic rights, and therefore by definition only states can violate these rights.”\(^ {75}\)

As seen above the development of international humanitarian law, through *inter alia* the adoption of the Second Additional Protocol in 1977, turned towards inclusion of non-international conflicts and non-state actors during the second half of the 20\(^{th}\) century. Proponents of human rights developments followed in this direction. In the mid-1990s both Amnesty International and Human Rights Watch changed their definitions of human rights violation to include acts committed by non-state groups.\(^ {76}\) During the 1990s, the Inter-American Commission on Human Rights has also, on several occasions, condemned acts committed by non-state groups as violations of the American Convention on Human Rights.\(^ {77}\)

Today, much seems to indicate that international treaty based and customary law, including human rights law, *can* create duties as well as rights for individuals and groups.\(^ {78}\) In addition to the support to be found in human rights treaties


\(^{75}\) *Ibid*, p. 2.

\(^{76}\) *Ibid*, p. 2.

\(^{77}\) 1969 American Convention on Human Rights, UNTS vol. 1144 p. 123; See also Crawford, J., Democracy and the body of international law, in Fox, G. H. and Roth, B. R., Democratic Governance and International Law, Cambridge, 2000, pp. 91-120, at p. 111 footnote 78 *en fine*.

It is also interesting to note that International human rights law affects non-state armed groups, at least indirectly, by making amnesties for gross human rights violations in civil wars invalid, see in this respect the case of Sierra Leone in fn. 251 below.

and documents, there is also increasing scholarly support for the contention that human rights law in many cases places obligations on individuals and groups.

It is not entirely clear exactly what obligations rest on individuals and non-state actors as regards the protection on human rights under international law lex lata. Even prominent human rights proponents argue that non-state entities are not suitable addresses of obligations under human rights law, reaching beyond the duty to respect the rights of other individuals. It seems likely, however, that the international community, in its search for effective ways to protect human rights under international law will have to come to terms with the fact that some territories are controlled by other authorities than states of the classical model. As Rosenne notes: “the international formulation of [human rights] can only be fully implemented through their firm introduction into national law and administration.” In certain areas, the “national law and administration”, is dictated by and personified in non-state armed groups.

The massive impact that human rights has had on international law during the last half century finds part of its explanation in “the moral, political and legal importance attributed to the idea of human rights”. The emergence of human rights as an authoritative body of law within the international legal framework has even cast doubt over some aspects of the fundamental international legal

79 Paust, supra, at p. 62: “[i]n conclusion, nearly all of the human rights instruments since World War II have provided express or implied recognition of private duties.” In his article, Paust provides a dire enumeration of treaties recognising obligations on individuals.

80 See impressive list of scholars supporting this idea in Paust, supra, at p. 51, footnote 5.


83 An interesting problem in relation to this potential development is the lacking domestic authority of armed groups to legislate within their area of control. See in this respect discussion by Sassoli, supra, at pp. 11-12. See also Assanidzé v. Georgia before the Grand Chamber of the European Court of Human Rights (ECtHR), No. 71503/01, 8 April 2004, where the responsibility of Georgia for the unlawful detention of a person by the Ajarian Autonomous Republic (a local governmental entity with autonomous status), and the Illascu case (Illascu and others v. Moldava and Russia, Grand Chamber ECtHR, No. 48787/99, 8 July 2004) dealing with the responsibility of Moldova and/or Russia for the unlawful imprisonment and maltreatment of three persons by the authorities of the unrecognized entity the “Moldovan Republic of Transdniestria” (supported by Russia), for fighting against the separatist entity and i.e. planning to assassinate Transdniestrian officials.

84 Malanczuk, supra, p. 220.
principle of state sovereignty. This discourse relates inter alia to the emerging right to democratic government and will be discussed in greater detail in chapter 3.2 of this paper.

2.3 International criminal law
International criminal law is another area relevant for the study of the behaviour of non-state armed groups. This emerging body of law may come to have immense implications for the potential of the international community to respond to atrocities committed in internal conflicts, by states as well as armed groups. After World War II, the community of states was united and determined to put those responsible for the most heinous crimes committed during the war to justice.85

The Nuremberg86 and Tokyo87 trials were both preceded and followed by numerous proceedings in national courts around Europe and elsewhere in the world.88 After the international community had dealt with the atrocities of the Second World War a period of virtual impunity for international crimes followed.89

As pointed out by Meron, however, notwithstanding the lack of major prosecutions against those committing atrocities within or outside the context of armed

85 For the sake of historic honesty it should be noted that this determination and commitment to humanitar-itarianism after WW II only included the perpetrators from Germany and other Axis-powers. The allies were responsible for actions that today would be considered as war-crimes but these naturally, and in consistence with the logics of power-politics, went unpunished. The air-strikes against (mainly civilian locations) in Berlin, Dresden and other German cities as well as the use of the A-bomb against the civilian populations in Hiroshima and Nagasaki in Japan are examples of such actions (See e.g. Englund, P. “Brev från nollpunkten”, Stockholm 2003).
86 See the 1945 Agreement for the Prosecution and Punishment of Major War Criminals, 82 UNTS 279, (London Agreement) and its annex, the Charter of the International Military Tribunal at Nuremberg (Nuremberg Tribunal). The tribunal was set up by an inter-Allied agreement to try German leaders for war crimes, crimes against humanity and crimes against peace; see also Malanczuk, supra, pp. 354-355.
87 A similar tribunal to that in Nuremberg was set up to try Japanese war leaders for crimes committed during the war through the Charter Annexed to the 1946 Agreement for the Establishment of an International Military Tribunal for the Far East, 5 UNTS 251; see also Harris, supra, p. 745 with references; Malanczuk, supra, pp. 354-355; see also von Glahn, G., Law Among Nations, 4th ed., New York, 1981, p. 769, with references in footnote 32.
88 See inter alia von Glahn, supra, pp. 769-770, with references in footnotes 33 and 35.
89 Meron, T. International Criminalization of Internal Atrocities, in 89 AJIL (1995) pp. 554-577, at p. 554; See also inter alia Malanczuk, supra, p. 355, referring to the genocide committed by the Khmer Rouge in Cambodia.
conflicts the Nuremberg Principles\textsuperscript{90} and the notion of internationally criminal acts have won international acceptance and legitimacy during the second half of the 20\textsuperscript{th} century.\textsuperscript{91} The atrocities of the 1990’s in former Yugoslavia and in Rwanda served as a wakeup-call for the international community. In a new, post-cold war world order the Security Council, acting under chapter VII of the UN Charter, reacted to these atrocities by establishing \textit{ad hoc} tribunals for former Yugoslavia and Rwanda to deal with the crimes committed by all parties to these conflicts.\textsuperscript{92} In 1994 the International Law Commission (ILC) adopted a draft to a treaty-based statute for an international criminal court.\textsuperscript{93} The statute was adopted at an international conference in Rome on July 17 1998 (the Rome Statute\textsuperscript{94}) and it entered into force in July 2002. A new trend in the way the world views and reacts to internal atrocities was thereby firmly established.

The mandate and jurisdiction of the ICC are governed by the Rome Statute. The jurisdiction of the Court is limited, in article 5 of the Statute, to the most serious crimes of concern to the international community as a whole, \textit{i.e.} genocide, crimes against humanity, war crimes, and the crime of aggression. The Court may exercise its jurisdiction in elation to crimes committed on the territory of a state that has accepted its jurisdiction, or in cases where the person accused of a crime is a national of such a state (article 12) after referral by a State Party or decision by the Prosecutor to initiate an investigation in accordance with article 15 (article 13(a) and (c)). According to article 13(b) the Security Council, acting under chapter VII of the UNC, may refer situations in which crimes under the jurisdiction of the court appear to have been committed. The latter situation is of special interest since it enables a bypass of the geographical limitations of the

\textsuperscript{90} GA Res. 95 (I) 1946, \textit{Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal}.
\textsuperscript{91} Meron (1995), \textit{supra}, at p. 554.
\textsuperscript{93} \textit{YBILC} (46\textsuperscript{th} session 1994), vol. II, Pt. 2, p. 26.
Court’s jurisdiction in cases where the Security Council gets involved.\textsuperscript{95} The Council can further, also acting under chapter VII, decide to request a deferral of investigations of prosecutions for periods of 12 months at a time, if deemed necessary to promote international peace and security (article 16).

2.4 The UN Security Council and non-state groups

Another measure by which the international community can put pressure on non-state entities, and thus potentially influence their behaviour, is through forcible measures by the Security Council under Chapter VII of the UNC.\textsuperscript{96} Such measures could take the form of economic or military action to be performed by member states in relation to non-state entities. In some instances the Security Council has even created direct duties for non-state groups.\textsuperscript{97}

UN enforcement measures aimed at influencing the behaviour of non-state groups can be divided into three categories: \textit{i}) measures aimed at non-state groups but implemented by member states; \textit{ii}) measures aimed directly at certain non-state groups, \textit{de facto} controlling certain territory or recognized, for example in peace agreements, as having limited international legal personality; and \textit{iii}) measures creating duties for non-state groups, which are not in control over territory and are not expressly recognized as having legal personality for international purposes.\textsuperscript{98} The most controversial of these practices is obviously the last, but in a commentary to article 41 of the UNC, Frowein and Krich concludes that the practice “has not met with objections and it would thus seem that parties fighting a civil war within a member State are now subjects to the jurisdiction of the SC [Security Council].”.\textsuperscript{99} It seems, Frowein and Krich continues, that \textit{all actors in internal conflicts} are under the jurisdiction of the Security Council.\textsuperscript{100}

\textsuperscript{95} This follows from the competence of the Security Council to take forceful measures under Chapter VII of the UNC (see article 25 UNC).
\textsuperscript{97} \textit{Ibid}, at pp. 715-716 para. 43, with reference to \textit{inter alia} SC Res 770, Aug 13, 1992, and SC Res. 942, Sept 23, 1994, both relating to demands on the parties to the Bosnian conflict, in particular the Bosnian Serb party, to accept a proposal for territorial settlement.
\textsuperscript{98} \textit{Ibid}, at pp. 715-716 para. 43 and 44.
\textsuperscript{99} \textit{Ibid}, at p. 716 para. 44.
\textsuperscript{100} \textit{Ibid}, at p. 716 para. 44.
The power of the UN Security Council to impose mandatory sanctions under Chapter VII was first used in the mid-1960s in reaction to the proclamation of independence by a racist minority regime of Southern Rhodesia. Since then this authority has been used on numerous occasions, but always against states or defined collectives, such as non-state groups. At the end of the 20th century, however, a “qualitative change” in Security Council sanctions policy occurred. In 1997 the Security Council adopted resolution 1127 imposing sanctions targeted against the leadership of the non-state armed opposition group, UNITA, active in Angola. This was the first time individuals were directly targeted by sanctions imposed by the Security Council. Since then the practice has continued and there are examples of recent resolutions from the Security Council imposing targeted sanctions on individuals with connection to governments or non-state groups. The practical implementation of targeted sanctions aimed at individuals resolution is usually involves a “sanctions committee” to which the task of establishing a “blacklist” is entrusted.

The doctrine of targeted sanctions aimed at individuals has grown out of attempts to avoid the adverse humanitarian effects of the classical indiscriminate comprehensive sanction regimes. However, the new problems arising, involving human rights standards and legal safeguards, as the UN Security Council,
takes on a task traditionally reserved for domestic courts and intelligence agencies, have only recently been recognized.\(^{109}\)

The human rights issues involved in sanction regimes targeting individuals are many. For the purposes of this paper it suffices to presenting the major problems from a human rights perspective in relation to implementation of such sanctions, identified by Cameron in 2003. Cameron argues that procedures for listing and de-listing of individuals in existing sanction regimes are not satisfactory; that there are no mechanisms for judicial review of the decisions made in the sanctions committees. He further contends that the political Security Council, and the committees of member state representatives, lack the competence for dealing with the difficulties involved in evaluating evidence of involvement in activities covered by sanctions and in locating and identifying individuals loosely connected to such activities. The judicial safeguards involved in evaluating intelligence material in traditional domestic systems are non-existent.\(^{110}\)

The human rights aspects of implementation of sanction regimes may seem peripheral to the study of engagement with non-state armed groups. However, the consequences of creating a system of sanctions that is not perceived as fair, may be detrimental to processes of engaging with such groups.

### 2.5 Articles on State Responsibility

While the international system has evolved to adjust to the challenges of increased relevance of non-state armed groups by extending application of IHL and providing for possibilities to employ punitive measures against such groups, the private law aspects of the problem has not been paid much attention.\(^{111}\) There are a few interesting national cases under the U.S. Alien Torts Act.\(^{112}\) Such cases in

---

\(^{109}\) Cameron NJIL (2003), *supra*, at p. 3.

\(^{110}\) *Ibid*, at pp. 10-15, where an outline of the major problems with the present practice of sanctions targeting individuals is given; in this respect, see also *A more secure world: Our shared responsibility, Report of the Secretary General’s High Level Panel on Threats, Challenges and Change*, UN, 2004, para. 152, p. 50 (*HLP-report*, 2004).

\(^{111}\) Sassóli, *supra*, at pp. 18-19.

\(^{112}\) The Alien Torts Act provides U.S. courts with jurisdiction over tort claims arising from actions committed in violation of the “law of nations”. See e.g. *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980); for cases concerning conduct by non-state groups, see *Kadic et al. v. Karadžic*, 70 F. 3d 232 (2d Cir.)
municipal courts will have to be regarded as an exception rather than a rule.\textsuperscript{113} One international instrument, however, opening for the possibility of seeking restitution for consequences of wrongful acts by non-state groups in internal conflicts is the law of state responsibility.

When the International Law Commission (ILC) was set up by the UN General Assembly in 1948 in order to fulfil the objective in article 13 (a) of the UNC: “encouraging the progressive development of international law and its codification”, one of the fourteen topics selected for scrutiny was the issue of state responsibility.\textsuperscript{114} The ILC were kept busy with drafting a document relating to the international responsibility of states for over 50 years. The work of the Commission during this time is extensively discussed and analyzed elsewhere.\textsuperscript{115} In 2001 the ILC adopted the finished product of its work: The \textit{Draft Articles of Responsibility of States for Internationally Wrongful Acts}.\textsuperscript{116} The articles have since been adopted by the UN General Assembly.\textsuperscript{117}

The ASR contains certain provisions relating to responsibility for the actions of non-state actors.\textsuperscript{118} The law of state responsibility can thus, in some cases, like the emerging system of international criminal law, serve as a deterrent from certain behaviour. It can be used to hold armed groups accountable for their actions and of course to prevent governments from supporting groups acting unlawfully in their interest.\textsuperscript{119} For the purposes of this work article 10 of the ASR is of primary interest:

\begin{quote}
\textit{“Article 10 - Conduct of an insurrectional or other movement}\
\end{quote}

\textsuperscript{29}
1. The conduct of an insurrectonal movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectonal 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.

