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International law: armed groups in a state-centric system

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Abstract

What is the position of non-state armed groups in public international law, a system conceived for and by states? This article considers the question, mainly in the light of jus ad bellum *and* jus in bello*. It shows that, while armed groups essentially trigger the application of* jus ad bellum*, they are not themselves endowed with a right to peace.* Jus in bello *confers rights and obligations on armed groups, but in the context of an unequal relationship with the state. This inequality before the law is strikingly illustrated by the regulation of detention practised by armed groups in non-international armed conflicts. Despite the significant role that they play in modern-day conflicts, armed groups constitute an 'anomaly' in a legal system that continues to be state-centric.*

Armed conflicts involving the participation of an armed group are a phenomenon of remarkable significance in comparison to inter-state armed conflicts. They occur more frequently and apparently antedate inter-state armed conflicts in history.[1] International law, which is anchored in a changing world and intended to regulate life in a global society,[2] was long uninterested in such conflicts,[3] essentially because they are governed by the domestic legislation of states rather than by international law.[4] International law is considered a branch of law open to development,[5] but the developments introduced are first and foremost in the interest of states. The latter have recognized no common higher authority.[6] The international legal order

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presents the state as the entity without which it cannot exist.[7] The state has a firm grip on international law: 'Contemporary international law is clearly the work of states; every last word conforms to their wishes. States jealously safeguard their constitutional attribute of independent sovereignty and thereby affirm their monopoly over both national and international matters'.[8] They are described in several ways for that purpose: as the law's primary,[9] or principal and original subjects.[10] They make and unmake international law.[11] On the face of it, therefore, all entities but the state fall outside the scope of international law.

The development of international law has led to its increasingly broad application in areas considered to be of internal concern to the state. Despite the fact that it is intended to regulate the external affairs of states with each other, it is gradually encroaching on what are in principle internal matters. International law's claim to extend to internal spheres takes little account of what is traditionally considered an area under the exclusive remit of the state, according to the long-standing and classic separation between what falls to states and what lies outside their jurisdiction. Indeed, 'international law has always been pulled between respect

1 Georges Abi-Saab, 'Conflits armés non internationaux', in *Le droit international humanitaire en devenir*, Martinus Nijhoff Publishers, Dordrecht/Boston, 1988, p. 252.
2 Boutros Boutros-Ghali, 'Le droit international à la recherche de ses valeurs: paix, développement, démocratie', in *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol. 286, 2000, p. 17.
3 The United Nations Secretary-General explains this by the fact that the state occupies almost all of the international stage. In addition, the United Nations dealt almost from the outset exclusively with interactions between member states. Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, pp. 14–15.
4 This is evident, for example, in the following texts: Convention concerning the Duties and Rights of States in the event of Civil Strife, of 20 February 1928, *League of Nations Treaty Series*, Vol. CXXXIV, 1932–1933, pp. 45 ff; Protocol (signed by the Plenipotentiaries on various dates between May and December 1957, in accordance with Article 11 of the Protocol) to the Convention concerning the Duties and Rights of States in the event of Civil Strife, *United Nations Treaty Series*, Vol. 284, 1957–1958, pp. 201 ff.
5 Michelet's comment – 'Those who look no further than the present, what is current, will not understand the present' – is justified when it comes to international law, which, more than any other branch of law, is 'inseparable from its past because it is essentially constantly changing'. See Patrick Daillier, Mathias Forteau, and Alain Pellet, *Droit international public*, 8th edition, Librairie Générale de Droit et de Jurisprudence, Paris, 2009, p. 51 (ICRC translation).
6 Agnès Lejbowicz, *Philosophie du droit international: L'impossible capture de l'humanité*, PUF, Paris, 1999, p. 15.
7 According to Christian Dominicé, for example, 'to say that the individual does not have the status of subject of the law in international public law is not to curb development or progress but simply to note the fundamental structure of the international legal order, which, for as long as it exists, will be based on the juxtaposition of sovereign states.' Christian Dominicé, 'L'émergence de l'individu en droit international public', in *Soixante ans de relations internationales: Contrastes et parallèles, 1927–1987, Annales d'études internationales*, Vol. 16, 1987–1988, p. 16 (ICRC translation).
8 A. Lejbowicz, above note 6, p. 292 (ICRC translation).
9 Emmanuel Decaux, 'La contribution des organisations non gouvernementales à l'élaboration des règles du droit international des droits de l'Homme', in Gérard Cohen-Jonathan and Jean-François Flauss (eds), *Les organisations non gouvernementales et le droit international des droits de l'Homme*, Bruylant, Brussels, 2005, p. 24.
10 A. Lejbowicz, above note 6, p. 277 (ICRC translation).
11 Joe Verhoeven, 'The normative and quasi-normative activities of international organizations', in René-Jean Dupuy, *A Handbook on International Organizations*, 2nd edition, Hague Academy of International Law, Dordrecht/Boston/London, 1998, p. 413; Clémentine Olivier, 'Les organisations non gouvernementales et la répression pénale internationale', in G. Cohen-Jonathan and J.-F. Flauss, above note 9, p. 123.

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for sovereignty and the requirements of international rules … Its history can be viewed through the prism of the constant give-and-take between internalization and internationalization'.[12] It is in this context that the question of the application of international law to armed groups and their operations arises.

Armed groups are made up of individuals over whom the state on the territory of which they operate wishes to maintain special control thanks to its internal laws. As such, armed groups do not benefit from the same status as government forces. In internal law, or in the language of the public authorities, the members of armed groups simply refuse to obey the law; they are bandits under ordinary law, terrorists, stateless persons who can be punished for the mere fact of having taken up arms. In international law, no instrument places insurgents on an equal footing with government troops. Armed groups therefore have relatively low status in international law, when it applies. Historically, tangible progress in incorporating situations of internal strife into international law has been incremental. It is true that armed groups, which are more often than not opposed to government forces, are not ordinary non-state entities. The fact that international law has been 'uninterested' in them is not just due to their non-state character. Armed groups are the enemy of the state, which holds the upper hand when it comes to the development of international law.

International law relating to armed conflicts – within which armed groups operate – has two main areas: the body of rules relating to the use of force, *jus ad bellum*, and the rules applicable in an armed conflict, *jus in bello*. This article endeavours to situate armed groups in international law from the point of view of these two main bodies of law. We can already say, unsurprisingly, that neither was conceived for armed groups or in the light of their existence. The various dimensions of *jus ad bellum* remain marked by that initial reality, whereas *jus in bello* presents a different picture. Still, questions such as the deprivation of liberty highlight the law's shortcomings with regard to armed groups.

Use of force

The right to use armed force in domestic law

There is no *jus ad bellum* that specifically applies to international law governing non-international armed conflicts (NIACs). As a result, the regulation of the use of force falls to the domestic law of states, which therefore serves as a kind of *jus ad bellum*.[13] Yet, insurrections are prohibited under domestic law; thus the insurgents will in principle stand in violation of the law. The situation is the same as that between states, but more clear cut. Compared to conflicts between states, there is no

12 B. Boutros-Ghali, above note 2, p. 19 (ICRC translation).

13 Marco Sassòli, '*Ius ad bellum* and *ius in bello* – the separation between the legality of the use of force and humanitarian rules to be respected in warfare: crucial or outdated?', in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines*, Martinus Nijhoff Publishers, Leiden/Boston, 2007, p. 257.

