BINDING ARMED OPPOSITION GROUPS

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Abstract This article considers how armed opposition groups fighting in an internal armed conflict are bound by the rules of international humanitarian law despite not being party to the relevant treaties. It assesses a number of explanations—customary international law, general principles of international humanitarian law, rules governing treaties and third parties and claims to succession—and argues that each has limited value. The ability of the state to legislate on behalf of all its individuals is considered the best explanation. This principle is explored and objections to it are countered. This article also examines the expressed commitment of armed opposition groups to the rules of international humanitarian law.

I. INTRODUCTION

The vast majority of conflicts being fought today are internal in character.[1] Internal armed conflicts are fought between a state and an armed opposition group, or between two armed opposition groups, within the boundaries of a single state.[2] Armed opposition groups are becoming increasingly sophisticated and are responsible for some of the most egregious atrocities committed in conflicts. Given the proliferation of internal armed conflicts, the number of armed opposition groups that take part in them, and the atrocities that are committed by such groups, it is essential that international humanitarian law regulates such conflicts and governs the behaviour of such groups.

There exist, however, only a minimum of international humanitarian law rules that pertain to armed conflict of an internal character. Common Article 3 states that, '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum' certain provisions contained therein.[3] Additional Protocol II 'develops and supplements Article 3

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[1] See Report of the High-level Panel on Threats, Challenge and Change, 'A more secure world: Our shared responsibility' (2004) 11.

[2] The term 'armed opposition group' is being used in this article to cover all armed groups that do not have a link with the government, irrespective of their political ideology. It includes those armed groups that conduct hostilities in a conflict in which the government does not participate.

[3] Art 3 Common to the four Geneva Conventions of 12 Aug 1949.

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common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application'.[4] The 1954 Hague Convention on Cultural Property,[5] and the Amended Protocol II to the Convention on Certain Conventional Weapons,[6] contain wording similar to that found in Common Article 3.[7]

A treaty binds parties to it, thus these instruments bind states parties fighting in an internal armed conflict. The language of these instruments also purports to bind armed opposition groups fighting in such a conflict. This raises the question of how armed opposition groups are bound by the law governing internal armed conflict when they are not party to the relevant treaties. Is it true, for example, that the armed opposition group would only be bound by these rules were it to 'choose to announce its adherence'?[8]

This issue has given rise to some debate in the legal literature though it has been frequently considered only in passing. Several reasons have been put forward to explain the binding nature of the rules governing internal armed conflict on armed opposition groups. Principal among these are: customary international law; general principles; the rules relating to treaties and third parties; the principle of succession; and the principle of legislative jurisdiction.[9] How best then to explain the binding nature of the rules governing internal armed conflict on armed opposition groups? This is not merely an academic question, of interest only to international lawyers. The question has to be faced if criminal tribunals are to respect the principle of *nullum crimen sine lege* in later proceedings. Further, the explanation behind the binding nature of the rules may influence the degree of compliance with the rules by armed opposition groups. Many of the explanations put forward are not sufficiently satisfying to the mind of an international lawyer. Nevertheless, a theoretically pleasing approach must not come at the expense of an unacceptable

[4] Protocol Additional to the Geneva Conventions of 12 Aug 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1997, Art 1(1).

[5] 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict Art 19(1).

[6] Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Art 1(3).

[7] Other instruments use different wording but raise issues similar to those considered in this article, eg Art 22(1) of the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict states 'This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.'

[8] G von Glahn 'The Protection of Human Rights in Armed Conflicts' (1971) 1 Israel Yearbook of Human Rights 208, 217; Yingling and Ginnane 'The Geneva Conventions of 1949' (1952) 46 AJIL 393, 396.

[9] In addition, H Lauterpacht *Oppenheim's International Law: Vol II* (Longmans London 1952) 211, n 3, has stated: 'The observance of fundamental human rights is not dependent upon the recognition of a specific status. Neither is it affected by the circumstance that the insurgents have risen in rebellion against the legitimate authority.'

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explanation to the armed opposition group. This may result in non-compliance thus defeating the very purpose of the exercise.

Part II of this article considers each of the explanations in turn, demonstrating that the customary international law argument and the general principles explanation are capable of binding all types of armed opposition groups but only by certain rules of internal armed conflict. It further shows that the binding nature of treaties on third parties reasoning and the succession theory are only capable of binding certain types of armed opposition groups by the rules governing internal armed conflict. Part II concludes that these four explanations, even in conjunction with one another, are incapable of binding all types of armed opposition groups by all the rules of international humanitarian law that govern internal armed conflict. As they do not provide a satisfying explanation as to how armed opposition groups as a category are bound by the rules governing internal armed conflict as a whole, they are of limited use.

Part III submits that the overarching reason for the binding nature of the rules governing internal armed conflict on armed opposition groups is the principle of legislative jurisdiction. This has been described as the competence of the government to legislate for all its nationals and suggests that the ratification of the relevant instrument on behalf of the state also binds the armed opposition group by that instrument.[10] This explanation has been subject to much criticism and has been rejected by the seminal article on the subject.[11] Part III demonstrates that the criticisms against this explanation are misplaced and the worries unfounded. Rather, the principle of legislative jurisdiction is the only theory that explains the binding nature of all the rules of international humanitarian law governing internal armed conflict on all armed opposition groups. Part III also undertakes an extensive study of the practice of armed opposition groups.

II. JUSTIFICATIONS OF LIMITED USE

A. Limited by the type of rule

1. The binding nature of customary international law

It may be thought that the value of this undertaking is entirely academic, that armed opposition groups are bound by the customary prohibitions on the subject and that the matter ends there. After all, this is the explanation that has been put forward by the Special Court for Sierra Leone to hold the Revolutionary United Front (RUF) bound; the International Commission of Inquiry on Darfur to hold the Sudan Liberation Movement/Army (SLM/A)

[10] DA Elder 'The historical background of common article 3 of the Geneva Convention of 1949' (1979) 11 Case Western Reserve J Intl L 37, 55.

[11] A Cassese 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 International and Comparative Law Quarterly 416, 429–30.

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and Justice and Equality Movement (JEM) bound; and the International Court of Justice (ICJ) to hold the contras bound.[12]

According to this explanation, the rules governing internal armed conflict bind armed opposition groups, for their binding character does not come from the signature or ratification of the instruments but from their customary international law status. Thus, the group need not be party to the instruments to be bound by them. This explanation is based on two premises: that the rules governing internal armed conflict have customary international law status and that armed opposition groups are bound by customary international law. If one of these underlying premises proves incorrect, this reasoning would not explain how armed opposition groups are bound by the rules in question.

Turning to the first premise, the task of determining the customary international law relating to internal armed conflicts is not an easy one. With the aim of seeking to regulate internal armed conflicts, much has been thrown into the cauldron of custom with relatively little analysis of state practice and *opinio juris*.[13]

Common Article 3 has been determined to have passed into the corpus of international law rules that have customary status. This can be considered to be what was meant by the International Court of Justice in *Nicaragua* in its statement that '[t]here is no doubt that, in the event of international armed conflicts, [the rules of Common Article 3] also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity"'.[14]

Similar statements have been made by the International Criminal Tribunal for the former Yugoslavia (ICTY),[15] the International Criminal Tribunal for Rwanda (ICTR),[16] and the Special Court for Sierra Leone.[17] The same is not true of Additional Protocol II; not all of its provisions have customary status. The Appeals Chamber of the ICTY has stated that only 'the core' of Additional Protocol II is part of customary international law,[18] a view shared by a Trial Chamber of the ICTR.[19] It is outside the scope of this article to

[12] See respectively *Prosecutor v Morris Kallon and Brima Bazzy Kamara* SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction, Lomé Accord Amnesty (13 Mar 2004) para 47; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 Jan 2005) para 172; *Military and Paramilitary Activities In and Against Nicaragua*, *Merits,* ICJ Reports (1986) 14, 113–14.