3. (...) ”

The first paragraph establishes a rule of state responsibility for all actions undertaken by an armed group in its struggle for power, once the group manages to overthrow the existing government. The second paragraph confirms that the same is true also if the group succeeds in establishing a new state within the borders of the state with which it has been at war. This makes it impossible for all groups with real aspirations for governmental power to ignore international law by claiming that it does not concern them.

The application of the provision is not uncomplicated, however. It serves its purpose well in situations where armed groups are successful, i.e. manages to overthrow the sitting government, or to establish a new state in part of an existing state’s territory. Nor is there a problem, for the purposes of international law, when an armed group is unsuccessful. Their conduct is then in most cases a matter within domestic jurisdiction unless serious international crimes are involved and international criminal jurisdiction comes into play. Another common situation, however, is that a civil war is ended through a peace treaty ensuring some political participation and influence for the challenging group. In these

120 See discussion on ICC in Chapter 2.3.
situations armed groups may form part of the transitional government. Article 10 of the ASR, however, does not provide for state responsibility in these cases. The rationale behind this is, in the words of Crawford:

“[t]he state should not be made responsible for conduct of a violent opposition movement merely because, in the interest of an overall peace settlement, elements of the opposition are drawn into a reconstructed government.”\(^\text{122}\)

The balancing of the interest of holding armed opposition groups, through newly established governments or states, responsible for actions committed during a civil war, with the interest of promoting peaceful settlement of internal conflicts demonstrated by the cited statement seems appropriate. The merit of the rule is that it serves as deterrence from ‘bad behaviour’, not deterrence from engaging in peace talks. The downside of the solution is the lost chance of restitution for those affected by the harmful actions of the group. One can presume however, that they too in the future, would benefit from having a stable and peaceful partner in the international community.

The ASR are also relevant to the study of rules relating to non-international armed conflict and non-stat armed groups by providing for a right of states to take counter-measures against a state committing internationally wrongful acts.\(^\text{123}\) Counter-measures could thus be employed by one or more states against another state committing gross human rights violations under the pretence that state is breaching international law. Counter-measures must be taken within the boundaries set up by the limitations in article 50 ASR and must further be proportionate (article 51).

### 2.6 Summary

In Chapter two I have shown that the practice of recognition of belligerence in internal conflicts is obsolete and has come to be replaced by a development towards the use of more objective criteria. I have also presented the international legal framework relating to non-state armed groups and described different legal

---

\(^{122}\) Crawford (2002), *supra*, p. 118.

\(^{123}\) See articles 49-54 ASR.
instruments applicable to situations and environments in which armed groups operate: the body of IHL applicable to internal armed conflicts and human rights law, the emerging system of international criminal law, and the ASR opening for the possibility of holding a future state internationally responsible for the actions committed by armed groups during revolutionary wars or holding states accountable for internal human rights violations by allowing for counter-measures to be imposed by other states. It has further been shown that the Security Council of the UN possesses extensive authority to intervene in situations of internal conflicts and put pressure on armed groups, through implementation action by governments, or by measures directly aimed at non-state groups.

3 The status of non-state armed groups under international law

A major problem in dealing with non-state armed groups is their dubious status under international law. How are they to be viewed from a legal perspective? This issue goes to the heart of the question of the relevance of international law to the interaction between states and armed groups. For the purposes of this thesis, it is important to examine the extent to which non-state armed groups are eligible to assume status as international “legal persons” and thus are “subjects” of international law. Chapter 3.1 deals with the concept of legal personality under international law and the potential for such personality for armed groups. The chapter further examines the treaty-making capacity of non-state groups.

Armed groups, in the meaning of this thesis, are challenging the authority of existing government, or competing with other armed groups for control and sovereign authority over certain territory. Issues concerning state sovereignty, legitimacy of governments, and the emerging right to democratic governance will therefore be discussed in Chapter 3.2. The survey of the status of non-state armed groups ends with a brief summary of conclusions in Chapter 3.3.

124 Regarding terminology, see Jennings and Watts, supra, § 33.
3.1 International legal personality
An entity with legal personality under international law is one possessing rights and duties defined in international legal regimes and capable of entering into relations with other subjects of international law.\(^{125}\) The classical legal approach is that sovereign states are the only subjects of international law and the primary holders of rights and obligations under the international legal order. In the words of Oppenheim in 1912:

> “Since the law of nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are subjects of international law.”\(^{126}\)

Even though it seems clear that international law has developed towards including individuals and other non-state entities as bearers of obligations and receivers of rights\(^{127}\), this does not necessarily alter the status of those parties in for the purposes of international law:

> “For the most part, however, the individual remains an object, not a subject, of international law whose most important characteristic for international legal purposes is his nationality.”\(^{128}\)

The statement indicates that the view that although an individual can be bound or protected by certain rules in international law the primary object or beneficiary of these rules is the state of which the individual is a citizen. The right or obligation then gets extended to the citizens of the state. The development of the concept of legal personality in relation to non-state armed groups is discussed in detail in the following sections.

\(^{125}\) Ibid, § 33.
\(^{127}\) See discussion on emerging rights of individuals in Chapter 2.2.1, footnotes 78-79.
\(^{128}\) Harris, *supra*, p. 142.
3.1.1 Determination of international legal personality

Traditionally, states have been regarded as the exclusive holders of international legal personality but today, in light of developments creating rights and obligations for individuals and groups directly under international law, it seems commonly accepted that some entities other than states have gained at least limited personality. However, there is little agreement on exactly how to categorize and define different actors and their status in this respect and on the extent of personality to be afforded to non-state entities:

"While states have remained the predominant actors in international law, the position has changed in the last century, and international organizations, individuals and companies have also acquired some degree of international legal personality; but when one tries to define the precise extent of the legal personality which they have acquired, one enters a very controversial area of the law."

The issue is bound to be even more controversial regarding the status of groups trying to overthrow the government of an existing state. On the status of other entities than states, the International Court of Justice (ICJ) noted in the Reparations for InjuriesCase that the nature and the extent of the rights of the subjects under any legal order may vary and that: “their nature depends upon the needs of the community.” Thus, it seems reasonable to say that the status of the different actors and the extent of their legal personality are determined and defined by the framework of international law, i.e. by states. Entities can obtain legal personality on the international arena to the extent that states as primary actors afford such personality to them.

---

130 Malanczuk, supra, p. 91.
132 See also Malanczuk, supra, p. 91, in relation to the statement by the ICJ in the Reparations for Injuries Case (footnote 130 above): “It is the international legal system which determines which are the subjects of international law and which kind of legal personality they enjoy on the international level.”
3.1.2 Treaty-making capacity of non-state armed groups

The definition of international legal personality provided above includes the element: “capable of entering into relations with other subjects of international law”. A central feature of such capability is the eligibility to conclude treaties under international law. The following section is devoted to an examination of the treaty-making capacity of non-state armed groups.

In article 2 paragraph 1(a) of the 1969 Vienna Convention on the Law of Treaties133 (1969 Vienna Convention), it is stated that a treaty is “an international agreement concluded between States in written form” (italics added). The conclusion easily drawn from this statement is that a non-state group cannot be a party to a treaty. But a reading of article 3 of the convention alters this conception. Article 3 reads: “[t]he fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law (…) shall not affect: a) the legal force of such agreements”. The 1969 Vienna Convention thus seems to presume the existence of agreements between states and ‘other subjects of international law’, or between such subjects, with international legal force.

A glance at the legislative history of the 1969 Vienna Convention reveals the origins of this reasoning. According to article 8 paragraph 2(b) of the ILC Draft Convention on the Law of Treaties134 “para-statal entities recognized as possessing a definite if limited form of international personality, for example, insurgent communities recognized as having belligerent status – de facto authorities in control of specific territory”135. It should be noted that the treaty making capacity of “para-statal entities” would not be unlimited under the Draft. Paragraph 4 of article 8 provided for a limitation relating to the status otherwise afforded to a subject under international law. The parties “must be contracting within any limits on their capacity arising from their status”.136 Special Rapporteur Fitzmaurice explains in the commentary:

“They [para-Statal entities] are subjects of international law and have certain international rights and obligations. Within the limits involved by the scope of their personality […] they have treaty-making capacity; for instance, insurgents recognized as belligerents in a civil war would certainly possess the capacity to enter into international agreements with third Powers about the conduct of the civil war, and matters arising out of it, affecting those Powers.”

When interpreting the statement, one must bear in mind the development of the law and practice relating to the recognition of belligerency status. 137 Article 8 of the draft did not make it into the final version of the 1969 Vienna Convention. It serves, however, as an indication on what the drafters of the Convention conceived as ‘other subjects of international law’ as expressed in present article 3. 138 The ILC also expressly declared that the “other subjects” referred to in article 3 includes “insurgents”. 139 As we shall see in the section of this thesis covering the implementation of the international legal framework, non-state entities do in reality enter into treaty-like agreements, although the exact status of such agreements is not an entirely uncontroversial issue. 140

3.2 State sovereignty and challengers of governmental authority
Max Weber (1864-1920) described the “state” as an institution that successfully “claims the monopoly of the legitimate use of force within a given territory”. 141 The question of the legitimacy of government goes to the core of the subject matter of this thesis. A denial of international legitimacy of an established government opens for claims of legitimacy for groups struggling to overthrow that government. It thus seems safe to conclude that the question of how to view sover-

---

137 See discussion under Chapter 2.1. The practice of recognizing the belligerency status of groups has increasingly been replaced by determining the status of the parties to an internal conflict, and the rules to be applicable in such conflicts, using purely objective criteria.
138 According to the 1969 Vienna Convention itself, the preparatory works of a Convention may serve as supplementary means of interpretation of treaties (article 31).
139 YBILC (1962), vol. II p. 157; see also comment on the ILC statement and comparison to article 10 of the ASR, in Rosenne, supra, p. 262.
140 See Chapter 4.3.2 of this paper.
eignty is the key to attempts to determine the international relevance of armed groups challenging the authority of governments.

The classic view that states are the exclusive subjects on the international arena rests on the idea of state sovereignty. The sovereign rights of a state have traditionally been closely linked to the state as an institution and the “quality” of governance has been an internal matter of each sovereign state. This view has been altered and the concept of sovereignty has potentially evolved, as focus of international law and international relations is shifting from the rights of states to rights of individuals. Especially interesting in this respect is the notion of an emerging human right to democratic governance. Any development which weakens the sovereign status of the state as an institution indicates a potential opening for non-state entities – such as certain armed groups – to gain ground on the international arena. In this chapter, I will present the contemporary theories on the development of an emerging right to democratic governance and of the concept to sovereignty.

3.2.1 Democratic entitlement as a human right
The emergence of a right to democratic governance under international law could potentially have consequences for inter alia the interpretation of the concept of sovereignty. There are good arguments both for and against the existence of such a development and its desirability. It seems impossible, however, to argue that international law still does not concern itself with the ‘quality’ of the governance of a state. Article 1(2) of the Charter of the United Nations states that one of the purposes of the organisation is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination

---

142 See in this respect Jennings and Watts, supra, § 34-37, describing “sovereignty” as a concept descriptive on the internal constitutional position of a state, rather than of their international status. The concept refers to the authority of a representative of a state to act on behalf of the people, as well as the freedom of the state from external powers.
of people”; according to article 25 of the International Covenant on Civil and Political Rights145 (ICCPR) every citizen of a contracting state has a right to “take part in the conduct of public affairs” and “[t]o vote and to be elected at genuine periodic elections which shall be by equal and universal suffrage”. Further article 21(3) of the Universal Declaration of Human Rights146: “[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” It is also a fact that virtually all regional human rights instruments include a right to democratic governance.147

Gregory H. Fox argues that the extreme participation in human rights conventions and instruments has created an international law proscribing democratic rights.148 In addition to the instruments cited above he lifts out “two new CSCE instruments which count among their signatories all the former Soviet bloc nations”149 as important indicators of this development. Fox further attaches much weight to UN efforts during the last half of the 20th century to monitor elections and promote democratic governance around the world.150

Another issue, however, is whether this right is widely respected in the practice of states. In the words of Crawford:

“Until recently, provisions such as Article 25 [ICCPR], or Article 1 [UNC] if it is understood as a sort of collective right to democratic institutions, were honoured more in the breach than in the observance. In the mid-1980s, only

145 International Covenant on Civil and Political Rights of 16 December 1966, 500 UNTS 95.
146 See footnote 69 above; on the customary nature of the UDHR see inter alia GA Res. 48/121 (1993).
148 Fox, G. H. The right to political participation in international law, in Fox, G. H. and Roth, B. R. Democratic Governance and International Law, Cambridge 2000, pp. 48-90 at pp. 89-90; on the emergence of a right to democratic governance in international law, see also inter alia Reisman, M. Sovereignty and Human Rights in Contemporary International Law, in Fox G.H. and Roth, B. R. Democratic Governance and International Law, Cambridge, 2000, pp. 239-258; Franck (1992), supra; and D’Amato, supra.
149 Fox (2000), supra, at pp. 68 and 89-90. The CSCE (X) instruments he is referring to are: Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, June 29, 1990, 29 ILM (1990), pp. 1305, 1307; and the CSCE Charter of Paris for a New Europe, 30 ILM (1990), pp. 190, 193 (preamble).
150 Fox, supra, at p. 90.
about a third of all the countries of the world could be described as democratic, and still a smaller proportion had long-standing and stable democratic structures.”

Crawford claims that, apart from treaties, there is no general endorsement of a principle of democracy in international law even though he concedes that the development is heading in that direction. He identifies three principal problems, disqualifying a rule of democratic governance from having entered into the general body of international law: i) the reluctance of certain states to accept international declarations reaffirming the right to democracy after 1966; ii) considerable inconsistencies in state practice; and iii) the difficulty to make legal judgements over qualitative measurements in politically complicated transitional situations.