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subjective equality between the parties before *jus ad bellum*.[14] In conflicts between states, each state believes that it is in the right and that the other state, the enemy, has violated the law. In domestic law, the situation is less subjective: the law is on the side of the government forces. The armed group's armed operations are conducted within a state; the group is therefore governed by domestic law. In principle, domestic law reserves the use of armed force for government forces.[15] An armed struggle against government forces is therefore by definition a violation of domestic law. This does not preclude the application of international humanitarian law (IHL), which, in turn, works to safeguard the right of the authorities in power to repress the mere fact of having rebelled.[16] Some historical texts nevertheless provide for a right of insurgency.[17] One example is this provision of the 1793 French Declaration of the Rights of Man and the Citizen: 'When the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable of duties'.[18] This is a remarkable provision, one that is akin at first glance to the texts adopted in revolutionary processes. However, since the aim of any authority is to keep itself in power, such provisions are rarely implemented in the legal, rather than political or ideological, sense. Any uprising, except when the authorities are manifestly powerless, is met with the repression that it is deemed to deserve.

The right to use force in international law

The prohibition of the use of armed force set out in contemporary international law only concerns states in their relations with each other. It does not concern situations arising within the borders of a state.[19] Thus, the use of force by states on their own

14 François Bugnion, 'Just wars, wars of aggression and international humanitarian law', in *International Review of the Red Cross*, Vol. 84, No. 847, 2002, pp. 523–546; M. Sassòli, above note 13, p. 242.

15 'As the monopoly on the use of force for State organs is inherent in the very concept of the Westphalian State, we may assume that the national legislation of all States prohibits anyone under their jurisdiction to wage an armed conflict against governmental forces or, except State organs acting in said capacity, anyone else.' M. Sassòli, above note 13, p. 255.

16 Additional Protocol II, Art. 6, para. 5.

17 In current constitutional law, certain basic laws provide that citizens have the right to bear arms. Such is the case of the Constitution of Argentina, Article 21 of which provides that Argentine citizens must take up arms to defend the Constitution. In the *Tablada* case, the insurgents invoked this provision, *Juan Carlos Abella* v. *Argentina*, Inter-American Commission on Human Rights, Report of 18 November 1997, para. 7, available at: http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm (last visited 6 October 2011).

18 Art. 35.

19 Robert Kolb, *Ius contra bellum. Le droit international relatif au maintien de la paix*, Helbing & Lichtenhahn, Basel/Geneva/Munich, Bruylant, Brussels, 2009, p. 247; Victor-Yves Ghebali, 'Remarques politico-historiques sur l'étiologie des guerres civiles', in Laurence Boisson de Chazournes and Vera Gowland-Debbas (eds), *L'ordre juridique international: Un système en quête d'équité et d'universalité. Liber amicorum Georges Abi-saab*, M. Nijhoff, The Hague, 2001, pp. 464, 476; Luigi Condorelli, 'Conclusions', in Jean-François Flauss (ed.), *Nouvelles frontières du droit international humanitaire*, Proceedings of the colloquium of 12 April 2002, University of Lausanne Institute of International Law, Nemesis/Bruylant, Brussels, 2003, p. 178; Mohammed Bedjaoui, 'Le droit humanitaire à l'ère des ruptures des consensus nationaux et internationaux', in *La guerre aujourd'hui, défi humanitaire: Rapport à la Commission indépendante sur les questions humanitaires internationales*, Bernard-Levrault, Geneva, 1986, p. 40.

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territory is not prohibited by the international law relating to recourse to force. IHL, for its part, does not deny states the right to fight those rising up against their authority. That is not its purpose. The causes of the fighting and the grounds for using armed force are of no concern in *jus in bello*. Indeed, it would appear to be in the law's interest to remain aloof from those questions, because conflating them would undermine respect for the law and even its existence. Certain provisions of IHL are phrased in such a way that it can be said that the law leaves the door open to repression of the activities of armed groups. The first such provision – the conclusion of Article 3 common to the 1949 Geneva Conventions – is relatively subtle and reads as follows: 'The application of the preceding provisions shall not affect the legal status of the Parties to the conflict'.[20] The relevant section of the commentary on this provision states that:

> the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion by all the means – including arms . . .[21]

The commentary is thus more explicit than the treaty text. The second provision is explicit about its intent. According to Article 3 of Additional Protocol II, nothing in the Protocol may be invoked to infringe the '. . . responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State'.[22] The Statute of the International Criminal Court (Rome Statute) echoes this sentiment.[23]

Armed groups are not prohibited under international law from using force against other armed groups or against the government authorities.[24] This statement follows from the general observation that traditional international law, which is profoundly state-centric in ideology, made no provision, in whatever shape or form, for NIACs.[25] Under *jus contra bellum*, the prohibition to have recourse to force set out in the Charter of the United Nations only concerns international relations. Two comments come to mind here. The first tends to reinforce the idea of a right of insurrection. A national liberation movement (NLM) defending a people against a colonial power may take up arms in pursuit of its cause.[26] Other instances in which

20 1949 Geneva Conventions, Common Art. 3, para. 4.

21 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross (ICRC), Geneva, 1958, p. 44.

22 Additional Protocol II, Art. 3, para. 1.

23 International Criminal Court (ICC), Rome Statute, Art. 8, para. 3.

24 R. Kolb, above note 19, p. 247.

25 Alessandro Migliazza, 'L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme', in *Recueil des Cours de l'Académie de Droit International*, Vol. 137, 1972, p. 211.

26 The exceptions to the prohibition to use force in international relations are: 'individual and collective self-defence, a decision or an authorization of the UN Security Council and, most people would add, national liberation wars in which a people is fighting in the exercise of its right to self-determination . . .'. Marco Sassòli, 'Collective security operations and international humanitarian law', in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-state Actors, 25 and 26 October 2002,*

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the right to 'external' self-determination is expressed by the use of armed force are subject to dispute.[27] The second remark does not entirely contradict the first. Generally speaking, the Charter of the United Nations does not explicitly condemn NIACs:[28] it specifically prohibits the use of force in international relations alone. However, Security Council practice with regard to military intervention in internal situations casts another light on the right of insurrection. The Security Council has on several occasions decided to intervene militarily in a situation of internal conflict.[29] Is this because non-state armed groups may not have the right to rebel or the state to repress them? The intervention may be prompted by the need to prevent violations of humanitarian rules. In that case, the endeavour to respect *jus in bello* is a means of ensuring respect for a kind of *jus contra bellum*. The intervention may, in addition, be prompted by the effect that NIAC has on international peace. The Security Council's intervention would thus be justified by its desire to maintain international peace by preserving the internal peace of states. It could then be said that the right of insurrection or to repress an insurrection exists insofar as its enjoyment does not affect *jus in bello* to the point of compromising international peace. This interpretation seems more to the point than that which consists in saying that the Security Council intervenes in NIACs because they are unlawful. For example, the Security Council has intervened in states (such as Haiti and Sierra Leone) in order to restore democracy, yet it cannot be said that democracy is a universal norm of international law.

What belligerents can call on the intervention of a third state? The classic reply – outside the time-honoured context of recognition of belligerency – is: the states. They are allowed to call on external military aid. Armed groups are denied this right.[30] This was the position adopted by the International Court of Justice in the case *Military and Paramilitary Activities in and against Nicaragua*.[31] It is authoritative, even though other ideas exist, such as that which allows no military intervention in 'direct support of one of the parties to the conflict'.[32] Article 3, paragraph 1 of Additional Protocol II does not contradict the Court's position. It prohibits foreign intervention in NIACs against the party called on to defend the state's sovereignty, but it says nothing that would prohibit the government authorities from inviting a state to repress an armed group.[33] Nor is such an invitation prohibited by the Charter of the United Nations. However, can a state call

Collegium special edition, No. 27, Spring 2003, p. 79, available at: http://www.coleurope.eu/template.asp?pagename=pub_collegium (last visited 6 October 2011).