[13] For a similar criticism, see T Meron *Human Rights and Humanitarian Norms in Customary Law* (Clarendon Press Oxford 1989) 36–7; G Mettraux *International Crimes and the* ad hoc *Tribunals* (OUP Oxford 2005) 15.

[14] *Nicaragua* (n 12) para 218.

[15] *Prosecutor v Duško Tadić* (*Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*) IT-94-1-AR72 (2 Oct 1995) para 98.

[16] *Prosecutor v Jean-Paul Akayesu* (*Judgment*) ICTR-96-4 (2 Sept 1998) para 608.

[17] *Lomé* (n 12) para 47.

[18] *Tadić*, (n 15) para 98.

[19] *Akayesu* (n 16) para 608.

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consider exactly which provisions of Additional Protocol II have customary status,[20] suffice to note that it seems to be agreed that not all provisions of Additional Protocol II are reflected in customary international law. As regards the 1954 Hague Convention on Cultural Property, it has been suggested that some of its provisions have customary status in internal armed conflict,[21] but this position is less well established. There is even greater uncertainty surrounding other rules that pertain to internal armed conflict.

As regards those rules that do have customary status, it becomes necessary to consider the second premise. It has been suggested that the rules that have customary status represent customary law with regard to states but not with regard to armed opposition groups,[22] and that an armed opposition group is required to comply with the rules of internal armed conflict only if other armed opposition groups have customarily acted as if the provisions were legally binding upon them.[23]

These arguments fall down for a number of reasons. First, they suggest that different international legal persons are bound by different customary international law rules depending on whether other members of the same class of legal person have acted as if those rules were binding upon them. Yet custom, as a source of international law,[24] binds all entities with personality under international law. For present purposes, it is unnecessary to consider fully the question of international legal personality of armed opposition groups. Suffice to note that the underlying principle is that the needs of the community determine the nature of an entity as a participant of international law.[25] As the needs change, so do the international legal participants.[26] This is rightly so if the law is to maintain relevance. Given that there are a large number of internal armed conflicts; that armed opposition groups play an important role in these conflicts and hence in the international community; that internal armed conflicts result in human rights abuses, refugees and internally displaced persons; and that the international community rates the protection of human rights as significant, the needs of the community require that the actions of armed opposition groups be effectively regulated.

An armed opposition group that 'possesses an organized military force, an

[20] For a recent pronouncement on the subject, see JM Henckaerts and L Doswald-Beck *Customary International Humanitarian Law* (CUP Cambridge 2005).

[21] *Tadić*, (n 15) para 98, cited with approval in *Prosecutor v Enver Hadzihasanovic and Amir Kubura* (*Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal*) IT-01-47-AR73.3 (11 Mar 2005) para 46.

[22] HA Wilson *International Law and the Use of Force by National Liberation Movements* (Clarendon Press Oxford 1998) 50.

[23] 'The Geneva Convention and the Treatment of Prisoners of War in Vietnam' (1966–1967) 80 Harvard L Rev 851, 856.

[24] Statute of the International Court of Justice, Art 38(1)(b).

[25] *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reports 174, 178.

[26] ibid.

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authority responsible for its acts'[27] and forces itself onto the international plane by committing acts above the level of mere banditry must have international legal personality.[28] In this regard, I share the view of Draper that, individuals, in grouping themselves such that they become a party to an internal armed conflict, are granted a sufficient degree of personality so as to be able to hold rights and be subject to obligations afforded to them by the rules governing internal armed conflict.[29]

The suggestions regarding the requirement of the participation of armed opposition groups in the formation of customary international humanitarian law assumes their ability to participate in the formation of custom. The ICTY in *Tadić* did use the practice of armed opposition groups to contribute to the creation of customary international humanitarian law,[30] and this has been said to provide evidence for the proposition that the consent of armed opposition groups is relevant to bind them by the rules of customary international law.[31] The ability of non-governmental organizations to participate in the formation of customary international law has been suggested,[32] and the ability of the ICRC to participate seemingly accepted.[33] However, the orthodoxy of international law has not yet accepted the participation of armed opposition groups in the formation of custom. For example, the ICRC study on customary international humanitarian law considered the legal significance of the practice of armed opposition groups to be 'unclear' and decided that it did not constitute state practice but 'other practice'.[34] The extension in the granting of international legal personality to armed opposition groups has not been followed by a similar extension as regards their ability to contribute to the practice required for the formation of customary international law. State practice is still considered to be the practice of the executive, the legislature and the judiciary.[35] And it is the practice of these bodies coupled with their *opinio juris* that binds the armed opposition group.

The legitimacy of the binding effect of customary international law on armed opposition groups may therefore be questioned by them. Specifically in the international humanitarian law context, the reliance of *opinio juris* over

[27] JS Pictet et al (eds) *The Geneva Conventions of 12 August 1949: Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC Geneva 1960) 36.

[28] See also R Jennings and A Watts *Oppenheim's International Law, Volume I: Peace* (Longmans London 1996) 166; A Cassese *International Law* (OUP Oxford 2005) 125.

[29] GIAD Draper *The Red Cross Conventions* (Stevens & Sons London 1958) 17.

[30] *Tadić* (n 15) paras 103, 107, and 108.

[31] L Zegveld *The Accountability of Armed Opposition Groups in International Law* (CUP Cambridge 2002) 26.

[32] IR Gunning 'Modernizing customary international law: the challenge of human rights' (1991) 31 Virginia J Intl L 211, 227–34.

[33] T Meron 'International Law in the Age of Human Rights' (2003) 301 Rec des Cours 1, 372.

[34] *Customary International Humanitarian Law* (n 20) xxxvi; JM Henckaerts 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87 Intl Rev Red Cross 175, 179–80.

[35] Jennings and Watts (n 28) 26.

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state practice[36] is harmful to the interests of the non-state actor for it is heavily weighted in favour of what the state has said as opposed to looking at its actual actions.[37] There are good reasons for suggesting that the practice of armed opposition groups be taken into account in the formation of customary international humanitarian law. One objection of armed opposition groups to compliance with international humanitarian law is that they played no part in its formation. Incorporating their practice into the formation of custom would counter this argument and give them a sense of ownership of the rules, potentially making them less willing to break the rules. Despite these criticisms and suggestions for modification, the underlying premises remain intact and as such, armed opposition groups are bound by the rules of international humanitarian law that have customary status.

However, the corollary of this explanation is that armed opposition groups are not bound by those rules that do not have customary status. Another consequence is that armed opposition groups would not have been bound by the rules of international humanitarian law before they gained customary status. Yet the ICTY has stated that it is not solely those rules that are part of customary international law that will be applied in a subsequent criminal prosecution.[38] In addition, the ICTY will apply provisions of a treaty to which a state is party, regardless of their customary character.[39] If the principle of *nullum crimen sine lege* is not to be violated, these rules must be binding on armed opposition groups by a method other than custom.

2. The binding nature of general principles

A variation on the custom explanation[40] is to consider armed opposition groups bound by the rules governing internal armed conflict by reason of their status as general principles of international law. Dicta to this effect can be found in various judicial decisions. For example, the International Court of Justice in the *Corfu Channel* case referred to 'certain general and well-recognized principles, namely: elementary considerations of humanity'; in the

[36] *Tadić* (n 15) para 99.

[37] See also T Meron 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90 AJIL 238, 240.

[38] cf Report of the Secretary-General pursuant to para 2 of Security Council Resolution 808 (1993) UN Doc S/25704 (3 May 1993) para 34: 'In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.' The Secretary-General adopted a different view as regards the ICTR: Report of the Secretary-General pursuant to para 5 of Security Council Resolution 955 (1994), S/1995/134 (13 Feb 1995) para 12.

[39] *Tadić* (n 15) para 143; *Prosecutor v Dario Kordić and Mario Čerkez* (*Judgment*) IT-95-14/2-A (17 Dec 2004) paras 44–6.