In this context it is relevant to mention that the one third of the world’s states adhering to democratic governance in the mid-1980s, as described by Crawford in the quote above, has turned into around 120 states or close to two thirds of the world’s states today. Many of the new democracies have, as has been indicated above, emerged under the close watch of the international community.

---

151 Crawford, J. Democracy and the body of International Law, in Fox, G. H. and Roth, B. R. Democratic Governance and International Law, Cambridge 2000, pp. 91-113 at p. 95 (hereinafter cited: Crawford I (2000)).

152 Ibid at p. 95, see also pp. 103-110.

153 See the discussion on the debate prior to the adoption of the Commission on Human Rights first resolution addressing the right to Democracy on April 27, 1999, in Crawford, J. Democracy in International Law – a reprise, in Fox, G. H. and Roth, B. R. Democratic Governance and International Law, Cambridge 2000, pp. 114-120 at pp. 116-117.

154 Ibid at pp. 115 and 117-120. In connection to this last argument, Crawford refers to the Matthews Case before the European Court of Human Rights held that the denial of voting rights of the people of Gibraltar, in the European Parliamentary elections, was a breach of article 3 of Protocol I of the ECHR.

155 The exact number of electoral democracies vary depending on who is counting. The US Department of State: Country Reports on Human Rights Practices, enumerated 130 states with domestic provisions providing for democratic governance in 1997. For a list of these states, see Franck, T. M. Legitimacy and the Democratic Entitlement, in Fox, G. H. and Roth B. R. Democratic Governance and International Law, Cambridge, 2000, pp. 25-90 at p. 27; More cautiously, the webpage of the US Department of State declares that there are 117 democracies in the world today, see http://www.state.gov/g/drl/democ/. It is not clear what has caused the decrease in numbers; see also Freedom in the World 2005 – Civic Power and Electoral Politics, A Report from Freedom House, available at http://www.freedomhouse.org/research/freeworld/2005/essay2005.pdf, as of February 2005, claiming that there are 119 competitive electoral democracies in the world in 2005.

156 Recent examples of UN election monitoring include the elections in East Timor, Afghanistan and Iraq, see UN Electoral Assistance Division, Department of Political Affairs: http://www.un.org/Depts/dpa/ead/ead-main-page.htm.
The trend is definitely turning the issue of municipal governance into a matter of international concern.

It could also be contended that many international rules are in fact: “honoured more in the breach, than in observance.” A classical example is the prohibition of torture, remaining a foundational principle in international law, despite the fact that it is constantly breached by states. There is no doubting the fact that the prohibition of torture constitutes an established norm under international law, even reaching the status of *jus cogens*. When confronted with accusations of torture, states rarely admit to its occurrence; instead they deny the use of torture and reaffirm their conviction that torture is illegal under international law. In the Nicaragua Case, the ICJ held that:

“If a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, significance of that attitude is to confirm rather than weaken the rule.”

A similar approach can be taken on the issue of democratic entitlement. The common response of “non-democratic” states when confronted with charges of not living up to democratic standards of democracy is not to deny the existence of the rule itself, but rather refer to differences in opinion regarding the best way to determine the popular will. Historical and cultural differences are used to legitimize divergence and the international community is accused of being neo-

---

157 Crawford I (2000), supra, see footnote 152.
159 There is ample evidence of the fact that the prohibition of torture is an established norm under international law. In addition to the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, UNTS vol. 1465 p. 85, all major human rights treaties contain a prohibition of torture. The issue of the *jus cogens* character of the prohibition was discussed by the ICTY in *e.g.* the *Frunzija Case* (1998) at para. 153; *Delalic Case* (1998) at para. 454; and *Kunarac Case* (2001) at para. 466.
The conclusion that is thus to be drawn from the lack of consistency in state practice is merely that there are differences of opinion as to how the will of a people is appropriately determined. In the words of former Secretary General Boutros-Ghali: “[t]here is no one model of democratization or democracy suitable to all societies”.163

As regards Crawford’s argument relating to the difficulties of judicial institutions to pass judgement over political processes, Reisman contends that the mere complexity and legal difficulty of the emerging body of human rights law cannot serve as an argument against its establishment. “No one is entitled to complain that things are getting too complicated”, Reisman says, “If complexity of decision is the price of increased human dignity on the planet, it is worth it.”164

The arguments presented above show the disagreement among scholars on how to interpret the evidence of the state of international law as regards a right to democracy. There is wide agreement on the fact that such a rule is emerging, but when it comes to the force of the rule as a matter de lege lata, the issue seems controversial. This being said, there is even less agreement on the possible implications and enforceability of the rule in question. Roth, while conceding the existence of an international legal obligation of states regarding internal political participation, “potentially reaching as far as the relationship between that participation and ultimate state authority”, concludes that there is no “‘right to democratic governance’ that binds states to accept direct implementation by outside entities or that licences ‘pro-democratic’ measures that interfere in domestic processes” contained within the international system.165 The discussion in the following sections will focus on the possible impact of a right to democratic governance on the interpretation of the concept of sovereignty under international law and the potential that a rereading of sovereignty holds for non-state groups.

---

164 Reisman, supra, at p. 258.
165 Roth, supra, p. 343.
3.2.2 Rereading sovereignty

State sovereignty has been described as the most “glittering and controversial notion in the history, doctrine and practice of public international law.” The conceptual meaning of the word sovereignty varies along with the historical context in which it is used. Traditionally sovereignty has been linked to certain territory and been awarded to the individual or group of individuals in effective control over it. Under this doctrine, the manner in which a government gains or maintains authority over its territory and subjects is of no relevance. Focus is put at the *de facto* authority.

Reisman contends that already the words in the preamble of the American Constitution “We the People”, adopted after the revolutionary war in 1766 “inaugurated the concept of the popular will as the theoretical and operational source of political authority”. Subsequent democratisation in Europe after the French revolution served as a confirmation of this concept. Reisman further argues that the increasing focus on human-, civil- and political rights in international law and international relations, including the emerging right to democratic governance discussed above, has altered the meaning of the concept of sovereignty. The established norm in contemporary international law is, according to Reisman, the inviolable sovereignty of peoples rather than states; a rule of ‘popular sovereignty’ has emerged. If one accepts the contention of Reisman *et

---

167 For a rich and insightful commentary on the history and development of the concept of sovereignty, see Steinberger, supra, at pp. 500-511.
169 Reisman, supra, at p. 240.
170 Ibid at p. 240
171 Ibid, at p. 240. It is also argued that lack of democratic governance in a state, or at least gravely undemocratic governance, triggers a right and, according to some commentators, even an obligation of the international community to intervene on behalf of the people of that state; see also D’Amato, supra, at p. 520. While the issue of ‘humanitarian intervention’, or as it is called in contemporary literature ‘the responsibility to protect’, is a fascinating subject of practical relevance for the subject matter of the present thesis, this is not the time nor the place to dwell any deeper into the possible legitimizations of forceful intervention for the protection of civilian populations (legitimacy of breaches of article 2(4) UNC). The purpose of this discussion is merely to show that the notion of sovereignty of the state *per se* is challenged, opening for the possibility of other entities to gain some form of status on the international arena.
of democratic governance there is a vacuum of internationally legitimate authority. This would put a large responsibility on the international community; a responsibility to which the community of states has not yet in action demonstrated serious commitment.

3.2.3 A defence of the moderate view on state sovereignty
There are, of course, scholars advocating a more classical view on state sovereignty. The progressive views of Reisman et al have been the subject of severe criticism. The criticism is not necessarily based on a difference of opinion regarding the evolving right of democratic entitlement as a human right, even though, as has been shown above, many commentators remain sceptical regarding the status of such a right. After stating that the right to democratic governance remain “at best, inchoate”\textsuperscript{173}, Byers and Chesterman go on to claim that:

“We take the position that to discuss the ‘democratic entitlement’ in terms of external enforcement is fundamentally to misconceive its nature. ‘Popular sovereignty’ may well represent the converging aspirations of many peoples around the globe, but the only vehicle in which this particular human right may find meaningful expression remains – in all but the most exceptional of situations – sovereignty of a more traditional kind.”\textsuperscript{174}

The criticism of Byers and Chesterman is mainly focused on the claim that failure to live up to democratic standards gives raise to a right to use force. The present analysis on the other hand, targets the potential change of status of the established government, and thereby possibly the status of challengers of their authority, that would follow a redefinition of state sovereignty. Roth touches upon the subject in a discussion on the implementation of the right to democracy embedded in international agreements. He states that a treaty-based right to democratic government has to be placed in the hierarchy of norms in the international legal

\textsuperscript{172} See also \textit{inter alia}: Fox (2000), \textit{supra}; and Franck (1992), \textit{supra}.


\textsuperscript{174} \textit{Ibid}, at p. 261.
system (as would rights contained within declaratory documents such as the Universal Declaration on Human Rights or resolutions adopted by the General Assembly). A treaty-based right to democracy cannot license any form of intervention in “matters essentially within the domestic jurisdiction” (article 2(7) UNC) as the Charter of the UN, by virtue of its article 103, prevails over any other international agreement.\(^\text{175}\) On this basis, an international rule of democratic governance contained in the instruments discussed above could not alter the sovereign rights of a state failing to comply with democratic standards.

Furthermore, the right to democratic governance contained in the regimes referred to above does not provide for any measures to be taken in the event of non-compliance. It could thus not trump the principle of non-interference. “Other states can, of course, in the exercise of their own sovereign prerogatives, criticize, cajole, shun and deny any gratuitous assistance to a human rights violator, but they cannot, individually or collectively, meddle in a foreign state’s internal affairs.”\(^\text{176}\)

However, in the absence of an inherent mechanism for measures in the event of non-compliance one could argue that the right of states to employ countermeasures against a state violating an international norm enables the community of states to take action against a state failing to comply with the requirements of democratic governance. Such countermeasures could of course take the form of unilateral or multilateral targeted sanctions and may or may not be authorized by the Security Council. The state subject to sanctions would in such a case be unable to claim that the sanctions violate its integrity and the non-intervention principle.

### 3.3 Summary
In conclusion, the status of non-state actor under international law is determined by the international system. Non-state armed groups can assume limited legal personality on an \textit{ad hoc} basis under a number of international regimes and pos-

\(^{175}\) Roth, \textit{supra}, p. 338.

\(^{176}\) Roth, \textit{supra}, p. 338.
sess some extent of treaty-making capacity. This capacity is determined by the legal framework relating to the situation in which the group is operating.

Further, there is an emerging right to democratic governance under international law, potentially threatening the traditional interpretation of the concept of state sovereignty. While domestic governance definitely has become a matter of international concern and the trend is set for movement even farther in that direction, we have not yet reached the point at which democratic rights are internationally enforceable. The concept of “popular sovereignty” is becoming an important concept and a useful conceptual tool in debates over legitimacy of governments and in discussions *de lege ferenda*. In contemporary international law, however, the notion of sovereignty bestowed upon the state as an institution, with effective control as the principal yardstick, remains intact.
PART II – Engaging with armed groups in practice

4 Engaging with armed groups – a legal perspective

Having gone through the international legal framework relating to internal armed conflict and non-state armed groups, I now turn to its practical implications. As stated at the outset of this thesis, its principal purpose is to combine the viewpoints of the theoretically inclined international lawyer with that of the practitioner, identify potential problematic areas and propose possible remedies. The structure of this chapter, dealing with the implications of the international legal system for practical engagement with armed groups, builds upon the different capacities armed groups may have in which interaction with them would prove highly desirable or even necessary for the international community.

If we assume that the overriding objective for engaging with armed groups being peaceful and sustainable resolution of conflicts and increased adherence to international humanitarian and human rights law, three primary potential capacities of armed groups make the case for the international relevance of such groups.177 First, armed groups may assume the role of de facto government over territory under their effective control. Second, armed groups are by definition military entities in conflict with government or other forces and thus under obligations to follow certain international standards of warfare. Third, non-state armed groups are political entities with which negotiations over peaceful solu-

---

177 These potential capacities, in a slightly different form, were presented by Bruderlein, C., 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, available at: www.hdcentre.org, as of 20 February 2005, p. 9, in relation to practical relevance of armed groups for the protection of human security: “From a practical perspective, armed groups remain key actors for protection strategies: as de facto governments within the territories under their control; as military entities active in combat; as authorities responsible for the protection of humanitarian operations; as political entities which may eventually be party to a peace settlement.”
tions may need to be conducted and they may also become parties to peace agreements.

These three potential capacities of armed groups and the way they are dealt with by the international community are analysed separately below. The starting point in relation to each of the potential situations is the question: What is the goal of the international community in engaging with the armed group(s)? This question is logically followed by: How can this goal be achieved using the existing legal framework? The analysis provided is given from a legal perspective, using examples from the practice of states and other international actors where appropriate.

4.1 Armed groups as de facto governments

In situations where an armed group is controlling substantial parts of the territory of a state, there is a vacuum of international responsibility for what takes place in that territory. The group usually has no independent standing as to assume any enforceable international responsibility, and the state is liberated from its otherwise strict responsibility in exchange for an obligation to exercise due diligence in respect of the territory in question.\(^{178}\) The natural goal of the international community in relations to the group is thus to influence the behaviour of the group encouraging them to comply with international standards. There are a number of areas in which the behaviour of the group will be of international interest.

The most obvious of these areas relates to the security of nationals of foreign states. This issue is twofold: i) foreign nationals may be in the territory controlled

\(^{178}\) See article 14 ASR; see also reasoning of the ICJ in the Corfu Channel Case, pp. 20-23; and the Nicaragua Case, where the Court held *inter alia* that Nicaragua was not responsible for transport of arms through its territory, because it was unable to prevent it (this related to actions of another state but it is submitted that the principle is valid in relation to insurrectional movements as well in the light of article 14 ASR).

See also the Illascu case ECtHR, *supra* fn 83, where the ECtHR held that Moldava had a positive obligation to take “all appropriate measures” to ensure the respect ro the European Convention even in the parts of its territory over whichit did not exercise *de facto* control (para 313). It should also be noted that the ECtHR held that the Russian Federation, in supporting the separatist Transdniestrian entity and maintaining its authority over part of Moldavas territory, was to be held responsible for the actions of the Transdniestrian authorities.
by the group, and ii) the destabilization of a state may pose a threat to international peace and security. A second area of international concern is the protection of human rights and humanitarian standards in the territory. These two areas of concern will be dealt with in the following sections. States may also have to decide whether or not to recognize the territory as a new state and the armed group in control as its government; the legal intricacies of such decisions, however, fall outside the scope of the present thesis.