27 International Court of Justice (ICJ), *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, paras. 82–83, available at: http://www.icj-cij.org/docket/files/141/15987.pdf (last visited 16 January 2012).

28 A. Migliazza, above note 25, p. 213.

29 For example, Somalia in 1992, Rwanda in 1994, Haiti in 1994.

30 R. Kolb, above note 19, pp. 326–329.

31 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, Judgment, ICJ Reports 1986, para. 246.

32 Mohamed Bennouna, *Le consentement à l'ingérence militaire dans les conflits internes*, Librairie Générale de Droit et de Jurisprudence, Paris, 1974, p. 214.

33 Antonio Cassese, 'Le respect des normes humanitaires dans les conflits armés non internationaux', in *La guerre aujourd'hui, défi humanitaire*, above note 19, p. 145.

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on an allied state in the fight against an NLM in the context of a war of national liberation? The answer is probably no, because such an intervention, while lawful within the meaning of Article 2, paragraph 4 of the Charter, nevertheless violates the *erga omnes* right of a people to self-determination.[34]

Collective armed action

The system of collective security devised after World War II did not take account of non-state entities. Reality on the ground has obliged both the Security Council and regional arrangements and agencies to consider the situations created by the action of such entities in general and by armed groups in particular. Indeed, in an improvement over the earlier position, the single state-centric purpose of the system of collective security has been replaced by two purposes: peace between states and peace within the state. Peace within the state encompasses peace from the acts of both harmful internal non-state entities and harmful external non-state entities (such as terrorist groups). The High-level Panel on Threats, Challenges and Change shares this view, concluding that there exists a wide range of elements that, according to it, constitute a threat to international peace and security and that are inter-state in origin and above all internal to states:[35] 'Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security'.[36] This is an exceedingly broad view of the threat to international peace and security. It is state-centric in that it is very generous towards states, placing them in an 'unassailable' class, with international peace and security predicated on their absolute calm.

In the main, coercive military action by international organizations in situations of NIAC has been directed at armed groups. In the case of Liberia in particular, the argument that the states of the sub-region (acting through the insurgents) had attacked Liberia was invoked to lend credibility to the decision to apply the 1981 ECOWAS (Economic Community of West African States) Protocol relating to Mutual Assistance of Defence.[37] In reality, however, the sub-regional

34 'In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court . . .; it is one of the essential principles of contemporary international law'. ICJ, *East Timor (Portugal* v. *Australia)*, Judgment, ICJ Reports 1995, para. 29.

35 • Economic and social threats, including poverty, infectious disease and environmental degradation
• Inter-state conflict
• Internal conflict, including civil war, genocide and other large-scale atrocities
• Nuclear, radiological, chemical and biological weapons
• Terrorism
• Transnational organized crime
A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, United Nations, 2004, p. 2, available at: http://www.un.org/secureworld/report2.pdf (last visited 6 October 2011).

36 *Ibid.*

37 Olivier Corten and François Dubuisson, 'L'hypothèse d'une règle émergente fondant une intervention militaire sur une "autorisation implicite" du Conseil de Sécurité', in *Revue Générale de Droit International Public*, 2000, p. 897.

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forces (ECOWAS Monitoring Group, or ECOMOG) were chiefly preoccupied by armed groups. In Sierra Leone, ECOWAS itself justified the transformation of its peace-keeping operation into coercive action by the need for its forces to defend themselves in the face of attacks by armed groups.[38]

As far as collective armed action is concerned, international law gives no 'legal weight' to armed groups. It deals with armed groups, not to regulate their activities, but to fight them, to calm the situations they create, or to manage the consequences of their disruptive existence. The right of the state to dispatch armed forces in the name of the United Nations or of regional bodies further weakens the position of armed groups should they contest the law governing collective action with the state. The intervention of other states, and later NATO, in Libya in 2011 is too recent to draw any final conclusions, but its implementation tends to call this statement into question. Indeed, although the intervention air forces backed the Libyan insurgency, to which the individual countries dispatched military advisers, the relevant resolutions of the United Nations Security Council, in particular resolution 1973 (2011) of 17 March 2011, had a more humanitarian bent, namely to protect the civilian population. The resolution's sponsors provided that the Security Council, acting under Chapter VII of the Charter of the United Nations,

> [*a*]*uthorizes* Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory . . .[39]

and '*[d]ecides* to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians'.[40] The authorization was not against the Libyan insurgents, but nor was it given, at least in the letter of the resolution, to support them. The insurgents were in favour of international action, bringing to mind the Kosovo Liberation Army (UCK) in Serbia and Montenegro and the intervention of NATO forces in 1999 (in that case, the Security Council had not authorized NATO action).

Individual military action

Self-defence against action by armed groups

Individual armed action for the most part confirms what has been said above. Historically, whether before or after the right to use armed force was limited, self-defence or anything resembling it has not in principle concerned the action of

38 *Ibid.*, pp. 898–899.
39 UNSC Res. 1973, 17 March 2011, para. 4.
40 *Ibid.*, para. 6.

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individuals through which the state's responsibility could not be discerned.[41] It is on this basis that the view that acts by non-state entities, such as terrorist groups, are basically in self-defence has been vigorously combated. The reaction of the United States of America and its allies in Afghanistan after the terrorist attacks of 11 September 2001 has often been seen as lacking a valid self-defence argument,[42] unless the attacks are considered to have been perpetrated by Afghanistan.[43] From the general perspective of non-state entities, it has been argued that there can be no aggression without the involvement of a state. Self-defence having 'clearly been conceived as an exception to the prohibition to use force in relations between states', it cannot be invoked to justify the use of force against individual perpetrators of crimes.[44] According to Maurice Kamto,

> whether the scope of the prohibition to use force can be extended to the activities of unofficial non-state entities has sparked a lively debate among scholars, who have reviewed the doctrine since the terrorist attacks of 11 September 2001 against the United States. The question is easy to answer if one assumes that the entities in question and their armed activities have no connection with a state: it seems fairly clear, in fact, both in view of the inter-state nature of the Charter and the tenor of Article 2, paragraph 4, that the rule prohibiting the use of force does not extend to non-state actors. It is impossible, without misconstruing the language, to speak of armed aggression in such a case, or, consequently, to invoke and exercise the right of self-defence within the meaning of Article 51 of the Charter; there is no need for lengthy discourse on the matter.[45]

Kamto goes on to say that the issue of whether the right to use force extends to non-state entities boils down to the nature of their ties with the state and the degree of control that the state has over the entities when they carry out their military operations. In short, a link is required to transform the unlawful activities of non-state actors into state action.[46] Thus, an armed group acting on its own, or any other non-state actor, is unable to commit an act of aggression. That position has not been refuted by the International Court of Justice, which is adamant that the acts of non-state entities must be attributed to a state before there can be any talk of armed aggression (and hence self-defence). Reaffirming the position that it took in the *Nicaragua* case, the Court recalls in *Legal Consequences of*

41 Jean-Pierre Cot, Alain Pellet, and Mathias Forteau (eds), *La Charte des Nations Unies. Commentaire article par article*, 3rd edition, Économica, Paris, 2005, p. 1330.