[40] Cheng considers the line between custom and general principles to be 'not very clear': B Cheng *General Principles of Law as Applied by International Courts and Tribunals* (Grotius Cambridge 1987) 23. See also *Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Reports 3, Separate Opinion of Judge Ammoun 286, 300–1.

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Nicaragua case it referenced 'fundamental general principles of humanitarian law' and described the rules of Common Article 3 as a 'minimum yardstick'; while in the *Reservations to the Genocide Convention* advisory opinion, it noted that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[41] The ICTY has stated that many provisions of Additional Protocol II 'can now be regarded as declaratory of existing rules or as having crystallized emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.'[42] Similarly, the International Commission of Inquiry on Darfur has stated that certain rules adopted at the 1974–77 Diplomatic Conference were adopted 'as provisions that spelled out general principles universally accepted by States' and that 'States considered that such provisions partly codified and partly elaborated upon, general principles, and that they were therefore binding upon all States or insurgents regardless of whether or not the former ratified the Protocols.'[43]

There is some debate as to the precise nature of general principles—what they are, how they emerge, upon what basis they are binding, whether they are principles drawn from domestic law applied at the international stage or are principles recognized at the international level. Regardless, the general principles of international humanitarian law are considered to be those of distinction and proportionality. The rules governing internal armed conflicts derive from these general principles and would, under this reasoning, be binding on armed opposition groups by reason of such status.

This approach is problematic in that it supposes that since the rules governing internal armed conflict derive from general principles of humanitarian law, they can themselves be described as general principles. It may well be that the underlying substance of the rules is binding as general principles.[44] However, when a rule expands on and gives substance to a general principle, it is no longer a general principle but is based on one. The rules governing internal armed conflict are built on general principles but are not general principles in and of themselves. As the Martens clause notes, 'in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.'[45] There is a distinction then between principles or usages and law.[46] In situations in which no detailed

[41] *The Corfu Channel Case, Merits* [1949] ICJ Reports 4, 22; *Nicaragua* (n 12) 14, 113–14; and *Reservations to the Genocide Convention, Advisory Opinion* [1951] ICJ Reports 15, 23.

[42] *Tadić* (n 15) para 117.

[43] International Commission of Inquiry on Darfur (n 12) para 158.

[44] See generally, B Simma and P Alston 'The sources of human rights law: custom, jus cogens and general principles' (1992) 12 Australian Ybk Intl L 82.

[45] This is the version of the Martens clause that appears in preambular para 4 to Additional Protocol II.

[46] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Reports 226, Dissenting Opinion of Judge Shahabuddeen 375, 406; Dissenting Opinion of Judge Weeramantry 429, 493; G Fitzmaurice 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' 1957-II Rec des Cours 1, 7.

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legal provisions exist, general principles fill the gap. Detailed provisions cannot also be general principles at one and the same time.

The question then becomes which rules, if any, reflect a general principle because it is only these that will bind armed opposition groups as general principles. The very existence of this question indicates that not all the rules governing internal armed conflict are binding on armed opposition groups as general principles. This explanation is therefore of limited use.

B. Limited by the type of armed opposition group

1. The binding nature of treaties on third parties

The seminal article on this topic written in the pages of this journal considers the treaties governing internal armed conflict to be binding on armed opposition groups despite their status as non-parties thereto as a result of the binding nature of treaties on third parties.[47] The relevant rules are laid down in the Vienna Convention on the Law of Treaties (VCLT).

A preliminary issue that has to be faced is whether it is possible to use the principles laid down in the VCLT to determine whether armed opposition groups are bound by the rules governing internal armed conflict given their status as non-state entities. Article 1 of the VCLT explicitly limits the Convention to treaties concluded between states. The VCLT itself then does not apply to treaties concluded between a state and a non-state entity or between two non-state entities. In light of this, it is difficult to argue that the rules governing treaties and third parties contained in the VCLT apply to non-state third parties. The rules may not be applied *qua* treaty. What of customary international law? It is less than clear that the rules in question (Articles 34–36) have customary status.[48] Further, even if a custom exists as regards the effect of these rules on states, it does not follow that there is a similar custom with respect to the impact of the rules on entities other than states. The customary rule may be limited *ratione personae*. For these reasons, it is highly unlikely that the rules relating to treaties and third parties contained in the VCLT may be used to explain the binding nature of the rules governing internal armed conflict on armed opposition groups.

Even if it were to be assumed *arguendo* that these difficulties could be overcome and the rules contained in the VCLT are used,[49] this explanation would remain unsatisfactory. The general rule as to the binding nature of treaties on third parties is to be found in Article 34. This provides that '[a] treaty does not create either obligations or rights for a third State without its

[47] *Status of Rebels* (n 11) 423–9.

[48] R Bernhardt 'Treaties' in 4 Encyclopaedia of Public International Law 926, 927 (Elsevier Amsterdam 2000); A Aust *Modern Treaty Law and Practice* (CUP Cambridge 2000) 10.

[49] Cassese opines that, while the VCLT only relates to states, 'the customary rules on the matter have a broader scope, in that they govern the effects of treaties on any international subject taking the position of a third party *vis-à-vis* a treaty': Status of Rebels (n 11) 423.

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consent.' However, a treaty may, in some instances, apply to third parties. The rules governing such instances are elaborated on in Articles 35 and 36. Article 35 observes that a third party may be subject to obligations that are contained in a treaty to which it is not party provided that those that are party to the treaty 'intend the provision to be the means of establishing the obligation' and the third party itself 'expressly accepts that obligation in writing.' Article 36 states that third parties may receive rights that are contained in a treaty to which they are not party provided that the parties to the treaty 'intend the provision to accord that right' to the third parties and the third parties 'assent thereto.' Unlike the case of obligations, the assent of the third parties is to be presumed unless there is indication to the contrary or the treaty provides otherwise.[50]

It is evident that the rules governing internal armed conflict purport to grant their addressees rights, and impose obligations upon them. Articles 35 and 36 VCLT are thus triggered and it becomes necessary to ascertain the intentions of the contracting and the third parties. The texts of the instruments themselves evidence the intentions of the contracting parties. Common Article 3, the 1954 Hague Convention on Cultural Property and Amended Protocol II to the Convention on Certain Conventional Weapons explicitly states that '*each Party* to the conflict shall be bound' by the rules laid down.[51] Since the parties to an internal armed conflict are necessarily either a state and an armed opposition group or two or more armed opposition groups, the intention of the contracting parties must have been to grant rights to and impose obligations upon armed opposition groups.[52] This is also true of Additional Protocol II which seeks to develop and supplement Common Article 3 'without modifying its existing conditions of application'.[53] The first requirement is thus satisfied.[54]

The second requirement before a treaty grants rights to and imposes obligations upon third parties is that they assent to the rights and obligations. While an armed opposition group may assent to the rights and obligations of international humanitarian law—and indeed there are good reasons for why they may—their doing so is not a foregone conclusion. Were the armed opposition group not to assent to the rights and obligations of the rules, they would not be bound by them. Thus, the binding nature of the rules governing internal armed conflict on armed opposition groups on this reasoning is completely dependant upon their will.[55] Effectively then, the rules bind only those armed opposition groups that are willing to be bound. While this may be the most pleasing

[50] Vienna Convention on the Law of Treaties, Art 36(1).

[51] Emphasis added.

[52] Cassese *International Law* (n 28) 130 states: 'it would not make sense to lay down a set of obligations solely incumbent upon the central authorities vis-à-vis all the other contracting States, while leaving rebels free from any legal trammel.'

[53] Additional Protocol II, Art 1(1).

[54] For additional reasons, see *Status of Rebels* (n 11) 424–8.

[55] *Status of Rebels* (n 11) 428 seems to implicitly note this stating, 'it will of course be necessary to determine in each civil war whether rebels are ready and willing to accept the Protocol'.