4.1.1 Protection of foreign nationals and international security

One of the main concerns of individual third states in situations of civil war the protection of its nationals in the country of conflict. The recent wave of kidnappings of civilian foreigners by non-state entities in Iraq, displays some of the extreme difficulties involved in such situations. A quick scan of the legal instruments presented in the chapters above does not leave us with a plethora of options for action. Considering the complicated nature of situations of virtual anarchy and total vacuum of effective control however, the situation in Iraq may not be the best yardstick against which to measure the efficacy of the international legal framework relating to non-state armed groups.

In situations when citizens of foreign states have suffered injuries in an internal conflict, at the hands of a non-state entity, issues regarding responsibility may be dealt with retroactively. In the case of a successful revolution, the state may be held accountable for the actions of the revolutionary movement during the conflict. Under some circumstance the state can be held internationally responsible for the actions of non-state armed group even if the group is not successful. These circumstances are defined in articles 5, 8-9 and 11 of the ASR, and relate to situations in which the actions of the group can be attributed to the state or in which the group’s conduct is “acknowledged and adopted” by the state. In the Teheran Hostages Case the ICJ held that the actions of a group of armed stu-

---

179 By September 2004, over 100 foreigners had been abducted by different non-state groups in Iraq since the US invasion, many of which have been killed, see coverage of the Iraq war in the news media, e.g. article in “Dagens Nyheter”, available in Swedish at: http://www.dn.se/DNet/isp/polopoly.jsp?id=145&a=320824, as of 25 February 2005.

180 Article 10 ASR; see also Chapter 2.5 of this paper.
dents barricading the American embassy, holding 52 Americans hostage for over 14 months were attributable to the Iranian state since, i) the government did not take sufficient action to prevent the conduct of the group, and ii) the new revolutionary government could be said to have “acknowledged and adopted” the conduct as its own retroactively.  

Further, when nationals of foreign states fall victim to war crimes of crimes against humanity, punitive measures may be sought against individuals before the ICC at the request of that foreign state, provided that the host-state is party to the Rome Statute. Failing these requirements, the Security Council could step in and refer the case to the ICC under article 13(b) of the Rome Statute, provided that the situation reaches the magnitude of threatening international peace and security. The interest of preventing and punishing crimes against humanity and war crimes however reaches beyond the mere interest of protecting nationals.

As regards the protection of international peace and security, the primary responsibility under the UNC (article 24(1)) is bestowed upon the Security Council. As described above, the Council may take non-forcible or forcible measures to protect peace and all member states are obliged, by virtue of article 25, to abide by their decisions. As we have seen, the Security Council possesses authority to take action in relation to any entity threatening international peace and security (states, non-state groups and individuals), so also in relation to a non-state group acting as de facto government over certain territory.

As noted in the report of the Secretary General’s High Level Panel on Threats and Challenges in 2004, the UN has been fairly successful in its efforts to promote peaceful solutions to internal conflicts. The number of internal conflicts dropped by almost 40% between 1992 and 2003.

---

181 ICJ – US Diplomatic and Consular Staff in Teheran Case, ICJ Rep. 1980, p. 3 (Teheran Hostages Case); see also Malanczuk, supra, pp. 259-260; the term “acknowledged and adopted” used in this context to compare with the subsequently adopted article 11 ASR.
182 Articles 12, 13, 14 Rome Statute.
183 See e.g. ref. to SC Resolutions in footnotes 104 and 106.
185 Ibid, at para 85, p. 33; See also Eriksson and Wallensteen, supra, at p. 625.
“In the last 15 years, more civil wars were ended through negotiation than in the previous two centuries in large part because the United Nations provided leadership, opportunities for negotiation, strategic coordination, and the resources needed for implementation. Hundreds of thousands of lives were saved, and regional and international stability were enhanced.”

The Panel is also critical however, of the ability of the UN and the international community to facilitate the successful implementation of concluded peace agreements and the apparent failure of the organisation to deal with widespread atrocities and ethnic cleansing in civil war contexts. One of the main recommendations of the Panel in relation to intra-state conflicts is to develop the mediation support capacity of the organisation and to increase involvement in peace efforts in relation to civil wars.

4.1.2 Protection of human rights and humanitarian principles

As established above, much indicates that contemporary human rights law does not only provide rights for individuals; that it also creates duties on states as well as on individuals at least to respect the human rights of others. It may thus be argued that armed groups can violate human rights. Further, there is arguably an international obligation on states, not only to respect the human rights of their population, but also to protect them from abuses by other individuals or groups. Is there a corresponding obligation for groups in effective control over territory, to protect the population of that territory from human rights violations committed by other actors? Is an armed group, for example, obligated to stop human rights violations committed by government forces in territories under their control? The obvious answer to this question of the traditional international lawyer is no. As we have seen, however, there is a development increasingly rec-

187 Ibid, at paras. 85-86, p. 34; in this context, reference is made to the atrocities committed in Rwanda, Bosnia and Kosovo.
188 Ibid, Recommendations 101-103.
189 See Paust, supra, at pp. 51 and 62.
190 See inter alia Rodley, supra, pp. 298-299; see also the development of the regional human rights instruments with enforceable obligations on the states to protect the human rights of their subjects: see inter alia article 1 of the ECHR: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” (Italics added).
ognizing the authority of non-traditional actors. It is reasonable to assume, as does Rodley, that groups having powers similar to those of a state has the ability to protect human rights in the territory they control. Such a contention would have to be used with caution however, and the notion of “powers similar to those of states” must be examined on a case by case basis. Once an ability to protect the human rights of the population under group control is established, one step is taken towards accepting the existence of a duty to do so.

As regards the protection of humanitarian operations, there is a provision in article 81 of Protocol I additional to the Geneva Conventions relating to a duty of the parties to the conflict to facilitate the access of humanitarian agencies, in particular the International Committee of the Red Cross and Red Crescent (ICRC), to those in need of their help. There is no counterpart to this rule in the IHL instruments relating to intra-state conflicts. The right to provide humanitarian assistance in international as well as internal armed conflicts is well established in international law provided the assistance is in fact purely humanitarian in its nature. Problems arise when one tries to identify a corresponding obligation for authorities to facilitate the provision of such assistance in internal conflicts. It is further the testimony of humanitarian organizations that issue of access to affected populations in internal armed conflicts is one of the major challenges of humanitarian efforts today. In this context it should further be noted that the problem of denied access to populations in need is not limited to areas controlled by non-state groups. States involved in conflicts with non-state groups are often just as reluctant to facilitate humanitarian access.

191 In this respect it is interesting to note that the draft articles produced by UN Global Compact for the responsibility of private commercial actors with regard to human rights envisages responsibility for multinational corporations to protect human rights: see A. General Obligations in the Norms on the Responsibilities of Transnational Corporations and other Enterprises with Regard to Human Rights (E/CN.4/Sub.2/2003/12/Rev2) available at: www.unhchr.org as of 20 March 2005.
192 Rodley, supra, p. 318. This only concerns groups with powers similar to those of states. Rodley is generally sceptical however, regarding obligations placed upon individuals under international human rights law.
193 See common article 3 of the 1949 Geneva Conventions, where the ICRC or other impartial humanitarian organizations may offer their services to the parties, but without obligation for the parties to accept such help; and Protocol II additional to the Geneva Conventions lacking provisions on the status and rights of humanitarian organizations.
194 See inter alia the Nicaragua Case, supra, in which the ICJ held: “
“In recent years, humanitarian access has been hampered by general insecurity arising from the conflict, an inability or unwillingness on the part of State or non-State actors to allow such access and, in some cases, deliberate attempts to obstruct humanitarian assistance. The cost in human lives and human suffering has been enormous.”

That states are reluctant to allow and facilitate access of humanitarian organizations may find part of its explanation in the sensitivity of states towards even acknowledging the existence of internal conflicts. As stated elsewhere in this paper however, under contemporary international law, there are more channels open to the international community to influence the behaviour of states than that of non-state groups.

### 4.2 Military entities active in combat

All armed groups are by definition involved in active hostilities either with states or with other non-state groups. The interest of the international community in these situations appears to be twofold: i) promotion of the development and application of, as well as adherence to, international humanitarian law, and ii) facilitation of a sustainable peaceful solution to the conflict. The rationales for the international community to get involved are based respectively on: i) humanitarianism and ideas such as the “humanitarian imperative” but also the interest of maintaining a coherent international framework relating to armed conflict, and ii) the interest of preserving international peace and security. While Chapter 4.3 will deal with international efforts to promote peaceful resolution of conflicts through political dialogue and facilitate negotiations between warring parties, this chapter will be dedicated to a discussion on international efforts to develop and promote application of IHL.

---


197 The concept is reverberating Immanuel Kant’s theory on the “categorical imperative” and refers to a duty or obligation of the international community to aid those in need. For a critical analysis of the concept, see Slim, H., Claiming a Humanitarian Imperative: NGOs and Cultivation of Humanitarian Dignity, Oxford Brookes University, Paper presented at the Seventh Annual Conference of Webster University on Humanitarian Values for the Twenty-First Century, Geneva, Feb 2002, available at: www.hapinternational.org.
4.2.1 Extending application of IHL

The development of international humanitarian law towards applicability in internal conflicts has been described in Chapter 2.2 of this paper. As we have seen, it was driven by NGOs (most notably the ICRC) rather than states and the result of the efforts of the efforts to create a comprehensive framework of rules governing the conduct of internal armed conflicts through the 1977 Protocol II, was a compromise solution. It extended the application of the laws of war to internal conflicts in comparison to common article 3 of the 1949 Geneva Conventions, but did not include the full scope of the humanitarian law relating to international conflicts.

In 1984, six years after the entry into force of the additional Protocols, Suter claimed that the creation of these instruments had been a disappointing failure.\textsuperscript{198} One of the main reasons for this, he claimed, was that governments, with a possible exception for the Scandinavian countries, were fundamentally not interested in creating an international law relating to internal armed conflict.\textsuperscript{199} It is submitted that the difficulties to reach international consensus over rules relating to internal conflicts are a result of the politically paralyzing nature of internal conflicts. States are inherently reluctant towards recognizing the relevance of the international system to circumstances of specific or potential disturbances on their own territory. As Meron observes:

“States are prone to consider violent acts committed with political objectives as crimes regulated by domestic penal law, even when the violence has escalated into a non-international armed conflict.”\textsuperscript{200}

\textsuperscript{198} His criticism is aimed at the scope of included articles as well as the unclarity \textit{inter alia} regarding the threshold for application. He also argues that international humanitarian law is a creation of lawyers and diplomats without knowledge or understanding for the situation on the ground; see Suter, \textit{supra}, pp. 175-185: “The law of armed conflicts has been devised over the past century in the sophisticated and elegant conference centres of Europe by intelligent, detached people. It is to be implemented (if at all) by young, not necessarily well educated men who in combat zones are aware that the present moment could be their last.”

\textsuperscript{199} Suter considered this to be extraordinary, since, already at the time of the adoption of the Protocols, active internal armed conflicts drastically outnumbered international character (35 internal conflicts and five conventional international conflicts), see Suter, \textit{supra}, p. 177.

\textsuperscript{200} Meron, T. Human Rights in Internal Strife: Their International Protection, Cambridge, 1987, p. 73.
The quote has bearing in relation to the development of new law as well as on implementation of existing legal instruments. It illustrates one of the main obstacles to any agent seeking to engage with non-state armed groups. This political paralysis is a pitfall for anyone attempting to influence armed groups to respect and abide by international humanitarian and human rights norms. If government forces refuse to extend privileges of IHL to combatants from non-state groups or civilians sympathising with them, how can the forces of oppositional groups be expected to respect these bodies of law in their conduct? On the other hand, the incentive for government forces to extend such privileges to non-state entities is reliant on their perception of a reliable counterpart and perceived reciprocity. The principal problem lies here; there is a dire need for improved implementation of and increased respect for existing norms and instruments. If the very basic principles contained in common article 3 would be universally respected the world would definitely be a much better place, even if we had no such thing as the 1977 Protocol II. As we enter back into the realms of reality however, we are left no option but to conclude:

“As we have seen in the recent conflicts in Bosnia, Rwanda, Afghanistan, Liberia and Chechnya, unfortunately, often not even the most elementary of these minimum standards are observed.”201

4.2.2 International reactions to violations of IHL
Another issue related to the upholding of respect for IHL and international standards is the ability of the international community to react to violations of its basic principles. There are two principal legal instruments available to the international community: i) criminal prosecutions before the ICC, and ii) forcible measures by the Security Council under Chapter VII of the UNC.

The potential for international investigations and prosecutions of war crimes and crimes against humanity has increased with the establishment of the International Criminal Court in 2003. The efficacy of the ICC is still to be evaluated, the Court is still to deliver its first judgement, but it is undoubtedly a large step in the

---

201 Malanczuk, supra, p. 353.
direction of achieving truly enforceable minimum standards of protection, relating to international as well as internal conflicts.

In addition to the right of states to refer cases to the ICC, the UN Security Council acting under chapter VII of the UNC, can refer issues to the Court for investigation.\textsuperscript{202} The Security Council has shown preparedness to get involved in indictments of war crimes and crimes against humanity in the recent past through the establishments of the \textit{ad hoc} tribunals in the Former Yugoslavia and Rwanda.\textsuperscript{203} The new and less complicated option for the Council, to refer cases to the ICC for investigation and prosecution, may contribute to a more frequent involvement. At the time of writing this paper, an issue of referral to the ICC regarding the actions of a non-state group is pending in the Security Council. The International Commission of Inquiry on the conflict in Darfur, headed by Antonio Cassese, recommended the Security Council to make use of its right to refer the situation in Darfur, widespread killing of civilians, displacement of populations and systematic rape perpetrated mainly by the Janjaweed militia, to the ICC.\textsuperscript{204} The Commission concluded that “[t]he Sudanese justice system is unable and unwilling to address the situation in Darfur”\textsuperscript{205} and that a referral of the situation to the ICC “would contribute to the restoration of peace in the region.”\textsuperscript{206} No action was taken on the matter at the Council meeting on 16 February, 2005.\textsuperscript{207}

A factor to be considered however, not speaking in favour of Security Council action on the matter of Darfur, or any other referral to the ICC, is that out of the 15 present members, only nine have ratified the Rome Statute, four have signed but not ratified and two (the permanent members, the United States\textsuperscript{208} and

\begin{footnotes}
\item Article 13(b) Rome Statute (1998).
\item See SC Res. 827 (1993), establishing the International Criminal Tribunal for the Former Yugoslavia; and SC Res. 995 (1994), establishing the International Criminal Tribunal for Rwanda.
\item \textit{Ibid}, p. 5
\item \textit{Ibid}, p. 5.
\item See UN Doc. S/pv.5125, SC meeting, Wednesday, 16 February 2005, 4 p.m., New York.
\item President George W. Bush rescinded the signature of ex-President Bill Clinton.
\end{footnotes}
China) have neither signed nor ratified the Statute.\textsuperscript{209} The United States is directly opposing the ICC and is not likely to participate in a referral of any situation to the Court.\textsuperscript{210} Whether they will make use of their veto-power is not clear. In this respect it should be noted that one of the recommendations in the High Level Panel Report 2004, in relation to intra-state conflicts is that the Security Council should make use of its authority to refer cases of suspected war crimes and crimes against humanity to the ICC.