42 Olivier Corten and François Dubuisson, 'Opération "liberté immutable": une extension abusive du concept de légitime défense', in *Revue Générale de Droit International Public*, 2002, pp. 64, 70.

43 Éric David, 'Sécurité collective et lutte contre le terrorisme: guerre ou légitime défense?', in *Les métamorphoses de la sécurité collective. Droit, pratique et enjeux stratégiques*, A. Pedone, Paris, 2005, p. 145.

44 Luigi Condorelli, 'Les attentats du 11 septembre et leurs suites: où va le droit international?', in *Revue Générale de Droit International Public*, 2001, pp. 838–839 (ICRC translation).

45 Maurice Kamto, *L'agression en droit international*, A. Pedone, Paris, 2010, pp. 145–146 (ICRC translation).

46 *Ibid.*, pp. 146–147.

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the Construction of a Wall that there is a right of self-defence when one state commits an act of armed aggression against another.[47] The problem is that when the Court interprets the scope of Article 51 of the Charter at the same time it modifies its criteria:[48] Article 51 does not stipulate that armed aggression must be the act of a state.

The Rome Statute opted for a classic position on aggression. The Review Conference of the Rome Statute adopted a resolution in Kampala on 11 June 2010 by which it amended the Statute to include a definition of the crime of aggression. The resolution provides that the following text is to be inserted as Article 8 bis of the Statute:

> 1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
>
> 2. For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . .[49]

Regardless of whether there is a declaration of war, acts of aggression are those defined (as such) by United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974. Thus, the individual 'author' of the aggression must have used the state machinery to deploy the force incriminated. This is an anachronistic view. Four main states that have cases pending before the International Criminal Court (cases relating to crimes of war and crimes against humanity), namely the Democratic Republic of the Congo, Uganda, the Central African Republic, and Sudan, have at least one thing in common: armed groups from outside their borders carried out operations on their respective territories. The judgment of the International Court of Justice of 19 December 2005 in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda*) deals for the most part with mutual accusations of aggression, in particular on the part of armed groups based elsewhere or aided by the enemy. Jean-Pierre Bemba, former leader of an armed group in the Democratic Republic of the Congo, is being tried by the International Criminal Court for acts committed, not in his country, but in the Central African Republic. At the time, it is true, his armed group was fighting alongside the official government of the Central African Republic, but the alliances

47 ICJ, *Military and Paramilitary Activities in and against Nicaragua,* above note 31, para. 195.

48 This view was criticized by Judge Rosalyn Higgins in her separate opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, Separate Opinion of Judge Higgins, paras. 32–34, available at: http://www.icj-cij.org/docket/files/131/1680.pdf (last visited 6 October 2011). Judge Higgins had criticized a similar position by the Court in the *Nicaragua* judgment. See Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, pp. 250–251.

49 Annex 1 to RC/Res. 6, of 11 June 2010, *Official Records*, Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, ICC, The Hague, 2010.

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could easily have been another way round. Relations between Sudan and Chad, in particular, have frequently deteriorated in the wake of action by 'foreign' armed groups or armed groups operating from abroad. All this could have prompted the Assembly of States Parties to innovate when it came to the definition of aggression used by the Court. It could have stipulated that the members of an armed group conducting activities comparable to those constituting aggression, by using the armed group's apparatus, were liable to prosecution by the Court. This supposes that the armed group is able to carry out an act of aggression.

Africa after the 1990s and post-9/11 has another view of the question of aggression. The African Union Non-Aggression and Common Defence Pact of 31 January 2005 includes 'the provision of any support to armed groups' in its definition of aggression.[50] It re-examines the position of the International Court of Justice in the *Nicaragua* judgment, wherein the Court stated that assistance to rebels in the form of the provision of arms or logistical aid was not an act of aggression. The Pact facilitates indirect aggression by giving greater weight than the Court to support to armed groups by foreign states.[51] The Pact is also interesting in that it goes further than the UN General Assembly resolution 3314 to stipulate that invading or attacking the territory of a state with armed forces constitutes aggression.[52] In contrast, the UNGA resolution is more restrictive when it says that the invasion or attack of a state's territory must be carried out by the armed forces of another state to be an act of aggression.[53] Thus the Pact, in the absence of other details, leaves it to be understood that the invading or attacking armed forces can also belong to an entity other than the state, notably armed groups.[54] The act of aggression is thus no longer indirect but rather a 'private act' perpetrated solely by

50 African Union Non-Aggression and Common Defence Pact of 31 January 2005, Article 1.c.viii: 'The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organization of States, or non-State actor(s) or by any foreign entity: . . . (viii) the sending by, or on behalf of a Member State or the provision of any support to armed groups, mercenaries, and other organized trans-national criminal groups which may carry out hostile acts against a Member State . . .'.

51 Raphaël van Steenberghe, 'Le Pacte de non-agression et de défense commune de l'Union africaine: entre unilatéralisme et responsabilité collective', in *Revue Générale de Droit International Public*, 2009, p. 136.

52 African Union Pact, above note 50, Art. 1.c.ii: 'The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organization of States, or non-State actor(s) or by any foreign entity: . . . (ii) the invasion or attack by armed forces against the territory of a Member State, or military occupation, however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of a Member State or part thereof . . .'.

53 UNGA Res. 3314 (XXIX), 14 December 1974, Art. 3, para. a.

54 In fact, and in keeping with the general definition of aggression used, the following acts by armed groups are also considered as acts of agression: use of armed force against a member state; bombardment of the territory or the use of any weapon against the territory of a member state; blockade of the ports, coasts, or airspace of a member state; attack on the land, sea, or air forces, or marine and fleets of a member state; acts of espionage that could be used for military aggression against a member state; technological assistance of any kind; intelligence and training provided to another state for the same purpose; encouragement of, support for, harbouring of, or provision of any assistance for the commission of terrorist acts and other violent transnational organized crimes against a member state. Under the Pact, the following types of aggression are the preserve of states: use of the armed forces of a member state that are within the territory of another member state with the agreement of the latter, in contravention of the conditions provided for in the Pact; and the action of a member state in allowing its territory to be used by another member state for perpetrating an act of aggression against a third state.

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the armed group.[55] One final element of the African Union Pact worth noting is the definition of threat of aggression. The concept is defined as 'any harmful conduct or statement by a State, group of States, organization of States, or non-State actor(s) which though falling short of a declaration of war, might lead to an act of aggression'.[56]

Armed groups' right to peace

Do armed groups have a right to peace? If foreign forces have not been invited by the official government, then their operations are an act of aggression in respect of that government (unless they are acting on the authorization of the UN Security Council). We are best advised to affirm that it is the state that has the right to self-defence in the face of such forces. Armed groups fighting such forces could be compared to resistance groups but do not appear to have the right to self-defence. If the foreign armed forces are acting on the invitation of the official government, armed groups have no right of self-defence, since they have no right against aggression. In the recent case of the conflict between Russia and Georgia, the Independent International Fact-finding Mission on the Conflict in Georgia reviewed the use of force between the Georgian government and the forces of the separatist province of South Ossetia. While acknowledging that South Ossetia continued to be part of Georgia, the Mission concluded that international law prohibited the use of armed force between Georgia and South Ossetia and that military activities against the separatist province gave rise to a self-defence operation for its benefit.[57] That position does not hold up to scrutiny. It implies what the Charter does not say. It cannot be assumed that the use of force is prohibited between a government and an entity that remains a part of the state concerned (unless that entity is an NLM). To cite specific agreements between the parties (to the conflict) not to have recourse to force and make the connection to the Charter, as the Mission did, lends itself fairly easily to criticism. The special agreements cannot be deemed to have the same status as the Charter of the United Nations, otherwise the many peace agreements between belligerents in NIACs would all be on an equal footing with the Charter. Since self-defence supposes a prior act of aggression, the implication is that the entity enjoying that right benefits from a minimum of sovereignty (conversely, there is no need to be sovereign to attack). Yet a separatist province is not sovereign.