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explanation from the point of view of the armed opposition group, it is also an ad hoc approach that will vary from conflict to conflict, armed opposition group to armed opposition group and treaty to treaty. Furthermore, whether the armed opposition group is bound will not be able to be determined in advance and may take place even in the middle of the conflict. Even then, the armed opposition group may only assent to the rights and obligations of certain treaties. There remains the question of whether a verbal assurance on the part of an armed opposition group that it considers itself bound would suffice, for Article 35 provides that third parties must assent to the obligations in writing in order to be bound. Given that this discussion is premised on the assumption that the rules are binding *qua* custom, it is likely that the associated formalities have not obtained customary status and a verbal assurance would suffice.

For these reasons, the rules contained in the VCLT do not apply whether as treaty or as custom to armed opposition groups. On the view that they do apply, this reasoning still does not satisfactorily explain the binding nature of the rules governing internal armed conflict on armed opposition groups. At most it binds only certain types of armed opposition groups, namely those that agree to be bound. Armed opposition groups that do not consider themselves bound—the very groups that are most in need of being bound—would not be bound.

2. *The binding nature of treaties through succession*

The ICRC Commentary to Geneva Convention III considers an armed opposition group bound by a convention it has not signed for the reason that, 'if the responsible authority at [its] head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country.'[56] When a government ratifies a treaty, the ratification binds the state and not just the particular ratifying government. Treaties that are already in force thus bind incoming governments regardless of their status prior to becoming the government. The relevant treaty therefore also binds an armed opposition group that becomes the government even if it was previously rebelling against the very government that ratified it. The succession reasoning applies this principle one stage further and holds that an armed opposition group that claims to be the government is also so bound.

A more recent variation on the ICRC view is the linkage of this approach with de facto control over territory. Commentators favouring this approach argue that armed opposition groups that exercise effective control over a segment of the territory are bound by reason of their purported representation of the state or part thereof.[57] The difference between the two approaches is that in the former, the very claim to represent the state binds the armed opposition

[56] Pictet (n 27) 37. [57] Zegveld (n 31) 15.

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group by the rules governing internal armed conflict. In the latter, the claim to represent the state is not explicit but is considered manifest in the de facto control of territory.

Both variations are problematic. As to the first, a distinction should be drawn between an armed opposition group that actually becomes the government and an armed opposition group that merely claims to be such but never actually achieves said status. With regard to the armed opposition group that becomes the government, the principle of succession applies and the rules governing internal armed conflict bind the opposition group, but they do so *qua* the newly formed government and not *qua* the armed opposition group. In respect of the armed opposition group that never becomes the legitimate government, there is the purported assignation of the obligations of the state onto those who are merely claiming to represent the state no matter how ridiculous or unlikely the claim may be. If an armed opposition group claims to represent the country and is defeated some two days later, would it really make sense for it to have been subject to the rules governing internal armed conflict by reason of its claim to represent the state?

The second variation is free from these problems in that the de facto control of territory would have to be of a sufficiently lengthy period of time as to suggest that the armed opposition group may be treated as having quasi-governmental status. It is, however, problematic in that de facto control of territory does not necessarily imply a claim to represent the state or part thereof. Any notion of consent to be bound by reason of representing the state deriving from the control of territory may be questioned. In any event, it is questionable why a bare assertion of state representation should bring in to play the rules governing internal armed conflicts.

In addition to these problems, both variations of this succession reasoning are limited in their explanatory power. When the ICRC Commentary notes '*if* the responsible authority . . . exercises effective sovereignty, it is bound',[58] it does not explain how the responsible authority that does not exercise effective sovereignty is bound. Further, where the armed opposition group does not purport to represent the state, for example, where the armed opposition group is fighting to displace the government in favour of elections, or where the aim of the conflict is secession, this succession argument would not apply. Therefore this reasoning binds, at the very most, only those armed opposition groups that purport to represent the state and is consequently of limited use.

C. Summary

None of these reasons, on their own, provide an adequate explanation for the binding nature of all the rules governing internal armed conflict on all types of armed opposition groups. Even cumulatively these four explanations do not

[58] Pictet (n 27) 37 (emphasis added).

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prove sufficient so as to bind all types of armed opposition groups by all the rules. The only types of armed opposition groups that are bound by all the rules are those that consent to be bound or those that purport to represent the state. The only rules that are binding on all armed opposition groups are those that have the status of custom or of a general principle. This is not to say that these explanations are worthless. They provide a valuable back up—as to the binding nature of certain rules on certain types of armed opposition groups—to the explanation that does explain the binding nature of all the rules of internal armed conflict on all types of armed opposition groups, that of legislative jurisdiction.

III. THE OVERARCHING EXPLANATION—THE PRINCIPLE OF LEGISLATIVE JURISDICTION

The principle of legislative jurisdiction may be described as the competence of the government to legislate for all its nationals. Applying the principle to treaties, when a state ratifies a treaty, it does so not just on behalf of the state but also on behalf of all individuals within its territory. The delegate of the USSR at the Diplomatic Conference of 1974–7 put it thus: '[a]ny international instrument signed by a Government was binding on all those within its territory',[59] while the delegate of Greece at the Diplomatic Conference of 1949 said '[i]nsurgents and even bandits were obviously nationals of some State, and were thereby bound by the obligations undertaken by the latter'.[60] This approach thus considers armed opposition groups bound because the state in ratifying the relevant instrument binds all individuals within its territory by that instrument, even those that may later rebel against it.[61]

A state in ratifying a treaty not only binds itself. After all, the rights and duties of states are simply the rights and duties of the people who make up those states.[62] And it is not abstract entities that commit crimes but people. In this regard, the oft-cited words of the International Military Tribunal at Nuremberg may be recalled, namely that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals

[59] *Official Records of the Diplomatic Conference on the Reaffirmation and Development on International Humanitarian Law Applicable in Armed Conflicts (1974–1977)* CDDH/III/SR.32, Vol XIV, p 314, para 22 (Federal Political Department Bern 1978).

[60] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. IIB, p 94 (Federal Political Department Berne 1951).

[61] G Abi-Saab 'Non-International Armed Conflicts' in UNESCO (ed) *International Dimensions of Humanitarian Law* (UNESCO Paris 1988) 217, 231; Y Sandoz, C Swinarski, and B Zimmerman (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC Geneva 1987) 1345; C Lysaght 'The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and other Human Rights Instruments' (1983) 33 American University L Rev 9, 12.

[62] The Collected Papers of John Westlake on Public International Law (L Oppenheim ed) 78, in Jennings and Watts (n 28) 17.

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who commit such crimes can the provisions of international law be enforced.'[63] The individuals that are bound by ratification of a treaty on the part of the state are private individuals and collectivities of individuals. The latter encompasses state collectivities, neutral collectivities and individuals forming a collectivity for the purposes of challenging the state.

The fact that the collectivity challenges the authority of the state is of no significance to the binding nature of the rules since the laws or war function like any other treaty in this regard. The general principle being that, 'since treaties are made on behalf of the State, and bind the State as a whole, all treaties already in existence when an insurrection breaks out are necessarily binding on the insurgent community'.[64] This is true of the period during which the armed opposition group fights the state and the post-conflict period if the armed opposition group ascends to power. Just as a challenge to the authority of the International Criminal Court by an armed opposition group arguing non-recognition of the Rome Statute as a treaty ratified by a government would fail, so too does a challenge to the binding nature of the laws of war on the basis of the same argument.

This explanation has been subject to much criticism. It has been contended that the participants at the Diplomatic Conference did not intend to legislate for armed opposition groups and that the explanation fails to appreciate the differing relationship between international law and municipal law in different legal systems. These criticisms shall be considered in turn and the principle of legislative jurisdiction will emerge as the only reasoning that adequately explains the binding nature of all the rules governing internal armed conflict on all types of armed opposition groups.