The Security Council may further make use of its authority to impose sanctions on groups not living up to their international obligations and, as we have seen, this is not uncommon. As an example, the Secretary General of the UN recently recommended the Council to impose sanctions on Liberation Tamil Tigers Eelam (LTTE) due to alleged use of child soldiers.\textsuperscript{211} The issue is still pending at the Council.

4.3 Armed groups as political entities key to peaceful solution
Armed groups in internal armed conflicts have to be involved in any efforts to reach peaceful resolutions to such conflicts. No sustainable peace can be achieved without the participation of one or more of the warring parties. Armed groups by their very nature, as defined in this paper, have the ability to veto in action any attempt to achieve peace. Engaging with non-state groups is therefore a necessity for third states or international organizations aiming at assuming an interlocutor role in relation to non-international conflicts.

Assuming that one of the aims of the international community is to promote peace and stability, which does not appear to be an overly bold assumption, the interest of the international community and individual foreign states is to find ways in which to interact with non-state groups, without lethally damaging the

\textsuperscript{210} On the situation in Darfur, the US ambassador-at-large for war crimes stated: “We don’t want to be party to legitimizing the Court.” See Reuters Foundation, AlertNet: U.S. lobbies United Nations for a new Darfur Court, 28 January 2005, available at: http://www.alertnet.org/thenews/newsdesk/N2715850.htm, as of 20 February 2005.
relations with the host-state in the process. The issue is very political in its nature and careful considerations as to the choice of proper political and diplomatic strategies will have to be made. In some aspects, however, the international legal framework and legal determinations are also of relevance. This primarily concerns: i) the legal status of the armed group(s) in question, and ii) the ability of groups to enter into internationally enforceable agreements with other groups and with states.

4.3.1 International recognition of group status
As we have seen, under contemporary international law, armed groups can assume international legal personality to the extent such personality is afforded to them by the international community, i.e. states. Traditionally, recognition of insurgency or belligerence played a crucial role for the application of international legal norms in internal conflicts, and thus granting status to armed groups under these norms. It has been shown however, that international law is moving towards using objective criteria for the application of IHL in non-international conflicts.

This means that international personality, for the purposes of application of IHL, is bestowed upon armed groups as soon as the requirements of common article 3 of the 1949 Geneva Convention and article 1 of Additional Protocol II, respectively are fulfilled. The exact extent of this personality and the implications of it is a matter of controversy. Notably however, common article 3 also explicitly provides for the capacity of groups involved in armed conflicts to enter into agreements to extend the application of humanitarian law.

In the context of recognising non-state entities as subjects of international law, National Liberation Movements have taken a special position in the practice

---

212 See Chapter 3.1 of this paper.
213 See requirements for application of common article 3 of the 1949 Geneva Conventions and the 1977 Protocol II; see also Chapter 2.1.
214 See for example discussion on the legal status and international enforceability of peace agreements concluded between non-state groups and states, Groete, R., The United Nations and the Establishment of a New Model of Governance for Central America: The Case of Guatemala, in Frowein, J. A. and Wolfrum, R. (eds.) Max Planck Yearbook of United Nations Law (1998), pp. 239-286 at p. 256; compare to discussion in Chapter 4.3.2 of this paper.
of the international community. As described above an NLM is defined by its struggle to realise the right to self-determination of the people it represents. The concept emerged out of the era of decolonisation and was based on a qualitative determination of the goals of the group rather than a measure of the group’s control over territory or ability to threaten the established government.\textsuperscript{215} Many NLMs were granted observer status at the General Assembly of the UN and their rights and international status have repeatedly been pronounced by the General Assembly.\textsuperscript{216} Further, article 1(4) and 96(3) of Protocol I Additional to the Geneva Conventions allows for formal accession by NLMs. It seems, however, that the concept, arguably well equipped to deal with de-colonisation issues, is not a tool to be counted on in relation to non-state armed groups outside of a colonial context. The only NLM with observer status at the General Assembly remaining after the democratisation of South Africa in 1994, ending the NLM status of the ANC\textsuperscript{217}, is the Palestinian Liberation Organisation (PLO).\textsuperscript{218} The right to self-determination is undoubtedly one of the most fundamental principles under international law, confirmed as an obligation \textit{erga omnes} by the ICJ.\textsuperscript{219} The fact that the cause of a group can be identified as in pursuit of self-determination is thus not irrelevant. However, it is my contention that the test of actual control over territory and the objective criteria set out in Protocol II are, in practice and in our decolonised era, the predominant factors in determining international standing of an armed group. Even though the right of peoples to self-determination is constantly referred to in the international debate, the legal meaning of the term NLM, as described above, seem limited to the context of decolonisation.

\textsuperscript{215} Ginther, \textit{supra}, at p. 212; see also Malanczuk, \textit{supra}, p. 104.
\textsuperscript{216} GA Res. 2918 (XVII) endorsed the concept of observer status for those NLMs recognised by the Organisation of African Unity (OAU) and through GA Res. 3247 the GA accepted the right for NLMs recognised by the AOU of the Arab League to participate as observers in the sessions of the Assembly and in other UN meetings, see Shaw, \textit{supra}, p. 220; see also GA Res. 2621 (XXV) and on the rights of NLMs to use “all necessare means at their disposal” and GA Res. 3103 (XXVIII) on the right for NLMs to invoke \textit{jus in bello} (laws of war), as cited in Ginther, \textit{supra}, at pp. 213-214.
\textsuperscript{217} GA Res. 48/159 retrieved the observer status granted to the ANC/PAC through GA Res. 3280 (XXV); see Ginther, \textit{supra}, at p. 215.
\textsuperscript{218} Ginther, \textit{supra}, at p. 214-215; the PLO was granted observer status at the GA through GA Res.
4.3.2 The status of peace agreements

Another issue related to peace efforts is the treaty-making capacity of non-state actors. What status does a peace agreement between a non-state actor and a state have under international law? Commentators have had different opinions on the issue. In 1996 a peace agreement was concluded between the Guatemalan government and the rebels of the Unidad Revolucionaria Nacional Guatemalteca (URNG). The “Accord for a Firm and Lasting Peace”, put an end to the 34-year long civil war that had killed over 100,000 people and resulted in the disappearance of 40,000 others.220 The agreement was co-signed by the former Secretary General of the UN, Boutros Boutros-Ghali, who was also requested to verify compliance of the parties with the agreement.221

In a commentary to the agreement, Groté concludes that the legal nature of the agreement is unclear, but that it is not to be regarded as a treaty under international law since one of the parties to it is not a state.222 In support of this contention, Groté cites article 2 of the 1969 Vienna Convention on the Law of Treaties. As discussed above, this is not necessarily the conclusion to be drawn from the 1969 Vienna Convention. Article 3 of the Convention explicitly states that the limitation contained in article 1 is not to affect the legal status of agreements concluded by other subjects of international law. Statements by the ILC in its commentaries to both the Vienna Conventions on the Law of Treaties of 1969 and the 1984 Vienna Convention on the Law of Treaties Between States and International Organisations223, clearly indicates the view that non-state entities are capable of concluding treaties under international law.224 A more accurate interpretation of the legal status of the Guatemalan peace agreement would thus be that it is not to be regarded as a treaty within the meaning of the 1969 Convention. This does not preclude, however, the possibility of the agreement having international status under any other regime.

222 Grote, supra, at p. 256.
It is possible, and indeed even logical, that the status afforded to armed groups involved in armed conflicts under applicable IHL, would suffice to give them capacity to conclude internationally enforceable treaties to end or regulate hostilities. It is necessary to examine the intention of the parties to the treaty in determining whether an agreement is of international character or not. The Secretary General of the United Nations co-signing the peace agreement and being requested to verify compliance of the parties with the agreement, as in the Guatemalan case, is a factor to be considered in this respect.

5. Problems identified by practitioners

In assessing the efficacy of the international legal framework it is appropriate to consult practitioners involved in contacts and negotiations with non-state groups, as well as armed groups themselves. In December 2004, the NGO Conciliation Resources published a report from a workshop entitled: Engaging Non-State Armed Groups in Peace Processes (CR-report). The workshop, held in July 2004, brought together people from different backgrounds, including representatives of armed groups, people playing official and unofficial intermediary roles, representatives of governments and academics. The participants in the workshop identified a number of practical problems relating to the nature and implementation of the present international legal system relating to internal conflicts and non-state groups. The identified problems of importance for this work include the claim that the state-centred international system contains an inherent bias favouring states over non-state actors; that the post 9/11 war on terror has shifted focus

---

225 See ILC commentary to the VCLT 1986 in YBILC (1981) vol. II, p. 125: “[t]he development of world humanitarian law and its extension for the benefit of entities which have not yet been constituted as states will provide further examples of this kind, and there will even be agreements concluded between one or more international organizations, one or more States and one or more entities which are neither States nor international organizations.”; see also discussion on the issue in Lindblom, A-K., The Legal Status of Non-Governmental Organization in International Law, Uppsala, 2001, p. 437-441.
226 Jennings and Watts, at p. 1202.
227 Ibid, at p. 1202; see also footnote 215 above.
228 Conciliation Resources is an NGO, established in 1994, specialised in providing practical and sustained assistance to people and groups in areas of armed conflict or potential violence.
229 Engaging armed groups in peace processes, Joint analysis workshop report, Conciliation Resources, as available at www.c-r.org, as of 14 February 2005.
from peace efforts and dialogue to restrictions and repression; and that international sanctions and punitive measures may prove to be counterproductive in relation to peace efforts. The criticism put forward gains support in policy papers from other NGOs involved in engaging armed groups in international processes.230 Broderlein, of the Centre for Humanitarian Dialogue in Geneva, further points out that non-state groups rarely, if ever, are invited to participate in the legislative process on the international arena and argues that increased participation would be conducive to the prospects of adherence to international norms by armed groups.231 These perceived problems will be dealt with in order in this chapter.

5.1 The asymmetry of the state-based system
One of the main problems identified in the CR-report relating to international legal aspects of engaging with non-state armed groups is based on the claim that the present state-centred international system is inherently biased, favouring incumbent governments in intra-state conflicts. The asymmetry of the international legal system was considered to be an important factor in the poor international response to civil wars and thus made the present system, “ill-equipped to respond to the challenges posed by non-state armed groups.”232

The asymmetry referred to is manifested in various ways. For example, states taking third-party roles in situations of internal conflicts find themselves in a dilemma. It is natural for them to engage with the government of the state in question, while the issue of engaging with the armed groups involved in the conflict is far more problematic due to respect for state sovereignty. In stable states with a satisfactory degree of democratic governance, this may seem to be natural. One can make the argument however, that the state-centric system appears more random and arbitrary in cases of so called “weak” or “failed” states where many of

230 See e.g. Broderlein, supra, regarding the views of Centre for Humanitarian Dialogue; see also Policzer, supra, specifically on the change of attitude towards armed groups post 9/11 2001.
231 Broderlein, supra, p. 7.
232 Engaging non-state armed groups in peace processes, supra, p. 13.
the attributes forming the base for the validity of state sovereignty on the international arena can be put in question.233

There are also other examples of situations in which the incumbent government is not considerably more stable than the group(s) challenging its authority. One example given in the CR-report is the Democratic Republic of Congo (DRC), where the host-government itself was an armed group just a year before the outbreak of a new rebellion. In DRC, a rebel group led by Laurent Kabila ousted the government of Mobutu Sese Seko in 1997; a government which had itself gained power through a coup in 1965. The Kabila leadership was challenged by a Uganda- and Angola supported rebellion only a year after gaining power, but had by then gained all the privileges of a government actor in the international system.234

At the Conciliation Resources workshop, armed groups voiced concerns that the bias of the state system created a feeling of inequality even before negotiations and peace talks begin.235 Obviously, this runs the risk of making engagement even more difficult. One should not forget, however, that the natural state of an actor challenging an existing authority is that of an “underdog”. One of the main purposes of a state is to protect its laws and thereby its subjects through a monopoly of coercive force.236 This being the argument of stability, there is an equally pertinent argument on grounds of legitimacy. All armed opposition groups are not, judged by the yardstick of democratic entitlement and human rights, legitimate contenders for state authority. However, the de facto strength of a group often requires a pragmatic perspective allowing for interaction with an armed group despite a questionable human rights record or political agenda. A development of international law towards greater participation of armed opposition groups should aspire to reflect the need for balancing of these contrasting interests.

233 See Koskenmäki, supra.
236 See Weberian concept of the state referred to in Chapter 3.2 above.
5.2 War on terror

In the CR-report, deep concern is voiced over the consequences of the post 9/11 war on terror: “[t]he current environment is such that it is particularly difficult to engage with armed groups at a time when there is a desperate need to do so.”

Politzcer similarly notes: “today we are faced with a uniquely complex situation. Armed groups are widely recognized to be of paramount political importance, but there is far less consensus over how to deal with them than there was even a decade ago.”

The ‘war on terror’ has in fact opened a window of international sympathy, perhaps reaching beyond rationality, for regimes whose authority is threatened by insurgent groups in states troubled by internal disturbances. The paramount political trauma of the terrorist attacks in the US in the autumn of 2001 has made it easier to get international acceptance for labelling challenging groups “terrorists” or mere criminals. Many states, traditionally troubled by internal unrest, have made moves to advance their positions internationally in the wake of these events. States may even receive the help of the international community to curb the activities of armed groups on their territory, through targeted sanctions and other international enforcement measures.