If the armed group in question is an NLM defending a people against a colonial power, the right of that group to self-defence would seem to be on more solid ground. Here, the intervention of foreign states may be construed as violating the right to self-determination. Colonized peoples have the right to use armed force for the purpose of defending their right to self-determination. Logically, therefore,

55 R. van Steenberghe, above note 51, p. 139.
56 African Union Pact, above note 50, Art. 1, para. w.
57 International Independent Fact-finding Mission on the Conflict in Georgia, *Report*, Vol. II, 2009, pp. 229 ff, available at: http://www.ceiig.ch/Report.html (last visited 17 January 2012).

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the operations of the NLMs representing such peoples are legitimate acts of self-defence carried out in response to the action of foreign states that are duty bound not to prevent them from achieving self-determination.[58] This idea has not, however, garnered unanimous support. For example, Antonio Cassese, who wrote a commentary on the article of the Charter relating to self-defence (Article 51) appears to disagree. He recounts the lengthy struggle of developing countries (aided by the East European states) for recognition within the United Nations that colonial peoples or those oppressed by a foreign power have the right to use force under Article 51 of the Charter. He considered that their struggle was in vain. The sole outcome was to confer on NLMs the right to use armed force, a right derived from the principle of self-determination, but not a right under Article 51 of the Charter.[59] His position distinguishes between the right to use armed force and the right of self-defence, which apparently ranks higher. It can nevertheless be supposed that, in international law, an entity that has the right to use armed force is entitled to act in self-defence if attacked. In addition, Cassese's views appear to relate more to the relationship between the NLM and the colonial power concerned, for the developing world struggle mentioned above was no less than to reclaim the right to self-defence against the colonial power, which was already clearly present in the territory of the peoples concerned. If we look again at the situation of an NLM confronted by foreign armed forces 'assisting' the colonial power, it would be hard not to consider that the movement is exercising the right to self-defence.

Conclusions on the use of armed force

The attacks of 11 September 2001 in the United States rekindled discussion of the possibility of acting in self-defence in response to an operation by a non-state entity. The discussion naturally included the specific activities of armed groups. International law does not seem to have a fixed position on the matter, the African regional texts recognizing armed groups as potential triggers of self-defence operations. As for the question of whether armed groups are entitled to a right of self-defence, the reply should be affirmative for NLMs fighting the allies of colonial powers. However, such conflicts no longer appear to arise with any frequency.

Armed groups basically trigger the application of *jus ad bellum*. In general, they are not themselves endowed with a right to peace. In limited instances, when they take the form of NLMs, they are entitled to use armed force on behalf of peoples aspiring to independence from colonial domination. Armed groups have a more explicit place in situations of *jus contra bellum* (thus clearly a right against the use of force) and are set apart from international *jus ad bellum* (which refers to the

58 'Every State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter'. UNGA Res. 2625 (XXV), 24 October 1970.

59 J.-P. Cot, A. Pellet, and M. Forteau, above note 41, pp. 1356–1357.

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'mere' regulation of recourse to armed force). However, cross-border armed groups appear to be upsetting traditional assumptions. In all cases, *jus ad bellum* is profoundly 'anti-armed group'.

Law of armed conflicts (*jus in bello*) and related aspects

Is the law of armed conflicts favourable to armed groups?

The existence of international humanitarian rules applicable to situations in which armed groups participate could not always be taken for granted. Armed groups – simple collections of individuals with no military function assigned by the state authorities – were outside the scope of international law, as were the conflicts opposing them to the state. Yet the relations of all states vis-à-vis an aggressor are similar to those between the state and armed groups: they are basically relationships of rejection.[60]

IHL is applicable in situations in which a non-state entity is participating only when that entity is of a certain importance. It applies in principle only in the context of an armed conflict, and the existence of an NIAC is also predicated on the importance of the enemy opposing the government forces. But the importance of a belligerent is only examined in the case of non-state entities; it is hardly a matter of concern to international law whether a state, no matter what its importance (surface area, population, military strength, etc.), can wage war. That ability to take up arms (which is different from the right, strictly limited by contemporary international law, to wage war) is inherent in the quality of statehood[61] and not in the quality of a mere group of individuals.

One objective of the promoters of IHL is to attain a uniform system of protection for individuals in all situations of armed conflict.[62] The law of international armed conflicts (IACs) is neither perfect nor complete; rather, it is a body of rules that is meant to evolve as required by the contingencies of the moment. It is nevertheless the model that serves as a reference. The law of NIACs is developing in such a way as increasingly to resemble the law of IACs. Many scholars have written that the trend is strong and the goal in sight,[63] or about the urgency of the task.[64] The study conducted by the International Committee of the Red Cross

60 See Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, A. Pedone, Paris, 1970, p. 127.

61 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor* v. *Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para. 60, in which it is presumed that the government armed forces are sufficiently organized.

62 Konstantin Obradovic, 'Les mécanismes d'enquête et de constatation des violations du droit humanitaire: quelques suggestions sur les possibilités d'améliorer leur fonctionnement', in *La guerre aujourd'hui, défi humanitaire*, above note 19, p. 190.

63 Éric David, *Principes de droit des conflits armés*, 4th edition, Bruylant, Brussels, 2008, esp. p. 132.

64 James G. Stewart, 'Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict', in *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 344 ff.

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(ICRC) of customary IHL indicates that the line between IACs and NIACs is on the verge of disappearing.[65] The time has not yet come, however, when IHL can be applied in the same manner in IACs and NIACs. There remains a difference in the rules that can be applied, and that difference can be felt as soon as the discussion turns to the threshold of applicability of the law. Indeed, for humanitarian law to be applicable in an NIAC, a number of criteria must be met, in particular the level of violence; no such criteria apply to armed conflicts between states.[66]

States choose to expand the material scope of application of inter-state agreements to situations involving armed groups. They can also expand the personal scope of application by clearly stipulating rights and obligations for armed groups. Even in IHL, where the largest international law concessions have been made to armed groups (in the sense that their status has been raised), states have still generally[67] opted to differentiate between the law applicable in armed conflicts between states and that applicable in armed conflicts involving armed groups.[68] The tendency to close the gap between the legal systems applicable in the two types of armed conflict is more clearly expressed in customary law or jurisprudence, which lies outside specific sphere of nation-states, than in new international treaties.[69]

The inequality between the state and armed groups is omnipresent in international law. For a start, legal personality does not exist *ex nihilo*. The fact that an entity other than the state has such a personality is because the states have so agreed.[70] Thus, such an entity has no more than a derived legal personality.[71] And if the entity in question is an armed group, then it would seem to owe its promotion to the very entity that is usually its enemy. Since international law is historically an inter-state type of law, it is between states that the law's principal and general rules are usually decided. This is not to ignore the influence that non-state entities can have,[72] in particular during the negotiation or

65 É. David, above note 63, p. 132: 'of 161 rules, [the study] identifies only 17 that are only relevant in international armed conflicts, 7 that apply in international armed conflicts or internal armed conflicts, and 137 that are applicable in both types of conflict' (ICRC translation).