The first argument against the legislative jurisdiction explanation is that states at the Diplomatic Conference did not intend to legislate for armed opposition groups and that the Geneva Conventions regulate the interplay between states and only affect armed opposition groups incidentally. In support of such a proposition is that the phrase 'each Party to the conflict' is not the typical phrase used if the intention was to legislate on behalf of armed opposition groups and that the word 'Party' relates to the words immediately beforehand, namely 'High Contracting Parties', which in turn refer solely to states.[65]

[63] *Trial of Major War Criminals Before the International Military Tribunal,* 14 Nov 1945–1 Oct 1946, Vol I (Nuremberg 1947) 171, 223.

[64] AD McNair *The Law of Treaties* (Clarendon Press Oxford 1961) 676. McNair adds 'at any rate when the other party to a treaty grants recognition of belligerency to the insurgents'. However, with the decline of the recognition of belligerency, it is submitted that the redacted version holds true.

[65] The relevant part reads: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions.' That the phrase 'High Contracting Parties' refers only to states is confirmed by Sandoz (n 61) 1338; M Takemoto 'The 1977 Additional Protocols and the Law of Treaties' in C Swinarski (ed) *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (ICRC Geneva 1984) 257–8.

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This argument is not persuasive. It is true that the reference to the 'Party to the conflict' in Common Article 2 refers to states parties.[66] However, Common Article 2 relates to international armed conflicts. When Common Article 3, relating as it does to internal armed conflicts, refers to 'each Party to the conflict', it has in mind states as well as armed opposition groups since an internal armed conflict is by definition fought between a state and an armed opposition group or between two or more armed opposition groups. This can be the only conclusion in light of the precise wording used. Further, any other reading would be inconsistent with the later statement in Common Article 3 that the application of the provisions shall not affect the legal status of the parties. A consideration of the French text leads to the same conclusion since it states '*chacune des Parties au conflit sera renue d'appliquer au moins les dispositions suivantes'*. The confusion that results from the use of the word 'Party' as opposed to 'party' immediately following the term 'High Contracting Parties' was seemingly noted during the Diplomatic Conference that led to the adoption of the Additional Protocols since it was proposed that in Additional Protocol II, 'in order to make it clear that a corresponding duty devolved on Parties to a conflict which were not High Contracting Parties', the word 'Party' should be amended to read 'party'.[67] Thus, the instruments cannot be said to simply affect armed opposition groups incidentally. Thus to argue that the legislative jurisdiction explanation does not bind armed opposition groups purely on the basis that the approach of states at the Diplomatic Conference was to adopt a contractual approach is not compelling. Indeed, there was no agreement at the Diplomatic Conference as to exactly how armed opposition groups were bound.

The principal criticism levelled at the legislative jurisdiction approach is that it neglects the divergence in the practice of states concerning the relationship between international and domestic law and as regards the direct effect of treaties.[68] The argument proceeds as such: in countries in which treaties are generally self-executing, when the state ratifies a treaty, the treaty automatically becomes part of domestic law without the need for implementing legislation. In others, ratification of the treaty does not achieve the same result. The treaty has to be incorporated into domestic law by way of implementing legislation before it can be considered binding in internal law. Thus, in these legal

[66] Pictet (n 27) 57.

[67] *Official Records of the Diplomatic Conference on the Reaffirmation and Development on International Humanitarian Law Applicable in Armed Conflicts (1974–1977), Volume VIII* (Federal Political Department Bern 1978) 213. All references to this phrase were subsequently dropped.

[68] M Bothe, KJ Partsch, and WA Solf *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff The Hague 1982) 700. See also *Status of Rebels* (n 11) 429; T Fleiner-Gerster and MA Meyer 'New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty' (1985) 34 International and Comparative Law Quarterly 267, 272 and 277 who ask, if the obligation of armed opposition groups to observe Common Art 3 is taken for granted, 'are the revolutionary forces then subjects of international law, or are they bound to apply Article 3 because that provision has been incorporated into their State's internal law?'

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systems, a state does not bind its citizens simply by ratifying a treaty. Instead, the treaty will only be binding upon the individual if and when the state incorporates the treaty into its domestic legal framework. The danger is, then, that the effectiveness of the treaty rules 'may be eviscerated' if they are not transformed into domestic law.[69]

A further argument against the legislative jurisdiction rationale is that, although in most States treaties form part of domestic law immediately upon ratification, 'they then bind individuals and State authorities *qua* domestic law . . . However, what is at stake in the present case is not whether rebels are subjects of domestic law, but their legal standing in *international* law'.[70]

Were the armed opposition group to declare 'null and void' all domestic legislation, this would include the Geneva Conventions.[71] The chances of this happening are considered great given that the armed opposition group is unlikely to comply with a treaty that has been ratified by the very government against which it is rebelling.[72]

Turning first to the arguments that, were the state not to incorporate the rules governing internal armed conflicts into their domestic law, the armed opposition groups would not be bound and that, what is in question is the legal standing of armed opposition groups in international law, not in domestic law. There are certain treaties that create rights and obligations upon individuals directly upon their ratification by the state irrespective of whether or not they have been incorporated into domestic law. In the Advisory Opinion on the *Jurisdiction of the Courts of Danzig*, the Permanent Court of International Justice stated that it is in accordance with a well-established principle of international law that international agreements 'cannot, as such, create direct rights and obligations for private individuals.'[73] However, the situation is different where the very object of the agreement, as found from the intention of the contracting Parties, is 'the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts'.[74] In this situation, effect will be given to the intention of the parties even if no transformation is forthcoming.[75] There is thus a presumption against the direct acquisition of rights, however the presumption is rebuttable.[76]

Among the agreements in which the presumption is rebutted and therefore that create direct individual rights and obligations are the instruments govern-

[69] T Meron *Human Rights in Internal Strife: Their International Protection* (Grotius Cambridge 1987) 39.

[70] *Status of Rebels* (n 11) 429. [71] ibid 429–30.

[72] L Moir *The Law of Internal Armed Conflict* (CUP Cambridge 2002) 53; R Baxter 'Ius in Bello Interno' 518, 527 in JN Moore (ed) *Law and Civil War in the Modern World* (Johns Hopkins Baltimore 1974); R Dufresne 'Book Review: Zegveld, The Accountability of Armed Opposition Groups in International Law' (2004) 15 EJIL 226, 226.

[73] *Jurisdiction of the Courts of Danzig* (1928) PCIJ Series B, No 15, p 17.

[74] ibid 18. [75] ibid 26.

[76] H Lauterpacht *The Development of International Law by the International Court* (Stevens & Sons London 1958) 176.

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ing internal armed conflict. One of the Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgement of the Tribunal, as formulated by the International Law Commission, was that '[a]ny person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.'[77] The Commentary thereto states that the general rule underlying this principle is that 'international law may impose duties on individuals directly without any interposition of internal law'.[78] This was confirmed in the International Law Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind and the 1996 Draft Code of Crimes against the Peace and Security of Mankind.[79] Though these instruments refer to the international criminalization and not the binding nature of the rules as such, it is evident that in order to be able to prosecute individuals for the breach of certain rules, they must necessarily have been binding upon them in the first place. The above statements can then also stand for the proposition that international humanitarian law binds individuals regardless of whether incorporation into domestic law has taken place.[80] Armed opposition groups are thus bound by the rules governing internal armed conflict regardless of whether such rules have been transformed into the domestic legal system of the state concerned.

As to the other principal argument against the legislative jurisdiction explanation, the precise area of contention concerns the manner in which the armed opposition group is bound. The actual binding nature of the rules is not disputed. This is evident from the statement that treaties 'bind individuals and State authorities *qua* domestic law' but 'what is at stake in the present case is not whether rebels are subjects of domestic law, but their legal standing in international law'.[81] What is at stake is not even this. It is simply whether the rules governing internal armed conflict are binding on armed opposition groups. The underlying concern over the manner in which armed opposition groups are bound is that the binding nature of international humanitarian law through domestic law will lead to less adherence of the rules by armed opposition groups since the rules may have been formulated by the very government against which the armed opposition groups is in conflict.