---

238 Policzer, supra, p. 2.
239 There has been a drastic boost in international focus on the threat of terrorism which is illustrated inter alia by the considerable increase of SC Resolutions on the matter. Between 1997 and 2000 the security council adopted one resolution, SC Res. 1189 (1998) relating exclusively to the threat of terrorism condemning the bombings of American embassy buildings in Nairobi, Kenya and Dar-es-Salaam, Tanzania, and three resolutions relating to the Al-Qaeda and the situation in Afghanistan, e.g. SC Res. 1267 (1999) imposing sanctions on the Al-Qaeda, Usama Bin-Laden and the Taliban. During the same amount of time, between September 2001, after the terrorist attacks in the New York and Washington, and the end of 2004, the Council adopted 15 resolutions relating specifically to the threat to peace and security posed by international terrorism, including Res. 1373 in effect obliging all states to implement the contents of the 1999 International Convention on the Suppression of the Financing of Terrorism, available at: http://untreaty.un.org as of 20 March 2005, in addition to the many resolutions dealing with terrorism in specific conflict and post-conflict situations. In this context the discussion on political considerations and lacking legal safeguards in Chapter 2.4 is also relevant, see Cameron (2003), supra, at pp. 10-15; see also SC Res. 1530 (2004), cited in footnote 234 below.
240 Policzer puts inter alia Colombia, Russia, Pakistan, Indonesia and the Philippines in this category, Policzer, supra, p. 2.
241 See footnote 239 above; particularly illuminating of the attitude of the international community, acting through the Security Council, is SC Res. 1530 (2004), in which the Basque separatist organization ETA was singled out as responsible for a major train bombing in Madrid 14 March 2004 (Op 1), based on
The development towards increasing “blacklisting” of organisations runs an obvious risk to stigmatize armed groups and further alienate them from the international community and political dialogue. This is one of the arguments for the importance of considering the problems involved in taking international action against more or less defined groups under the pretence of preventing terrorism. In this context it is crucial for the international community, and in the interest of armed opposition groups with political ambitions, that more selective and effective ways to target terrorist-organisations are developed.242

5.3 International sanctions and punitive measures
During the workshop organized by Conciliation Resources, it was further argued that international enforcement- and punitive measures, such as sanction regimes and indictments in the International Criminal Court, can in fact be counterproductive in relation to armed groups and detrimental to efforts to achieve interaction and negotiations between parties to internal conflicts and adherence to international standards.

5.3.1 International sanctions
In the CR-report, reference is made *inter alia* to restrictions imposed on Liberation Tamil Tigers of Eelam (LTTE) members’ movements that affected participation in aid conferences in Washington and Japan in 2003.243 It was argued that such limitations imposed on a group and its members by the international community or individual foreign states are detrimental to any attempts to promote dialogue.244 A situation in which one of the parties to a conflict is not guaranteed the safe passage to and from talks in third states is of course not conducive to

Spanish accusations. The bombing were later linked to Islamic fundamentalists, seeking “revenge” for the Spanish participation in the war in Iraq (See *inter alia* BBC News analysis: Madrid Blasts, Who is to Blame? from March 18 2004, available at: [http://news.bbc.co.uk/2/hi/europe/3512748.stm](http://news.bbc.co.uk/2/hi/europe/3512748.stm), as of 20 February 2005).

242 See also discussion under 2.4 and 5.3.


244 *Engaging armed groups in peace processes*, supra, at p. 14.
negotiations. This must be kept separate from situations in which measures strictly under domestic jurisdiction are undertaken.

The CR-report also referred to the arrest of Free Aceh Movement (GAM) leaders on their way to peace talks in Tokyo in 2003 and the arrest of a negotiator from one of Colombia’s armed insurgent movements travelling to attend talks in 2004. Both of these instances deal with municipal authorities enforcing law against its own citizens on its own territory. Thus, as long as the arrests were carried out in accordance with applicable norms of due process these cases do not concern international law. Of course, a mechanism of temporary amnesty or immunity for purposes of conducting peace talks would be the recommended course of action. It is relevant to keep in mind, however, that any efficient system under international law conferring something similar to diplomatic immunity, relating on certain non-state armed groups and their representatives, would have to interfere in the criminal jurisdiction of host-states. As we have seen above, in IHL under the Geneva regimes the drafters and concluding states were careful not to interfere in the rights of individual state’s right to prosecute and punish those guilty of treason.

5.3.2 Prosecutions by the ICC and international criminal law
Related to the issue of international sanctions is the claim by some of the participants of the Conciliation Resources workshop, notably representatives of armed groups, that investigations and prosecutions by the International Criminal Court of alleged criminal actions by members of armed groups are counterproductive to the achievement of conciliation and peace. In the CR-report the threatening investigation into the actions of the Ugandan non-state group Lord’s Resistance Army by the ICC was given as an example of international actions that could “undermine rather than bolster prospects for peace.”

246 The arrests would then be matters “essentially within the domestic jurisdiction” of the arresting states, see article 2(7) of the UNC.
248 See Chapter 2.2 of this paper.
With respect, I have to take the position that these concerns are, at best exaggerated, and in the worst case motivated by a reactionary wish to maintain the order of impunity for violations in states without capacity for effective prosecutions. However, the view presented in the CR-report, gains support from other organizations working close to the conflict. 250 Undoubtedly, a balancing of interests is necessary. The immediate need to promote dialogue, perhaps through granting some form of immunities to certain leaders of armed groups, may be balanced with keeping the door open for prosecution at a later stage. 251 It seems anachronistic however, to allow immunity from prosecution for officials of non-state groups in a time when the immunity traditionally afforded to state officials is increasingly questioned, and in some cases even abandoned. 252

The LRA are accused of massive violations and brutality towards the civilian population during their 18 year war against the Ugandan Government. 253 Arguably, government forces also committed violations during the protracted conflict, but this cannot serve as an excuse or justification of the actions of other actors. The LRA itself does not have the standing to bring accusations against the government before the ICC, but the Court has the authority to start investigations *proprio motu*, under conditions specified in article 15 of the Rome Statute. The investigation of the actions of the LRA may in fact lead to the initiation of inves-

250 “Their officials [ICC] seem to lack some serious grasp of the situation, particularly the fact that to start war crimes investigations for the sake of justice at a time when the war is not yet over risks having, in the end, neither justice nor peace delivered.” The statement was made by the Gulu Catholic Archdiocese's Justice and Peace Commission in connection to the ICC threat to investigate the actions of the LRA. (Source: IRIN News (UN OCHA), 11 February 2005, available at: http://www.plusnews.org/report.asp?ReportID=45514&SelectRegion=East_Africa&SelectCountry=UGA NDA, as of 20 February 2005.)

251 Permanent amnesties for gross human rights violations are not permissible under international law. See in this respect the e.g. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone 7 July 1999, available at www.c-r.org/accord/s-leone/accord9/Lome.shtml, (the Lomé Agreement), in which article IX grants full immunity to the parties to the conflict. The amnesty was immediately disqualified by the Secretary General of the UN and subsequent to SC Res. 1315 (2000) the Special Court for Sierra Leone was set up. According to article 10 of the Statute of the tribunal all amnesties given in relation to crimes under te jurisdiction of the court are void; see Dougherty, Beth K., Searching for Answers: Sierra Leone’s Truth & Reconciliation Commission, in African Studies Quarterly, Vol. 8, Issue 1 (2004).

252 Immunity from charges of international crimes, in foreign courts, is only available for the most high-ranking state officials (head of state, and arguably foreign ministers) and only while in office, see e.g. Jennings and Watts, *supra*, at § 456. Further, there is an ongoing development towards combating impunity for the most serious crimes, even when committed by public officials, and the Rome Statute (1998) explicitly disqualifies any immunities from proceedings before the International Criminal Court (article 27); See also the work of the ICTY and ICTR.

tigations of the activities of government forces. Further, there are a number of safeguards built into the Statute, preventing the Court from being used for political ends. Additionally, if an investigation or prosecution before the ICC would risk interfering with ongoing peace efforts, the Security Council has the authority to defer proceedings before the court for a period of 12 months at a time.

In addition to the criticism relating to the effect of international criminal investigations on peace efforts however, the model of the evolving system of international criminalization of internal atrocities has been criticized on slightly different grounds. This criticism is more related to the obstacles under international law to the participation of armed groups in preventing impunity for violations of international humanitarian and human rights law. These obstacles are unavoidable consequences of the reluctance to grant formal status to armed groups in international treaties. An illuminating example is given by Capie and Policzer in relation to the international efforts to ban the use of child soldiers. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict, prohibits non-state groups from using persons under 18 years of age in hostilities. The main mechanism for implementation and enforcement of the provision is for states to criminalize such recruitment. “This simply begs the question of how armed groups can be held accountable, when the existence of such groups in the first place reflects a state’s incapacity to effectively control and enforce laws in its territory.” The typical behaviour of states towards non-state groups is described with merit in the following quote:

“If armed groups are to be held accountable for violations of humanitarian norms, they have to be assigned responsibility for ending them. For this to happen, groups have to be addressed directly. Not surprisingly, states are reluctant to permit this. Jealous of their sovereignty, they are wary of anything that might confer legitimacy on their enemies.”

257 Article 4(2).
258 Capie and Policzer, supra, p. 2.
259 Ibid, p. 2.
PART III – The way forward and Conclusions

6. Way forward

This paper has shown that there is a vast network of international norms operating in situations of internal conflict and relating to the conduct of non-state groups. It has also shown however, that the international legal system is sometimes inadequate or simply ill-equipped to deal with the new challenges posed by contemporary, primarily non-international, armed conflicts and to facilitate dialogue between warring factions. In the present chapter I revisit the problematic areas identified in previous parts of the thesis and analyse potential remedies. I have focused on possible legal remedies, though obviously, there is a just as dire a need for new policy approaches. That, however, is outside the scope of the present work.

In this chapter, three problematic areas will be analyzed from a perspective lege ferenda. The areas I have chosen to focus on are: the need to define the status of non-state armed groups and their potential participation in international processes, the perceived asymmetries of the state-based system, and the political paralysis caused by the sensitive nature of intra-state conflicts.

6.1 Defining status and participation in treaties

One of the main problematic issues related to non-state armed groups is the difficulty in finding a general definition of the concept. This is not made easier by the controversial character of the political aspects of the issue. There are a number of alternative definitions of the concept offered in the literature. These are ranging from a very wide understanding of the term, including criminal bands, terrorist organisations and private security corporations, to equally narrow interpretations of the concept only including groups that seriously challenge state authority.\textsuperscript{260} Throughout this thesis I have intentionally chosen to use a broad work-

\textsuperscript{260} See discussion by Policzer, \textit{supra}.
ing definition of the concept to shed light on the entire framework of rules relating to armed groups. In this chapter, I will discuss the need for a more limited definition of the concept in some situations.

6.1.1 The question of definition

Policzer has identified four main characteristics predominant in the most commonly suggested definitions: i) organizational coherence or hierarchical structure; ii) use of violence as political method; iii) independence from state control; and iv) some territorial control.\(^{261}\) These requirements are all elements of the definition contained within article 1(1) of the 1977 Protocol II additional to the 1949 Geneva Conventions.\(^{262}\)

Non-governmental organizations, working in the field of engaging with non-state armed groups, have made various attempts to define the concept. Claude Bruderlein, of the Centre for Humanitarian Dialogue, has proposed a definition consisting of requirement i) to iii) above.\(^{263}\) Geneva Call, aiming to get armed groups to adhere to international norms by way of signing Deeds of Commitment\(^{264}\), defines armed groups as entities fulfilling the first two of these requirements.\(^{265}\) Policzer, co-director of the NGO Armed Groups Project, argues that a better approach is to focus on the challenging of state authority. He proposes an extremely inclusive, minimalist definition, building on the Weberian conception of the state\(^{266}\), containing only one qualitative requirement: “Non-state armed groups are challengers to the state’s monopoly of legitimate coercive force.”\(^{267}\)

\(^{261}\) Ibid, at p. 6.

\(^{262}\) In this respect see also the more detailed requirements for “prisoner of war” status under Protocol I additional to the Geneva Conventions, articles 43-44.

\(^{263}\) Bruderlein, supra, pp. 8-9; see also discussion on this and other proposed definitions in Policzer, supra, pp. 5-12.

\(^{264}\) See Chapter 6.2.1 below.

\(^{265}\) See definition stated at: [http://www.genevacall.org/about/about.htm](http://www.genevacall.org/about/about.htm); see also discussion on this and other proposed definitions in Policzer, supra, pp. 5-12.


In dealing with the issue of definition of a concept such as non-state armed groups, one must consider the context in which the definition is to be used and the purpose for defining the concept. Creating a working definition to be used by NGOs involved in engaging with armed groups may not be the same thing as defining the concept for the purposes of an international legal instrument. Engagement with armed groups by NGOs may be necessary even in cases where legal recognition and legitimization is not appropriate.

As noted above, the best definition provided under international law today is that offered by article 1 of Additional Protocol II. This does not include the groups fighting civil wars without reaching the threshold of application in the Protocol, however. Under common article 3, a group only has to be a party to an “armed conflict” within the territory of a High Contracting Party. The personality granted to a group as a result of fulfilling the requirements of the definitions above, only serve to receive the rights and perform the duties under those regimes. As this paper has shown, however, there may in certain situations be a need for the international community to relate to armed groups for a number of other purposes than the mere application of IHL in conflict situations. For example, there are a number of international agreements that cannot be implemented effectively without enforcement action of non-state entities. Arguably, there is thus a need of criteria for granting status for other purposes. This is an extremely sensitive issue, which is most likely why the community of states has not yet come up with a mutually acceptable solution.

In this respect it is important to carefully consider which groups the community as a whole, the people affected by the conflict, and the prospects of peaceful solutions would benefit from granting status. Should there be a qualitative requirement as to the political persuasion of the group? Are democratic ambitions required? If so, are we not risking further alienation of the most dangerous groups? Even groups with deeply undemocratic agendas and without popular

268 1977 Additional Protocol II, article 1(1): “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.”
269 See e.g. discussion under 5.3.2 above.
support are able to “veto or frustrate the process of transition away from violent conflict towards sustainable and just peace”, and therefore need to be dealt with. Yet, do we want, in addition to the vast number of undemocratic, human rights-mocking states, an equal number of ditto armed opposition groups influencing the international agenda?