66 '[I]nternational armed conflicts are much more straightforward because no specific level of armed violence between States is required. As soon as there is any armed violence between States, as soon as the first shot is fired, there is armed conflict, international humanitarian law applies and the States involved have an interest in its application'. Jean-Marie Henckaerts, 'Binding armed opposition groups through humanitarian treaty law and customary law', in *Proceedings of the Bruges Colloquium*, above note 26, p. 129.

67 Except in the case of an armed conflict in which an NLM is participating.

68 J.-M. Henckaerts, above note 66, p. 123.

69 The Rome Statute must nevertheless be mentioned here, for it broadens the range of acts likely to be committed by an armed group and prosecuted by the International Criminal Court. This is not as ideal as it might seem at first sight, however, given the Statute's limited field of application and the repressive nature of the institution thus created (it is naturally easier for states to punish the greatest number of acts possible by armed groups than to give them more rights under international law).

70 On this point, see Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?*, 2nd edition, ICRC, Geneva, 2005, Vol. I, p. 266.

71 Christian Walter, 'Subjects of international law', in *Max Planck Institute Encyclopedia of Public International Law*, Heidelberg and Oxford University Press, May 2007, para. 26.

72 François Rubio, 'Perspectives historiques de l'impact des acteurs non étatiques sur la rédaction des traités internationaux', in Rafâa Ben Achour and Slim Laghmani (eds), *Acteurs non étatiques et droit international*, A. Pedone, Paris, 2007, pp. 63–78.

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codification[73] of rules (such as the conferences on statelessness held in Geneva in 1959 and in New York in 1961).[74] Specific examples are the NLMs that took part in the preparatory work for the 1977 Protocols Additional to the 1949 Geneva Conventions.[75] However, while states have occasionally agreed to stipulate rights and obligations for armed groups, they are reluctant to associate those groups in the establishment of international rules. Treaty-based rules are, with few exceptions, drawn up in the absence of armed groups.[76] Because of their deep-seated fear, states at times see the participation of armed groups in the 'creation' or establishment of rules governing their conduct as granting such groups a status that the states do not wish to confer.[77] No international treaty is submitted for accession or ratification to armed groups, yet armed groups are bound to uphold the treaties ratified by the states to which they 'belong'. Conversely, the non-ratification of treaties by such states prevents armed groups from being bound by them even if such is their wish. In this regard, armed groups depend in all regards on what states want.

Some international treaties – Additional Protocol I of 1977[78] and 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[79] – allow armed groups with a special status, namely NLMs,

73 Markus Wagner, 'Non-state actors', *Max Planck Institute Encyclopedia of Public International Law*, above note 71, paras. 18 and 21.

74 Hatem M'rad, 'La participation des acteurs non étatiques aux conférences internationales', in R. Ben Achour and S. Laghmani (eds), above note 72, pp. 79–99.

75 These comprised the African National Congress (ANC), the African National Council of Zimbabwe (ANCZ), the Angola National Liberation Front (FNLA), the Mozambique Liberation Front (FRELIMO), the Palestine Liberation Organization (PLO), the Panafricanist Congress (PAC), the People's Movement for the Liberation of Angola (MPLA), the Seychelles People's United Party (SPUP), the South West Africa People's Organization (SWAPO), the Zimbabwe African National Union (ZANU), and the Zimbabwe African People's Union (ZAPU). See Marco Sassòli, 'Legal mechanisms to improve compliance with international humanitarian law by armed groups', in *Proceedings of the Bruges Colloquium: Improving Compliance with International Humanitarian Law, 11–12 September 2003, Collegium* special edition, No. 30, Winter 2004, p. 98.

76 NLMs were invited to attend the negotiations of the 1977 Additional Protocols as observers. See J.-M. Henckaerts, above note 66, p. 127.

77 Working group chaired by Anthony Rogers, 'Améliorer le respect du DIH pendant les conflits armés non internationaux: une responsabilité globale', in *Collegium*, above note 75, p. 132, available at: http://www.coleurope.eu/template.asp?pagename=pub_collegium (last visited 17 January 2012).

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

79 'Article 7 – Treaty relations upon entry into force of this Convention: . . . 4. This Convention, and the annexed Protocols by which a High Contracting Party is bound, shall apply with respect to an armed conflict against that High Contracting Party of the type referred to in Article 1, paragraph 4, of Additional Protocol I to the Geneva Conventions of 12 August 1949 for the Protection of War Victims: (a) where the High Contracting Party is also a party to Additional Protocol I and an authority referred to in Article 96, paragraph 3, of that Protocol has undertaken to apply the Geneva Conventions and Additional Protocol I

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to make a unilateral declaration by which they undertake to abide by the provisions concerned. In this context, are such declarations unilateral acts or are they part of treaty-based law? For example, the following has been said of the declaration allowed under Additional Protocol I:

> The effect of this declaration is to trigger the application of the Geneva Conventions and Additional Protocol I in the armed conflict in question. As we can see, this is a new form of undertaking in treaty law, by unilateral declaration, yes, but with synallagmatic effects, because the effects, as concerns relations in international humanitarian law between the High Contracting Party and the authority, are identical, for the entire duration of the conflict, to those arising from an accession or ratification.[80]

Unilateral declarations made by NLMs are hard to classify among unilateral acts, if only because of the reciprocal effects that they give rise to. Would Additional Protocol I be applicable between a High Contracting Party and an NLM if the movement had not made the declaration? According to the wording of Article 96,[81] the effects are set in motion (and the national liberation movement bound on the same terms as the state) only once the depositary has received the unilateral declaration. In other words, so long as the declaration has not been received, the Geneva Conventions and Additional Protocol I do not apply between the movement and the High Contracting Party. This gives the declaration a 'law of treaties' aspect: it is acceptance of an agreement (signature or ratification, as the case may be) that burdens the state with the rights and obligations it sets out. On this point, Additional Protocol I falls short of Common Article 3, which has the advantage of being automatically applicable to any NIAC. But are we in the realm of the law of treaties? The wording of the title of Article 96 – 'Treaty relations upon entry into force of this Protocol' – points to a treaty-type functioning. A movement's unilateral declaration is unrelated to the Protocol's entry into force, and is therefore not a ratification. Nor is it appropriate to speak of accession. Accession enables the treaty concerned to enter into force between the acceding entity and the states that are or will be party to it. The movement's unilateral declaration is only effective between the movement and the High Contracting Party concerned by the movement's

in accordance with Article 96, paragraph 3, of the said Protocol, and undertakes to apply this Convention and the relevant annexed Protocols in relation to that conflict; or (b) where the High Contracting Party is not a party to Additional Protocol I and an authority of the type referred to in subparagraph (a) above accepts and applies the obligations of the Geneva Conventions and of this Convention and the relevant annexed Protocols in relation to that conflict. Such an acceptance and application shall have in relation to that conflict the following effects: (i) the Geneva Conventions and this Convention and its relevant annexed Protocols are brought into force for the parties to the conflict with immediate effect; (ii) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions, this Convention and its relevant annexed Protocols; and (iii) the Geneva Conventions, this Convention and its relevant annexed Protocols are equally binding upon all parties to the conflict. The High Contracting Party and the authority may also agree to accept and apply the obligations of Additional Protocol I to the Geneva Conventions on a reciprocal basis.'