[77] Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, Principle I.

[78] Report of the International Law Commission covering its second session, 5 June–29 July 1950, A/1316 (1950), Formulation of the Nurnberg Principles, para 99.

[79] 1954 Draft Code, Art 1; 1996 Draft Code and ILC Commentaries thereto.

[80] See also Cassese *International Law* (n 52) 144–5 who notes that there are a number of international rules that directly impose obligations upon individuals 'regardless of whether the national legal system within which individuals live contains a similar or the same obligation', ie whether they have been translated into domestic law. Although limited by Cassese to customary rules, there would seem to be no reason why such a principle cannot be extended to treaty rules.

[81] Status of Rebels (n 11) 16.

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This is questionable. It is most unlikely that what is objectionable to an armed opposition group is the manner in which they are bound, that is directly once a treaty is concluded or only when implementing legislation is enacted. Rather, it is the fact of their being bound by rules formulated by the very government against which they fight. It is the creation process of the rules that is of concern to them; that the party against whom they are in conflict had a say in the formation of the rules by which they are both bound and they did not.[82] In the situation where an armed opposition group does not abide by the law, the group will likely regard all laws passed by its opponents as illegitimate, regardless of whether they are domestic or international in nature. This is especially so given that the international treaty will likely have the same content as the domestic legislation, being different only as a matter of form.

Even this may be overstating the case somewhat. The legitimacy of the rules from the point of view of the armed opposition group has to be balanced against the legitimacy of the armed opposition group from the perspective of the international community. An increase in the former, and a resulting increase in respect for the rules,[83] may lead to an increase in the latter. Thus, armed opposition groups will often consider themselves bound by international humanitarian law in order to avoid classification as a terrorist group and in order to be seen as legitimate in the eyes of the international community.[84] It may seem unlikely that an armed opposition group will consider itself bound just so as to give itself the air of legitimacy. Yet generally there is the perception on the part of armed opposition groups that following the rules of international humanitarian law will contribute to their struggle being recognized as legitimate by the international community, or, at the very least, keep their struggle from being seen as illegitimate. For example, Carlos Castano, head of the United Self-Defence Groups of Colombia (AUC) has stated: '[w]e have to adjust ourselves to the world's new order and obey international humanitarian law and distance ourselves from . . . unacceptable practices.'[85] This reflects the view that if an insurgent party does not apply Common Article 3, 'it will prove that those who regard its actions as mere acts of anarchy or brigandage are right'.[86]

A perception of illegitimacy has numerous consequences. It may lead to the armed opposition group being considered by the international community as a terrorist organisation and thus to a diminution of support for the group, the freezing of funds from abroad and limitations on meetings. For example, one

[82] While certain national liberation movements participated in the diplomatic conference that culminated in Additional Protocol I, no armed opposition groups were invited to participate in the formation of Additional Protocol II.

[83] An interesting question is to what extent the degree of legitimacy of certain rules affects their degree of compliance by armed opposition groups.

[84] See also DP Forsythe 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts' (1978) 72 AJIL 272, 292.

[85] 'Peace overtures from Colombia's king of the paramilitaries' *The Guardian* (9 Sept 2002).

[86] Pictet (n 27) 37–8.

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result of the Liberation Tigers of Tamil Eelam (LTTE) being labelled a terrorist group under the United Kingdom Terrorism Act 2001 was the loss of $450–550 million due to its inability to use its overseas headquarters in London as a means of collecting funds from abroad.[87] A perception of legitimacy on the other hand has all sorts of advantages. At one extreme, the according of legitimacy to certain armed groups may result in their being seen as fighting against 'colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination' thus engaging Additional Protocol I. At a lower level, legitimacy may encourage support from actors at various domestic and international fora. Statements of support and the like not only keep the issue on the agenda of the international community but also put pressure on the relevant government to negotiate with the armed opposition group.

A consideration of the practice of armed opposition groups may be of some assistance in determining the weight to be given to the underlying concern. Some armed opposition groups have tried to adhere to the Geneva Conventions. This was true of the Provisional Revolutionary Government of Algeria,[88] the Smith government in Rhodesia,[89] and more recently the Kosovo Liberation Army (KLA).[90] However, only states may be parties to the Geneva Conventions. Hence, when the Executive Committee of the Palestine Liberation Organization (PLO) decided, on 4 May 1989, to adhere to the Geneva Conventions and Additional Protocols, the Swiss Government did not consider itself to be in a position to decide whether this communication could be considered an instrument of accession. It therefore stated that the PLO's earlier unilateral declaration of application of the Geneva Conventions and of Additional Protocol I made on 7 June 1982 remains valid.[91]

In light of the inability of armed opposition groups to adhere to the Geneva Conventions and the Additional Protocols thereto, many armed opposition groups have instead unilaterally declared the application of the relevant rules. Unilateral declarations may create legal obligations for the declaring party.[92] From the substance of the declarations, the circumstances in which they were made and the persons who made them, these unilateral declarations would be given legal effect. With regard to Common Article 3 or 'the principles of the conventions', unilateral declarations have been made by the Front de Liberation Nationale (FLN) in 1956 in Algeria,[93] Katanga in the Congo

[87] 'Money and the Sri Lankan Tigers' *The Economist* (8 Mar 2001).
[88] Forsythe (n 84) 292, n 93.
[89] ibid.
[90] Zegveld (n 31) 14, n 18.
[91] A Roberts and R Guelff *Documents on the Laws of War* (Clarendon Press Oxford 2000) 362.
[92] *Nuclear Tests Case (Australia v France)*, ICJ Reports (1974) 253, paras 42–51.
[93] M Veuthey 'Learning from History: Accession to the Conventions, Special Agreements, and Unilateral Declarations' (2003) 27 Collegium 139, 139; Moir (n 72) 71; D Schindler 'The different types of armed conflicts according to the Geneva Conventions and Protocols' (1979-ii) 163 Rec Des Cours 117, 146; *Treatment of Prisoners* (n 23) 857; Forsythe (n 84) 274.

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(1961),[94] and armed opposition groups fighting in conflicts against the governments of Lebanon (1958), Cuba (1959) and Yemen (1962).[95]

Perhaps for reasons of legitimacy, both so as to make the group appear legitimate and so as to liken the group to a legitimate government, some groups have considered themselves bound by all four Geneva Conventions. The first case of the recognition of the applicability of the Geneva Conventions by an armed opposition group was the conflict in Hungary in 1956.[96] More recently, the KLA has said that it 'recognizes the Geneva Conventions and the conventions governing the conduct of war, even though it has not been offered the chance of signing them, as it would have done'.[97] The Maoist leader in Nepal has also stated that:

> Our Party has been committed to the fundamental norms of human-right and Geneva Convention [*sic*] since the historic initiation of the People's War . . . Our Party has been expressing its commitment not only on the Geneva Convention in relation to the war but also on the international declarations in relation to the human rights.[98]

There has also been more widespread acceptance of Additional Protocol II by armed opposition groups than is commonly thought. This was true of the Frente Farabundo Marti Para La Liberacion Nacional (FMLN) in El Salvador which stated in 1989 that '[t]he FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II'.[99] So too Filipino armed opposition groups in 1991,[100] the RPF in Rwanda who considered itself bound by international humanitarian law,[101] the LTTE in Sri Lanka who in February 1988, 'announced that it will abide by the Geneva Conventions and their Additional Protocols',[102] and the National Liberation Army (ELN) in Colombia which 'specifically declared that it considers itself to be bound by the 1949 Geneva Conventions and Protocol II'.[103]

[94] Moir (n 72) 75; Veuthey (n 93) 140; DW McNemar 'The Postindependence War in the Congo' in RA Falk (ed) *The International Law of Civil War* (Johns Hopkins Maryland 1971) 244, 260. See also Schindler (n 93) 146: 'unilateral declarations of parties to a conflict made upon the request of the ICRC, to the effect that for a specific conflict, they would agree to apply certain principles of the humanitarian law. This happened, for example, in Algeria (1955–62), Congo (1962–4), Yemen (1962–7) and Nigeria (1967–70).'