As we have seen the traditional cemented concept of state sovereignty is starting to crumble because of the emerging doctrine of the supremacy of individual- and group human rights. I do not dare propose that we are yet at a point where a human right such as the right to democratic governance will trump the sovereign rights claimed by a government in effective control over the territory of a state. The argument of “popular sovereignty”, however, is morally attractive. In light of the development towards requiring democratic governance of states as a precondition for full participation in the international community, it does seem anachronistic to invite new actors to participate in that arena without a corresponding requirement.

As we have seen, National Liberation Movements (NLM) have historically held a special position under international law; sometimes even granted observer status at the UN. The idea of recognizing NLMs and granting them status on the international arena rests on the principle of a right to self-determination of peoples struggling for liberation from foreign oppressors. The concept has virtually fallen out of use after the era of decolonisation. The only recognised NLM presently holding observer status at the General Assembly of the UN is the PLO. Some armed groups claim to be fighting for national liberation, but the response from the international community is not the same outside of a colonial context. Admittedly, determining that a certain group is entitled to, and is in

---

270 Engaging armed groups in peace processes, supra, p. 4.
271 The African National Congress (ANC), the South West African Peoples Organization (SWAPO) and the Palestinian Liberation Organization (PLO) were all granted observer status in the General Assembly of the UN and in conferences set up under the auspices of the General Assembly; see also Ginther, supra, at p. 213-214; and Malanczuk, supra, p. 104-105.
272 Ginther, supra, at pp. 214-215.
273 See for example the webpage of the Tamil Tigers of Eelam at: http://www.eelam.com/, as of 25 February, 2005.
fact fighting in pursuit of, a right to self-determination is not as easy in contemporary internal conflicts as it was in a colonial context.

In addition – or in the alternative – to claims of fighting for national liberation, groups often legitimize their actions by pointing at human rights violations committed by established governments, particularly breaches of the right to democratic governance. As previously noted, the legitimacy of interference of states to the aid of a group struggling against undemocratic rulers is also increasingly argued by legal scholars. This is still a controversial issue but a further development of acceptance towards such interventions is far from impossible. Potentially, in a future era of global democratisation, the right to democratic governance could come to give rise to similar rights as the right to self-determination did during decolonisation.

6.1.2 Assessment of status and international participation

IHL sets the limit for international legal personality for purposes of applying norms of warfare and potentially the ability to conclude internationally binding peace agreements. Under the present system, international legal personality for other purposes – participating in international conferences, ratifying international agreements or negotiating the safe passage of humanitarian or other delegations through territory under a group’s control – will have to be afforded on an ad hoc basis. As we have seen, the participation of non-state groups in the implementation of treaties may prove essential in certain cases. There are experimental initiatives by NGOs, from which the international community of states and relevant IGOs could seek influence. The Geneva Call is flirting with the idea of a more permanent and comprehensive system of armed group participation.

---

274 See contemporary debate on the “responsibility to protect”; See in particular D’Amato, supra, and his passionate defence of the American invasion of Panama in 1989, relying on the precedent of the US invasion of Grenade in 1983.

275 See inter alia Capie and Policzer, supra, p. 2.

i) The Geneva Call

The work of the Geneva Call to engage with non-state armed groups is based on the idea that such groups can be inspired to take on international commitments and abide by international standards of humanitarian and human rights law, if only given the opportunity to make a public declaration to that effect. Under the regime, the need of non-state groups for international acceptance and good will is expected to be enough for the groups involved in the project to abide by the commitments made. The focus of the Geneva Call’s efforts to engage armed groups is on the use of anti-personnel mines (AP mines). Building on the 1997 Mine Ban Treaty, which does not allow for non-state actors as parties, Geneva Call developed Deeds of Commitment (DoC) enabling non-state groups to commit to the same standards as states. The organization sees this as “a straightforward response to a straightforward problem - since armed Non-State Actors (…) are part of the problem, they must be part of the solution.” However, the Geneva Call aims higher than just to deal with the issue of AP mines – it also aspires to promote awareness and respect for humanitarian principles and standards in general. In signing a DoC, the armed group agrees:

• To a total prohibition on the use, production, acquisition, transfer and stockpiling of AP mines and other victim-activated explosive devices, under any circumstances.

• To undertake, to cooperate in, or to facilitate, programmes to destroy stockpiles, to clear contaminated areas, to provide assistance to victims and to promote awareness programmes.

• To allow and to cooperate in the monitoring and verification of their commitments by Geneva Call.


278 1997 Mine Ban Treaty article 15 é contrario; see also discussion on the treaty-making capacity in general of non-state groups under 3.1.2 below; see also however the provision on special agreements included in common article 3 of the 1949 Geneva Conventions.

• To issue the necessary orders to commanders and to the rank and file for the implementation and enforcement of their commitments.

• To treat their commitment as one step or part of a broader commitment in principle to the ideal of humanitarian norms. 280

Article 6 of the DoCs clearly states that the signing groups understand that the signing does not alter the status of the group in any way. The mere goodwill involved in publicly declaring the non-use of AP-mines is bound to be plenty for many groups, however. 281 On the other hand, there are also a category of armed groups virtually indifferent to the way they are perceived by the international community, resting on a solid local constituency. 282 These groups will obviously have to be dealt with in a different manner. 283 By December 2003, 25 armed groups from Asia, the Middle East and Africa had signed DoC with the Geneva Call. 284

ii) Elaborating on the Geneva Call model
As constantly repeated throughout this work, one of the main problems of creating a separate status for non-state entities under international law is the reluctance of states to acknowledge any legitimacy of armed opposition groups. It may therefore be suitable for an independent, such as an NGO like Geneva Call, to approach non-state groups in an attempt to create a bridge of communication, and in the long run trust, between the groups and the international community. Nevertheless, a valid question is whether this is a task that should fall upon private initiatives and actors? And have states failed so miserably and so many times that we give up on them to protect fundamental values and, individually and as a community, make sure that the subjects within their respective borders act in accordance with international obligations?

280 Ibid at p. 5.
281 Bruderlein, supra, p. 11-12.
282 Bruderlein, supra, p. 11.
283 Compare with Sassòli, supra, p. 13.
The answers to these questions may *prima facie* seem obviously answered in the negative. We should expect states to deal with these issues! However, private initiatives and NGOs at the forefront of international legal development is not a new thing. On the contrary, the ICRC is directly responsible for much of our modern humanitarian law, organizations such as Amnesty International and strong individuals have stood on the barricades developing human rights law into what it is today and keep working to improve it. This is not to say that states are not primarily responsible; a system building on the model set by Geneva Call is conceivable under the classical international legal umbrella.

A non-political institution, with the legitimacy of being set up and endorsed by the international community, mandated to assess armed groups and signing “Deeds of Commitment” (DoC) with groups reaching a certain level of reliability may, at least in theory, have potential to increase the international participation of armed groups and thereby enhance their conception of the legitimacy of the international system. The core of such DoCs would be a reaffirmation of the group’s commitment to respecting IHL and IHRL and could be extended with commitments to other international standards, such as the Mine Convention. Fulfilling the necessary requirements, signing a DoC, and thereby gaining the acceptance from the international community would not necessarily alter the internal relationship between the group and the host state. The group would still for the purposes of domestic law and jurisdiction, so far as this system is functional, be a subject of the host state. It would however be beneficial for the overall goal of facilitating peace processes and “improving” the conduct of warring parties as it would entail:

- acknowledgment of the situation as an internal armed conflict, relinquishing any doubts of applicability of IHL;
- affirmation of the binding nature of IHL on groups and states alike;
- recognition of the group as a party with which to seek negotiation, precluding the possibility/risk of that group ending up on a “blacklist”; and
- a feeling of participation and choice to the armed group as regards the rules by which they are expected to abide.

The statements by armed groups themselves and by those involved in dealing with them indicate that the last two of these pros are fundamental for the success of any attempt at constructive dialogue. The importance of establishing a feeling of participation by armed groups should not be underestimated. Zegveld gives the example of FMLN in El Salvador, which in interactions with the ICRC did not consider itself bound by Protocol II unless it concluded a special agreement to that effect.²⁸⁵ It is therefore “psychologically and diplomatically preferable to have a commitment by the group itself.”²⁸⁶

6.2 Countering the asymmetries of the state bases system?

As presented above, one of the obstacles in engaging with armed groups identified by practitioners is a perceived asymmetry inherent in the international system. The ultimate goal for practitioners engaging with armed groups or aiming at engaging groups in negotiations with adversaries is to facilitate peace processes and enhance respect for international norms in internal conflicts. The achievement of this goal is also in the interest of the international community as a whole. From an international legal perspective a few points are of special interest.

The remedy to the described problem is to put the parties on a more equal (legal) footing, thus encouraging the ostensibly weaker part to negotiate. This goal can be accomplished either by strengthening the position of armed groups, or by negating some of the advantages of the state party to a conflict. In some cases, a little of both may be appropriate. Strengthening the position of armed groups could be done by granting them, under certain conditions, a stronger status under international law. Today, in the absence of express recognition by agreement, their status appears to be limited to rights and obligations under applicable IHL and human rights law. The potential extension of the legal status of

²⁸⁵ Zegveld, supra, p. 17.
²⁸⁶ Sassòli, supra, p. 10.
non-state armed groups has been dealt with above. In dealing with how to view the status of states involved in conflicts within their own borders, one must make a distinction between stable states, and states in which the essential characteristics of statehood are failing.

### 6.2.1 Stable states

In the case of stable states with functioning institutions the issue of how to neutralise the advantages of statehood in relation to armed groups challenging the authority of the existing government is very difficult. The international community expects the state, through its established government, to control its citizens through the use of legitimate coercive force.\(^{287}\) As we have seen, whether or not to require a certain quality of that rule for legal purposes is still an open question. Though the issue is still controversial, there are impressive moral arguments, and as we have seen in some respects legal support (\textit{i.e.} the availability of counter-measures), for the notion that gross human rights violations disqualify the established government from the privileges otherwise afforded to states.\(^{288}\) The extent and magnitude of violations required for such disqualification is not clear however.

Apart from granting some additional status to certain armed groups as discussed above, which in itself must be considered encroaching on the integrity of the host state, there seems to be little scope for negating the advantages of a stable government merely because it is involved in armed conflict with groups within its territory. What needs to be addressed however, especially in light of the “war on terror”, is the state’s prerogative of definition regarding domestic situations. A state involved in violent conflict with an armed group is obviously not in a position to determine the status or character of that group. This issue is dealt with through the development towards increased international involvement

---

\(^{287}\) Weber, \textit{supra}; see footnote 141 above.

\(^{288}\) See \textit{e.g.} Reisman, \textit{supra}; and D’Amato, \textit{supra}.
in assessing situations of internal armed conflict and the actors involved in such conflicts.\footnote{See Chapter 6.1 of this paper.}

The evolving system of international criminalisation of internal atrocities must be seen as another equaliser between the actors of internal conflicts; a system of criminal law, indiscriminately applicable to states and non-state entities alike. The system might put an end to the historic impunity of state-officials for crimes committed against civilians and adversaries in internal conflicts. It has been implied that the right of states to refer situations to the ICC for consideration has been to further the inequalities between parties to internal conflicts and open for potential abuse by states referring cases to the Court for political purposes.\footnote{Engaging non-state armed groups in peace processes, supra, at p. 14.} The legal safeguards involved, the ability of the Security Council to refer and defer cases before the Court, and the mandate of the prosecutor to initiate investigations \textit{proprio motu}, rebut such claims effectively however.

\textbf{6.2.2 Failed or failing states}

In situations where the established or \textit{de jure} government is not \textit{de facto} exercising any more authority than one or more opposition groups in the country, the rationale for accepting that government as the legitimate representative of the state may indeed be difficult to understand. In situations of failed or failing states, where the essential features of the state are dysfunctional, there may be scope to argue that the state no longer deserves the advantages afforded to it under international law.\footnote{See \textit{inter alia}, Policzer, \textit{supra}, pp. 5-7; compare with Koskenmäki, \textit{supra}, at pp. 17-18.} Simply stripping the established government of its formal statehood status, however, would only create a power vacuum and a state of anarchy.

Increased and more coherent involvement by the international community seems to be the only constructive way forward. The international system offers a plethora of alternative measures to handle disputes between states but lacks the same magnitude of instruments to deal with intra-state controversy. The extreme instrument that could be deployed by the Security Council, to even out the play-
ing field between a government and armed non-state challengers, is the establishment of UN mandates as in the case of e.g. East Timor.\textsuperscript{292} This presupposes physical involvement to enforce UN control over the areas in question, which leads us back to the issue of multilateral military intervention to protect fundamental values such as human rights. The issue of military interventions falls outside the scope of the present paper but it should be noted that it has proven difficult to reach the necessary agreement within the Council to decide on measures involving the use of force in protection of human rights.\textsuperscript{293} Furthermore, as indicated above, the issue of where to draw the line for legitimacy of international interference is a very difficult question on a moral-philosophical as well as a legal level.

\section*{6.3 Political paralysis of states caused by the sensitive nature of intra-state conflicts}

During the course of this work, it has become apparent that the slow pace and inaction when it comes to development of international regulation of internal conflicts is the result of a reluctance of states to deal with the problem. The issues have primarily been advocated and dealt with by the NGO community, as have most international developments encroaching upon the domestic jurisdiction of states. It is submitted that this is due to the political paralysis of states, or rather governments driven by internal and external political motivations, inherent in the complex nature of internal conflicts. This is not only demonstrated by the inability of the international community to deal with their legislative responsibili-
It is also evident from state practice as regards international reaction to such conflicts, that political considerations rather than legal principles are determining where and how international involvement will become reality.

6.3.1 Customary development of IHL relating to internal conflicts

Chapter 2.2 of this paper, on the development of IHL, indicates that the inclusion of human rights norms in the body of rules relating to armed conflicts and the extension of application of IHL to cover internal conflicts was the result of severe political compromise. As we have seen, some argue that this was mainly a result of the disinterest of states represented at the Geneva Conferences to create a comprehensive regulatory framework for intra-state conflicts. The claim is well in line with the conclusions of this paper regarding the attitude of states towards the international regulation of internal conflicts.