80 Denise Plattner, 'La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvements en lutte dans un conflit armé', in *Revue Belge de Droit International*, Vol. 18, 1984–1985, p. 299 (ICRC translation).

81 Above note 78.

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demands. This is not how treaties usually function; rather, it appears to be a new type of special agreement. The special agreements provided for in Common Article 3 allow the parties to the conflict to go further than Common Article 3, which applies automatically, without special agreements. By the same token, Common Article 3 applies to the armed conflict between the movement and the state concerned even if the movement has made no unilateral declaration. However, unilateral declarations can serve to go further than Common Article 3, by making the entire body of IHL relating to IACs applicable. They are a form of consent that reinforces an 'intention' or a 'disposition' of the High Contracting Party that has been pending since its accession to Additional Protocol I. The declaration is not self-sufficient, as are classic unilateral acts; rather it is programmed and has attributed legal effects. It can be assimilated to an '*acte-condition*'.[82] (i.e. a means of obtaining access to existing provisions) rather than to a crucible of substantive rules.

The fact that armed groups have had little say in forming the rules of international law has had at least one effect in terms of international responsibility. The doctrine makes a distinction between primary rules and secondary rules. The former lay the foundations for conduct, while the latter govern the consequences of violations of the former. Primary rules and secondary rules are expressions used between states. They can, in theory, also be used when an armed group is involved in a situation. However, given that in general the sources of law are drafted by states, with regard to armed groups the primary rules can be said to be those imposed on the armed group, and the secondary rules those governing the consequences of violations of the rules imposed. The imposition of rules does not mean that the party on which they are imposed does not have rights thereunder, but simply that it has usually not had a voice in their construction. Since armed groups have rights in international law, logically any violation of those rights implies an obligation of reparation towards the armed group.[83] This can be termed 'received responsibility'. Conversely, an armed group violating rights can be expected to make reparation. This can be termed 'responsibility owed'. This follows logically from the application of the law, and would normally be expected in all situations in which armed groups are active but is more credible in situations in which the armed group is a major player – that is, it has existed over an extended period, it has effective and prolonged control over a part of a state's territory, and it has an almost quasi-state dimension (in particular NLMs). Armed groups have no sovereignty (over territory, resources, or other aspects) that might have been violated, and no citizens. They appear to have no internal affairs that can be interfered with. Their weight in fact or in law (for NLMs) could be a deciding factor when it comes to the existence of responsibility,

82 Georges Abi-Saab, 'Les sources du droit international: essai de déconstruction', in *Le droit international dans un monde en mutation. Liber Amicorum en hommage au Professeur Eduardo Jiménez de Arechaga*, Vol. I, Fundación, Montevideo, 1994, pp. 38–39.

83 See ICJ, *Case concerning the Factory at Chorzòw (claim for indemnity, merits)*, Judgment, 13 September 1928, Series A, No. 17, p. 29, available at: http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf (last visited 6 October 2011).

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especially 'responsibility owed'. Indeed, it would be difficult to speak, for example, of reparation for an insignificant armed group, even if, in theory, such reparation was due. In short, armed groups are not supposed to exist, and their *de facto* existence does not always make up for their *de jure* non-existence, especially when they are owed something.

IHL may have qualified the struggles of NLMs as IACs; nevertheless, it has not done away with the differences between such movements and government forces. This brings us to a shortcoming or defect in the status conferred on armed groups under IHL. Armed conflicts involving NLMs are not conducted in the same conditions as classic IACs. In the latter case, the conflict is between states. Starting with Additional Protocol I, the treaties of IHL on IACs apply in conflicts between a state and a people[84] represented by an NLM. But a people is neither a state nor a liberation movement. The legal tie binding the state to its citizens – nationality – does not exist with respect to the NLM, which, moreover, does not have its own territory. As a result, the responses provided in IHL for the treatment of nationals of the other party to the conflict, occupation, or invasion (such as *levées en masse*) are legally inoperative here. In addition, the national liberation movement may be fighting for the people, but the people are not the movement. Thus, the movement is no different from any other armed group; its members pose the same problems of definition as the members of armed groups. As for any armed group (in respect of the population in the area where it is present), it cannot be said that the entire people represented by the movement[85] has membership in the armed group. For example, there have been cases in which persons belonging to the peoples in conflict have joined the enemy.[86] In addition, the guerrilla tactics often used by NLMs are simply a method of combat (which government forces also sometimes use). They create a symbiosis, or give an impression of symbiosis, between the movement and the population, but that does not make every individual in the population a member of the movement.[87]

We can therefore say that members of NLMs, to which the ICRC, in its guidelines on direct participation in hostilities, pays scant attention, are defined in

84 Richard R. Baxter, 'The duties of combatants and the conduct of hostilities (Law of The Hague)', in Henry Dunant Institute and UNESCO (eds), *International Dimensions of Humanitarian Law*, Martinus Nijhoff, The Hague, 1988.

85 IHL forges a link of legitimacy between an armed group, the NLM, and the population of a territory by speaking of 'the authority representing a people', as it does in Additional Protocol I, Art. 96, para. 3.

86 For example, some Algerians allied themselves with France against the FLN (Front de libération nationale) during the war in Algeria (1954–1962). They served as back-up troops recruited by the French Army and are usually referred to as '*harkis*'.

87 Fatsah Ouguergouz, 'Guerres de libération nationale en droit humanitaire: quelques clarifications', in Frits Kalshoven and Yves Sandoz (eds), *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1989, p. 346: 'As to the representative nature of the NLM, it is most resoundingly proven by the very terms of the struggle. Its asymmetrical nature implies that both the individual combatant . . . and the people as a whole have a "superior motivation". In a war of national liberation, the hostilities can be pursued, even at a very low level of intensity, only if the combatant is totally immersed in the population; the support of the people (or more specifically of the people at war) for the NLM can therefore be interpreted as a clear manifestation of the latter's ability to represent the people' (ICRC translation).

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the same way as the members of armed groups in general. Because domestic law does not define what constitutes the member of an armed group, not even in the case of an NLM, contrary to most members of government armed forces, it is best not to use it as an example of the means of identifying such members. This view is not in line with existing law, and the status of members of an NLM should be determined on the same basis as that of members of government armed forces. This argument may strike the reader as strange, but it is not as outlandish as it might seem. The ICRC guidelines on participation in hostilities claim that membership in irregular state armed forces, such as militias and volunteer or paramilitary groups, is generally not regulated by domestic law and can only be reliably determined on the basis of the same functional criteria that apply to organized armed groups of non-state parties to the conflict.[88] Unless we maintain that NLMs have a functional internal law that clearly defines their members (easily achieved for a major movement that already manages a territory), it is tempting to declare that their members will also be identified using a functional criterion. Again, the argument steps back from the letter of current law. That being said, an individual taking up arms as a member of an NLM is a combatant in the eyes of the law, but that denomination is not attributed to those who fight as members of ordinary armed groups.[89]

Deprivation of liberty

General considerations

In NIACs, domestic legislation is in direct competition with international law. Such conflicts are internal situations in which internal law is applicable but which are for the most part regulated by international law. Because the 'law' is internal, it is on the side of the government troops, who – unlike the armed groups violating the domestic order – draw their authority from the government lawfully or legitimately holding power over the territory. However, to distinguish between what government forces and armed groups can do is to undermine the spirit of IHL, which is based on the principle of equal treatment of the belligerents.[90] Our aim is not to defend that point of view, but rather to use it as a starting point to bring clarity to the discussion.