[95] Forsythe (n 84) 275.

[96] Veuthey (n 93) 139.

[97] KLA spokesman cited in Human Rights Watch *Under Orders: War Crimes in Kosovo* (Human Rights Watch New York 2001) 492–3.

[98] Human Rights Watch *Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War* (Human Rights Watch New York 2004) 22–3, n 58.

[99] FMLN *La legitimidad de nuestros metodos de lucha* (Secretaria de promocion y proteccion de lo Derechos Humanos del FMLN EL Salvador 10 Oct 1988) 89 quoted in *Tadić* (n 15) para 107.

[100] Moir (n 72) 131; Veuthey (n 93) 140.

[101] *Akayesu* (n 16) para 627.

[102] Commission on Human Rights *Report of Special Rapporteur on extrajudicial, summary or arbitrary executions: Visit to Sri Lanka* UN Doc E/CN.4/1998/68/Add.2, para II.B.1.

[103] Inter-American Commission on Human Rights *Third Report on the Human Rights Situation in Colombia*, Chapter IV, para 20, n 11.

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Unilateral declarations are not the only way in which armed opposition groups may express their willingness to be bound. Acceptance of the rules of international humanitarian law may be inferred from bilateral agreements between the armed opposition group and the state against which it is in conflict. These may be agreements concluded under the auspices of Common Article 3, isolated agreements expressly not considered to be Common Article 3 agreements, or concluded in the context of larger peace negotiations. Agreements on international humanitarian law, or such provisions in more general agreements, feature prominently in peace processes.[104] These are of relevance to the discussion at hand given that recourse may be had to such agreements if the peace process subsequently breaks down or if the agreement was concluded at an early stage of the peace process and fighting remains ongoing. It also represents a statement of intent on the part of the armed opposition group and may be used in later criminal proceedings.[105]

Before considering examples of such agreements, it is necessary to ascertain whether they are in fact binding under international law at all or whether they are merely domestic agreements given that they are concluded between a state and an armed opposition group. There is nothing inherently objectionable to armed opposition groups being able to conclude treaties.[106] The International Law Commission in a draft of the articles giving rise to the Vienna Convention on the Law of Treaties defined the term treaty, for the purpose of the articles, as covering international agreements 'concluded between two or more States *or other subjects of international law*'.[107] Indeed, the phrase 'other subjects of international law' was intended to be wide enough to include *inter alia* 'an insurgent community to which a measure of recognition has been accorded.'[108] The reference was deleted in the final draft articles, but an article inserted[109] to make clear that deletion of those references should not be taken to imply a 'change of opinion on the part of the Commission as to the legal nature of those forms of international agreements' and is not 'intended to deny that other subjects of international law, such as international organizations and insurgent communities, may conclude treaties.'[110]

A variety of opinions have been expressed on this subject. In *Tadić*, the Appeals Chamber of the ICTY held that it may apply any treaty that was

[104] See generally C Bell *Peace Agreements and Human Rights* (OUP Oxford 2000).
[105] See eg *Prosecutor v Stanislav Galić* (*Judgment and Opinion*) IT-98-29-T (5 Dec 2003) paras 22–5.
[106] See the definition in Bernhardt (n 48) 927: 'A treaty is a consensual agreement between two or more subjects of international law intended to be and considered by the parties as binding and containing rules of conduct under international law for at least one (normally for all) of the parties.'
[107] 1962 Yearbook of the International Law Commission: Vol II, 161 (emphasis added).
[108] ibid 164.
[109] Vienna Convention on the Law of Treaties, Art 3.
[110] 1966 Yearbook of the International Law Commission: Vol II, 177.

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'unquestionably binding on the parties at the time of the alleged offence' that did not conflict with a norm of *jus cogens*.[111] Such treaties were not limited to those concluded between states but were simply those that were binding upon the parties to the conflict.[112] However, this approach does not tell us when an agreement between a state and a non-state entity may be considered a treaty. In the view of the Special Court for Sierra Leone, a peace agreement that settles an international armed conflict can be characterized as an international instrument, but an agreement that settles an internal armed conflict does not have the same status.[113] According to academic commentary, it is only 'an internationalized peace-agreement', namely one concluded with the involvement of the United Nations, which can have the status of an international agreement.[114]

None of these approaches are particularly satisfying. An armed opposition group that possesses an organized military force and an authority responsible for its acts and that forces itself onto the international plane by committing acts above the level of mere banditry has international legal personality. As international legal participants, these groups are subject to rights and obligations under international law pertaining to their particular status. In the case of armed opposition groups, these consist of limited rights and obligations relating to international humanitarian law.[115] One such right is the right to conclude international humanitarian law agreements. This encompasses Common Article 3 agreements as well as other international humanitarian law agreements. Thus, the only requirement for an international humanitarian law agreement between a state and an armed opposition group with international legal personality to be international in character is for the parties to intend the agreement to be an international one as evidenced from the text of the agreement itself.[116] Provided the parties so intend and both parties have international legal personality, it is irrelevant that the conflict is internal, the agreement is internationalized or effective control is exercised by the armed opposition group. Indeed, just as de facto entities in control of a portion of territory have the competence to enter into treaties relating to the territory

[111] *Tadić* (n 15) para 143.

[112] ibid paras 88–9. Zegveld (n 31) 30 notes that 'At the time the Appeals Chamber made this statement, it had not decided whether the conflict in the former Yugoslavia was international or internal in nature. It may be inferred that the Tribunal referred to agreements concluded by both states and armed opposition groups.'

[113] *Lomé* (n 12) para 42.

[114] PH Koojimans 'The Security Council and Non-State Entities as Parties to Conflicts' in K Wellens (ed) *International Law: Theory and Practice, Essays in Honour of Eric Suy* (Martinus Nijhoff The Hague 1998) 333, 338.

[115] With regard to insurgents and belligerents, see A Cassese *International Law in a Divided World* (Clarendon Press Oxford 1986) 84; G Fitzmaurice (n 46) 10.

[116] According to the ICJ, in determining whether an instrument is an international instrument, regard must be had to the 'nature of the act or transaction', the 'actual terms and to the particular circumstances in which it was drawn up': *Aegean Sea Continental Shelf Case, Jurisdiction* [1978] ICJ Reports 4, 39. See also *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility* [1994] ICJ Reports 112, 120.

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under their control,[117] so too do armed opposition groups in relation to matters within their competence, that is to say international agreements pertaining to humanitarian law.

The contrary consequence would be that the agreement would be governed by domestic law and would vary purely by reference to the territory in which the conflict takes place. This may not be objectionable where the internal armed conflict is between an armed opposition group and the representatives of the territory in which the conflict is fought, that is the government. However, where the internal armed conflict is fought between two armed opposition groups, both of which have international legal personality, an agreement concluded by the two parties that is governed by the law of the territory in which the fighting happens to be situated may seem largely arbitrary.