Since the 26th International Conference of the International Committee of the Red Cross and Red Crescent Societies in 1995, the ICRC has been working on a project identifying the customary international humanitarian law. The project report was to be presented at the 28th International Conference in 2003, but has been delayed and will (according to the latest information) be published by the end of March 2005. The report will deal with the customary developments of IHL regarding international as well as non-international armed conflicts. The project is an interesting detour from previous attempts at creating new interna-

294 In this context I use the word “responsibility” referring to a perceived moral duty of states to protect human life and security. I do not propose that there is a legal duty to be imposed on states to regulate one area or another through development of international instruments.

295 See inter alia discussion in Chapter 4.2.2 on the inability of the Security Council to reach a common position on the recommendations by the Secretary General to refer the situation in Darfur/Sudan to the ICC; see also Koskenniemi, M., The Place of Law in Collective Security, Mich. J. Intl. L. 17 (1996), pp. 455-490, at pp. 460-461: “Why Libya, but not Israel? Why the Council’s passivity during most of the eight-year Iran-Iraq war? Why has the Council’s reaction in Africa been markedly less vigorous and effective than in the Gulf? Why the discrepancy between the Council’s forceful attack on Iraq (an Islamic country) and its timidity to defend the Muslims of Bosnia-Herzegovina? The choice of targets, as well as the manner of reacting, has certainly not been automatic. The argument is made that the Council has not reflected the collective interests of United Nations members as a whole, but only the special interests and factual predominance of the United States and its Western allies within the Council.”, cited in Malanczuk, supra, p. 427.

tional treaties developing IHL. It may be easier for the proponents of extended application of IHL and human rights law principles in internal conflicts to achieve this through redefining the scope and application of existing norms using arguments based on changed state practice and opinion juris, than through convincing state actors to adopt new rules. This method also counters the “proliferation” of international norms, focus can be concentrated on making actors accept and abide by existing rules. As noted above, simply ensuring application of the existing rules of IHL applicable to internal conflicts would make the world a much better place.

Another positive aspect of the development of customary international humanitarian law in relation to internal conflicts is that armed groups arguably participate in this process. The main argument for this contention is that customary law is based on the behaviour of the subjects of the rules in question. Armed groups are subjects of the framework of IHL applicable to intra-state conflicts. In this capacity their actions and justifications for their behaviour are relevant to the development of custom. The argument from a practical perspective is the same as that relating to increased participation of armed groups in treaty-making: participation of groups promotes adherence of international norms.

6.3.2 De-politicising international reaction to internal conflicts
This paper has shown that political considerations often come in the way of the progressive development of international law and in some instances even the application of existing law. I have claimed that this is due to a lack political will of states to acknowledge any status of armed opposition groups. The situation has not been made easier by post 9/11 developments and the “war on terror”.

The development towards objective criteria for the application of IHL in non-international conflicts is one important step away from the over politicised proc-

297 See inter alia Suter, supra, p. 177.
299 Sassoli, supra, p. 6.
300 See footnotes 285 and 286 above.
ess relating to such conflicts. However, reality shows us that even in cases where the objective criteria are met, IHL is constantly being disregarded in intra-state conflicts and the reaction of the international community is, more often than not, highly politically motivated. It is my contention that neither states nor inter-state organs with state representation are fit to deal with the sensitive matters of assessing needs and defining actors in situations of civil wars. For objective criteria to be truly objective, the interpreter of the factual circumstances needs to be equally objective.

A permanent non-political international body, perhaps under the UN Secretariat, assessing and evaluating situations of internal unrest and non-international conflict, ex officio and at an early stage, with a view to finding peaceful solutions to disputed issues could be a way forward. This potential is compatible with the recommendations of the Secretary General’s High Level Panel on Threats and Challenges relating to the development of mediation capacity and involvement in peace efforts in situations of internal violence. The body should be mandated to refer volatile situations to the Security Council for consideration and make recommendations as to appropriate courses of action. With the proper mandate – see comparison with the NGO Geneva Call above – such a system could also be helpful in the determination of status of the parties to internal conflicts.

One potential way to bypass the sensitive nature of intra-state conflict is proposed by Capie and Policzer. After concluding that most contemporary conflicts are actually fought between non-state groups, without interference from state parties, they propose that international efforts to develop practices relating to armed groups at an initial stage should be directed at these conflicts. These situations are bound to be less sensitive because they do not involve states as parties to the conflict. Once practices are developed and functioning, situations in which states are involved could easier be dealt with.

301 Malanczuk, supra, p. 353; and Koskeniemi, supra, at pp. 460-461.
7. Conclusions

7.1 Summary of conclusions
This thesis has shown that even though the majority of armed conflicts in the world have been of an internal character for over 20 years, the international legal system is still not up to speed. Issues concerning the status of non-state armed groups, the international legal force of agreements concluded between non-state groups and governments and international responsibility of groups in relation to \textit{inter alia} human rights law are still controversial. However, as concluded in the Report of the Secretary General’s High Level Panel on Threats Challenges and Change, 2004, there is a positive trend in the ability of the international community to deal with internal conflicts.

The thesis has presented the international legal framework surrounding intra-state conflict and non-state armed groups. I have studied the system with a view to examine how the international legal system can be helpful in facilitating interaction with non-state armed groups and promote conflict resolution in situations of internal violence. As noted above, there is a positive trend: the number of internal armed conflict has decreased drastically during the last decade; the establishment of the International Criminal Court can potentially put an end to impunity for the worst violations against human dignity; and there seems to be a movement within the United Nations in the direction of increased involvement in internal conflict situations. However, there are also worrying developments: the war on terror has created an situation where security concerns and confrontation take the front seat at the cost of political dialogue and negotiation, which has furthered the sensitive nature of intra-state conflicts; even the most basic rules of IHL and human rights law are blatantly disregarded by state and non-state parties alike in conflict situation around the globe; there is still considerable political disagreement on many of the positive developments such as the ICC and the actions of states are too often based on pure self-interest.
From a legal perspective I have identified three main problematic areas in dealing with non-state armed groups: *i)* the need for a generally accepted legal definition of non-state armed groups allowing for extended participation, under certain conditions, by such groups in international processes; *ii)* the need for flexibility of the international system in situations of intra-state conflicts as regards the legal standing of the parties to such conflicts; and *iii)* the need to counter the political paralysis of states caused by the sensitive nature of intra-state conflicts.

Much focus in this thesis has been on the issue of status and potential international legal personality of non-state armed groups. In conclusion, the status of non-state armed groups is determined by the rights and duties afforded to the group in each given situation. I have argued that a group fulfilling the requirements for application of international humanitarian law, thereby is afforded the international personality for the purposes of applying these rules and entering into agreements with other subjects of international law relating to the ending or regulation hostilities. As for status to conclude other international agreements or assume other roles under international law special recognition must be given by states or international organisations on an ad hoc basis.

It is my contention that this is not a satisfactory system due to the fact that many international agreements require the participation of armed groups – at least the groups controlling substantial territories – to be successful. The lack of independent status of armed groups has also proved to be a problem in relation to participation of third parties in efforts to reach peaceful solutions to internal conflicts. Initiating contacts with a non-state group under the present system is very politically sensitive and could even be seen as interfering in the domestic affairs of another state. Further, increased participation of armed groups in international processes would arguably promote their compliance with international norms. I have therefore pointed to the potential of mandating a non-political international body, building on the example set by the NGO *Geneva Call*, to assess and engage with armed groups with a view to involving them in international processes on a more permanent basis. This could eventually lead to a practice resembling
that of granting observer status to certain groups struggling for self-determination during the era of decolonisation.

Throughout the paper I have contended that states and inter-state organs are ill-equipped to deal with the threats and challenges posed by intra-state conflicts. This is due to the political paralysis of states caused by the sensitive nature of intra-state conflicts. International law relating to internal conflicts has drifted from a highly political practice of recognition by states of a state of belligerency towards objective criteria for determining the applicability of IHL in internal conflicts. It has been shown that states driven by internal, as well as external, political considerations and “jealous” of their sovereignty, are often unable to make choices disconnected from their own political objectives. This has become even more evident in the wake of the post 9/11 “war on terror”. An independent institution, designed to monitor internal conflicts at an early stage, make recommendations to the Security Council and promote and facilitate peace processes by providing mediators, is therefore a potential way forward. This function could potentially be performed by an existing organ or institution by modifying its mandate.

In the course of this work I have also looked at the development of international humanitarian law (IHL) relating to non-state armed conflict. A study by the ICRC on the development of customary IHL, in international and non-international conflicts, will be presented later this year. Although there is a need to develop applicability of IHL in the context of intra-state conflicts – in particular relating to the threshold of application – one conclusion to be drawn is that the actual implementation and application of already applicable rules would do much to ameliorate the suffering caused to civilians in civil wars.
7.2 Concluding Remarks

Armed conflicts affect millions of people around the world and many of these conflicts involve non-state armed groups. Engaging with such groups is essential for efforts to reach sustainable peaceful solutions to conflicts in which they are involved. In this thesis I have identified problems involved in the interaction between the international community and different types of armed groups and pointed to ways forward in problematic areas. I am aware of the severe political difficulties that any progressive step within this area involves. I am also aware of the practical problems of setting up new international organs and institutions and some of the functions of the bodies proposed in the thesis may therefore better be included into already existing structures.

In any event, the most heinous attacks on human dignity are committed in the context of intra-state conflicts and last decade alone offered repeated examples of attempts at ethnic cleansing in such contexts. Armed groups will not go away because they are ignored by the international community. By not interacting with groups the community of states just loses the limited possibility available to influence their behaviour.

There seems to be an increasing willingness to address intra-state issues internationally. We are still, however, far from a reality in which big and powerful states acknowledges the existence of conflicts of international relevance within their borders; I do not expect Russia to acknowledge the status of Chechnyan rebels as anything but “terrorists” any time soon. However, the international community is increasingly getting involved in different capacities situations of internal armed conflicts. This will force a further development of the instruments to engage with parties to such conflicts. States have plenty of practice in dealing with other states. Is it not time to seriously address the issue of how to engage with different types of armed groups?
Bibliography

International Treaties


1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, 94 LNTS 65.


1945 Charter of the United Nations (1945), UNCIO XV 335.

1945 Agreement for the Prosecution and Punishment of Major War Criminals, 82 UNTS 279.

1946 Agreement for the Establishment of an International Military Tribunal, 5 UNTS 251 (International Tribunal for the Far East).


1966 The International Covenant on Civil and Political Rights, with Optional Protocol, 999 UNTS 171.


1977 Protocol I Additional to Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3.

1977 Protocol II Additional to Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 609.


1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, UNTS vol. 1465 p. 85.


Peace Accords


Security Council Resolutions

SC Res. 232 (1966), Sanctions - Southern Rhodesia.

SC Res. 827 (1993), establishing the International Criminal Tribunal for the Former Yugoslavia.


SC Res. 1127 (1997), imposing sanctions on the non-state group UNITA in Angola.

SC Res. 1267 (1999), in which the Security Council imposed sanctions on the Taliban, Al-Qaeda and Usama Bin Laden and individuals and groups in connection with them.

SC Res. 1306 (2000) through which a ban on diamonds produced by Revolutionary United Front (RUF) in Sierra Leone was imposed.

SC Res. 1315 (2000), on the situation in Sierra Leone (basis for special tribunal).


SC Res. 1373 (2001), on the threat to peace and security of terrorist acts.

SC Res. 1390 (2001), reinforcing SC Res. 1267.

SC Res. 1556 (2004), imposing an arms embargo on the Janjaweed militia in Darfur, Sudan.

**General Assembly Resolutions and other Documents**

GA Res. 95 (I) 1946, Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal.

GA Res. 174 (II) of 21 November 1947, on the mandate of the ILC.


GA Res 1514 (1960), Declaration granting independence of Colonial Countries and Peoples.

GA Res. 48/121 (1993), on *e.g.* the customary nature of the UDHR.


**Official Yearbooks and Reports**

*Yearbook of the International Law Commission (YBILC)*, (1958), vol. II.

*Yearbook of the International Law Commission (YBILC)*, (1962), vol. II.

*Yearbook of the International Law Commission (YBILC)*, (1994), vol. II.


**International Case Law**

International Court of Justice


European Court of Human Rights
Illascu and others v. Moldova and Russia, Grand Chamber, E CtHR, No. 48787/99, 8 July 2004.
Assanidzé v. Georgia, Grand Chamber, ECtHR, No. 71503/01, 8 April 2004.

International Criminal Tribunal for former Yugoslavia
ICTY Case No. IT-95-17/1-T (Prosecutor v. Furunzija), Trial Chamber Judgement, 10 December 1998 as found at www.un.org/icty (cited as Furuzija Case (1998)).

ICTY Case No. IT-96-21-T (Prosecutor v. Delalic and Other), Trial Chamber Judgement, 16 November 1998 (cited as Delalic Case (1998)).

ICTY Case No. IT-96-23 and IT-96-23/1466 (Prosecutor v. Kunarac), Trial Judgement, 22 Feb 2001 (cited as Kunarac Case (2001)).

International arbitration
Tinoco Arbitrations, (1923) 1 R.I.A.A. 369.

National Case

U.S. Courts
Filartiga v. Pena-Irala 630 F.2d 876 (2d Cir. 1980).
Kadic et al. v. Karadzic, 70 F. 3d 232 (2d Cir. 1995).
Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991) at 48.
Books


**Articles and Journals**


Crawford, J. Democracy and the body of International Law, in Fox, G. H. and Roth, B. R. Democratic Governance and International Law, Cambridge 2000, pp. 91-113 at p. 95.


D’Amato, A., The Invasion of Panama was a Lawful Response to Tyranny, AJIL 84 (1990), pp. 516-524.


Fox, G. H. The right to political participation in international law, in Fox, G. H. and Roth, B. R. Democratic Governance and International Law, Cambridge 2000, pp. 48-90 at pp. 89-90.


Grote, R., The United Nations and the Establishment of a New Model of Governance for Central America: The Case of Guatemala, in Frowein, J. A. and


Schachter, O., The Decline of the Nation-State and its Implications for International Law, 36 *Columbia Journal of International Law*, 7 (1998).


**Internet Resources**

www.e-r.org – Website of the NGO Conciliation Resources.


www.genevacall.org – Website of the NGO Geneva Call.

wwwarmedgroups.org – Website of Armed Groups Project.


www.state.gov – United States State Department.


www.unhchr.org – The website of the UN High Commissioner for Human Rights.