Numerous examples exist of such agreements. In the Nigerian civil war, the belligerent groups undertook to apply the four Geneva Conventions in an ad hoc agreement.[118] In the Yemen, the Royalists and the President of the Republic 'agreed to abide by the essential rules of the Geneva Conventions'.[119] So too Chad, where 'both the Frolinat forces and the Government of Chad expressed their determination to observe humanitarian principles for the benefit of the "victims", and in addition called upon the ICRC to intervene to ensure that protection'.[120] Afghan opposition groups also agreed to apply the principles of the Third Geneva Convention relative to the treatment of Prisoners of War in the conduct of the conflict.[121]

More recently, in Bosnia, the Agreement of 22 May 1992 between the parties to the Bosnian conflict supplemented the basic rules relating to internal armed conflicts.[122] In the San Jose Agreement between the FMLN and the government of El Salvador, the FMLN agreed to comply with Common Article 3 and Additional Protocol II.[123] Further human rights and humanitarian law agreements have been concluded in the course of peace negotiations between the Unidad Revolucionaria Nacional Guatemalteca and the government of Guatemala;[124] the National Democratic Front and the government of

[117] H Blix 'Contemporary Aspects of Recognition' 1970-II Rec des Cours 617, 618; Jennings and Watts (n 28) 165.

[118] UK Ministry of Defence *The Manual of the Law of Armed Conflict* (OUP Oxford 2004) 408, n 132; Forsythe (n 84) 275.

[119] *Tadić* (n 15) para 103; Veuthey (n 93) 140–1; Forsythe (n 84) 275; K Boals 'The Relevance of International Law to the Internal Law in Yemen' in Falk (n 94) 303, 315.

[120] *Status of Rebels* (n 11) 428 citing the ICRC Bulletin No 27 (5 Apr 1978) p 2.

[121] Zegveld (n 31) 29. See also Veuthey (n 93) 141.

[122] M Sassoli and AA Bouvier *How does law protect in war* (ICRC Geneva 1999) 1112. See also *Galić* (n 105) paras 22–5.

[123] Agreement on Human Rights signed at San Jose on 26 July 1990 UN Doc A/44/971-S/21541 (16 Aug 1990).

[124] Comprehensive Agreement on Human Rights, Done at Mexico, 29 Mar 1994 reprinted in 36 ILM 258, 276 (1997).

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the Philippines;[125] the RPF and the government of Rwanda;[126] and was due to be concluded between the LTTE and the government of Sri Lanka before the peace process stalled.[127] Numerous agreements have also been made between the government of the Sudan and the SLM/A and JEM.[128]

In addition to agreements between the armed opposition group and the relevant government, armed opposition groups have provided undertakings to a neutral source. Examples of such undertakings include the 1995 Ground Rules between UNICEF and certain southern Sudanese armed opposition groups in which the armed opposition groups committed themselves to supporting the Geneva Conventions, the Additional Protocols and the Convention on the Rights of the Child.[129] A considerable number of armed opposition groups have also made commitments regarding not recruiting children under the age of 18,[130] and not using anti-personnel mines.[131] The latter contains a provision whereby the armed opposition group will 'TREAT this commitment as one step or part of a broader commitment to humanitarian norms, particularly of international humanitarian law and human rights, and to contribute to their respect in field practice as well as the development of humanitarian norms.'[132]

Given this seemingly widespread acceptance of international humanitarian law by armed opposition groups, it may be thought that the VCLT explanation is satisfactory since all these armed opposition groups have assented to the obligations in writing and would thus be bound under the VCLT approach. The VCLT approach is certainly satisfactory as regards those armed opposition groups that agree to be bound by all the international humanitarian law treaties. However, it is with regard to those groups that an explanation for the binding nature of international humanitarian law is needed least. The VCLT approach does not explain the binding nature of the rules governing internal armed conflict on those armed opposition groups that do not assent to all the obligations of international humanitarian law.

The discussion on the practice of armed opposition groups should not disguise the fact that by no means all of them consider themselves bound by international humanitarian law. Far from it. There are many conflicts in which

[125] Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines.

[126] Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Rule of Law, Ch IV.

[127] Secretariat for Coordinating the Peace Process, Press Release: *Rehabilitation and Human Rights Issues Addressed* (19 Mar 2003).

[128] International Commission of Inquiry (n 12) para 155.

[129] Ground Rules available at <http://www.unicef.org/path/Documents/Session%204%20Humanitarian%20Principles/Trainer%20Resources/4.11%20SPLM%20Operation%20Lifeline%20Sudan%20Ground%20Rules.doc>.

[130] See <http://www.un.org/special-rep/children-armed-conflict/English/Commitments.html>.

[131] See <http://www.genevacall.org/resources/testi-referencematerials/deeds-signatory-groups.htm> listing 26 such armed opposition groups.

[132] A standard 'deed' is available at <http://www.genevacall.org>.

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armed opposition groups denied and continue to deny the applicability of international humanitarian law to them. For example, the National Liberation Front of South Vietnam denied that armed opposition groups were bound by treaties as a result of 'the accession of the state [they seek] to control'. [133] The FMLN of El Salvador argued that they were not bound by Additional Protocol II unless they had concluded an agreement to that effect.[134] Similarly, certain armed opposition groups in Colombia have contended that 'although they support humanitarian standards in theory, they do not accept Protocol II since it was not negotiated directly with them'.[135]

These armed opposition groups and others like them would not be bound by the VCLT approach. They would, however, be bound under the legislative jurisdiction theory. This is the fundamental difference between the two. Under the legislative jurisdiction explanation, all armed opposition groups are bound. Some may not consider themselves bound and therefore not follow the rules but they would remain bound. Under the VCLT reasoning, only the armed opposition groups that accept the rules are bound and even then only with regard to those rules that they choose to accept. In this respect, the VCLT explanation is but a subset of the legislative jurisdiction reasoning, at least in terms of the actual groups that would be bound by the rules governing internal armed conflict.

IV. CONCLUSION

Four reasons that are commonly put forward to explain the binding nature of the rules governing internal armed conflict on armed opposition groups—customary international law; general principles; the rules governing the effect of treaties on third parties; and the principle of succession—are not in fact capable of binding all types of armed opposition groups by all the rules of internal armed conflict. This is so even when all four reasons are used in conjunction with one another. The legislative jurisdiction explanation—the principle whereby the state binds all individuals within its territory upon ratification of a treaty—is the only one that is capable of binding all types of armed opposition groups by all the rules that govern internal armed conflict.

There is a more fundamental theoretical difference between the four limited explanations on the one hand and the legislative jurisdiction explanation on the other hand. The four limited explanations apply the rules that are applied to states to armed opposition groups. In this way, they are treated like states. The legislative jurisdiction approach treats armed opposition groups as entities

[133] *Treatment of Prisoners* (n 23) 853; Forsythe (n 84) 292.
[134] *Second Report of ONUSAL* A/46/658, S/23222 at paras 64/5 cited in Zegveld (n 31) 17, n 27.
[135] Human Rights Watch *War Without Quarter: Colombia and International Humanitarian Law*, Ch II. Available at <http://www.hrw.org/reports98/colombia/>.

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subordinate to states. The default positions of the two also differ. The four limited explanations start off from the position that armed opposition groups are not bound by the rules governing internal armed conflict while the legislative jurisdiction explanation begins from the view that armed opposition groups are so bound. Consequently, the four limited explanations are more attractive to armed opposition groups while the legislative jurisdiction approach is more appealing to states. As a result, a question that has to be asked is whether using the legislative jurisdiction approach will lead to a decrease in compliance with the rules on the part of the armed opposition group.

Compliance in this regard is likely affected more by the degree of legitimacy the armed opposition group sees in the rules than the precise manner in which they are bound. One of the threads underlying this article has been the degree of legitimacy of the rules from the perspective of the armed opposition group. In order to increase the degree of legitimacy of and foster a sense of respect for the laws governing internal armed conflict, participation of armed opposition groups in the formation of the rules is vital. Participation may range from the formal, for example involvement of armed opposition groups in the conclusion of new international humanitarian law treaties, using their practice for the purposes of customary international law, concluding Common Article 3 agreements and encouraging unilateral declarations of acceptance, to the less formal, such as creating linkages with armed opposition groups that do respect international humanitarian law and pointing to the positive practice of other armed opposition groups.

That armed opposition groups are bound by the rules governing internal armed conflict is beyond doubt; quite how to increase their compliance with these rules is the next big question.

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