In the IHL of IACs, owing to the mere fact that there is a conflict, regardless of any international crimes that may be committed, deprivation of liberty (of prisoners of war and civilian internees) is not a punishment if punishment requires a prior fault. In the context of an NIAC, however, deprivation of liberty is often tantamount to punishment, in that it is the government that detains individuals on

88 ICRC, 'Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law', in *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, p. 1001.

89 Jean-François Queguiner, *Le principe de la distinction dans la conduite des hostilités. Un principe traditionnel confronté à des défis actuels*, University of Geneva, Graduate Institute of International Studies, Geneva, 2006, p. 339.

90 See, in this issue, the debate between Professors Shany and Sassòli on the question of equality of the belligerents, and the comments on their discussion by Professor Provost.

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the grounds that taking up arms is in itself an act leading to punishment. For persons in the hands of armed groups, the overriding fear is that they will be subject to private justice.[91] The unstructured nature of recent NIACs, which have seen the concept of the group and its characteristics (such as its organized, disciplined, and hierarchical nature) crumble, has resulted in the extreme subjectivization of the rules governing deprivation of liberty.

The question whether it is lawful to detain someone is grounded in the very 'right' of the parties to an armed conflict to deprive anyone of liberty, especially during an NIAC. It arises before the issue of the capture itself and the implementation of a detention regime. IHL is silent on this point, and we shall endeavour to explain why. Any discussion of lawfulness would no doubt have resulted in blockages: it is theoretically difficult to have states accept the idea that armed groups can act lawfully after having taken up arms. Furthermore, raising the point might well call into question the theoretical equality of the parties to the conflict under IHL, on the one hand, and result in a move away from what is essential – ensuring that persons deprived of their liberty are treated properly – on the other. By skirting the debate on lawfulness, IHL is acting out of a sense of legal pragmatism, taking account only of the inevitable *de facto* or even preferable situation:[92] the state of deprivation of liberty. The people in the hands of the parties to a conflict benefit from the rules of protection, no matter which party holds them. This is why the law stipulates, for example, that the expression 'those who are responsible for the internment or the detention'[93] relates to persons who are *de facto* responsible for camps, prisons, or any other places of detention, independently of any recognized legal authority.[94]

In keeping with this pragmatic point of view, and in order to ensure that the parties to the conflict remain equal before the law, even if they are less concerned here than the persons being detained, IHL makes a number of weighty assumptions. We can start with the following example. When IHL provides that the death penalty is not to be pronounced on children who were under the age of 18 years at the time of an offence for which they have been convicted,[95] or on pregnant women or mothers of young children, even if they have been sentenced to death for offences related to the conflict,[96] it considers from the outset that even armed groups can try people and sentence them to death. Then there is the rule stipulating that no sentence is to be passed and no penalty executed on a person found guilty of an

91 It being understood that the parties to an NIAC can nonetheless decide to apply the rules of IHL applicable to persons deprived of their freedom in IACs.

92 Preferable, for example, to the elimination pure and simple of persons who should be detained, in keeping with either a 'take-no-prisoners' attitude or another attitude dictated by the circumstances.

93 The expression used in Additional Protocol II, Art. 5, para. 2.

94 'In fact, some experts have argued that it is unlikely that a court could be 'regularly constituted' under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula 'which was accepted without opposition'. See Yves Sandoz, C. Swinarski, and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, para. 4600, p. 1398.

95 Additional Protocol II, Art. 6, para. 4.

96 *Ibid.*

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offence related to an armed conflict[97] except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality both for the initial trial and for the appeal. Through this rule, IHL turns a blind eye to the institutional, legal, and judicial shortcomings of armed groups. Additional Protocol II speaks of a 'court offering the essential guarantees of independence and impartiality'. Common Article 3, for its part, requires a 'regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.[98] Implementation of these provisions, cited here as examples, is contingent on means that armed groups usually do not have (legal and judicial means, not to mention territorial control[99]). The pragmatism of IHL leaves hope for a satisfactory result without being overly concerned about the means used to achieve that result.

The right to deprive of liberty

Despite the efforts made to regulate all aspects of NIACs by means of international law, the fact is that such conflicts remain subject to the internal law of the state. Under that law, the members of armed groups are individuals punishable for the mere fact of having taken up arms. Even if they are not qualified as bandits, terrorists, renegades, or traitors, they are not considered as equal to the members of the government armed forces (whose operations are covered by the law). The government, in internal law, is the authority controlling the apparatus that limits or denies the liberty of persons on the territory for valid reasons. The government armed forces can, with the government's blessing, be a part of that apparatus with respect to the members of armed groups.

For its part, international law does not pull in the opposite direction. IHL is silent on the subject[100] – in itself an indication that government armed forces have the right to detain people. Indeed, humanitarian law not only accepts the fact of established deprivation of liberty, it also does not oblige the government in power to release persons detained for reasons relating to the conflict once the conflict has ended[101] (at least not in principle[102]), whereas the ICRC proposal for

97 *Ibid.*, para. 2.

98 Akin to the concept of a competent, impartial, independent tribunal established by law (as required, for example, by Article 14 of the International Covenant on Civil and Political Rights (ICCPR)). See Y. Sandoz, C. Swinarski, and B. Zimmermann, above note 94.

99 It is usually best not to overstress the criterion of territorial control. If the provisions of Additional Protocol II are applied to deprivation of liberty, the armed group should be of some consequence, given that the Protocol itself stipulates that it applies only in intense NIACs.

100 For an identical but more nuanced position (because it refers rather to a lack of clarity), see Marco Sassòli and Laura M. Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts', in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 618.

101 Article 6 of Additional Protocol II, in particular paragraph 5, stipulates no obligation but requires the authorities to endeavour to grant the broadest possible amnesty.

102 The ICRC study on customary law claims that persons deprived of their liberty in relation to an NIAC must be released as soon as the reasons for their detention cease to exist. It nevertheless goes on to say that the persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed. Jean-Marie Henckaerts and Louise

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Additional Protocol II stipulated the obligation of release at the end of the armed conflict.[103] General international law, underpinned by the spirit of neutrality in principle in NIACs, does not affect the right of the government of a state to detain someone. But that right is inferred from the cardinal principle of public international law, which is state sovereignty, more specifically territorial and individual sovereignty.

Unlike government forces, which have domestic law on their side, benefit from recognition under international law, through the government, and have the right to deprive people of their liberty on the national territory (for valid reasons), armed groups, in particular when it comes to restricting liberty, function on the fringes of the law. There is in principle nothing that gives individuals the right to detain people representing the public authority (members of the government armed forces), or people belonging to other private groups (members of enemy armed groups), or people not participating in the conflict, for security reasons (since the concept of security is related here to peace within the state, which the armed groups do not represent). When it comes to deprivation of liberty, armed groups have only the obligation to protect the persons whom they actually hold. They do not even have the right to remove from active hostilities a person belonging to the enemy camp.

Without actually saying so, IHL hints at two exceptions to the above. These are cases in which the parties concerned agree to the application in the conflict of the IHL of IACs.[104] That possibility gives the NIAC the legal appearance of an IAC in which the parties have the right to deprive of their liberty the members of the enemy armed forces and to release them without charge at the end of the conflict. Thus, by the mutual consent of the parties to the conflict, the armed group is also given the right to deprive persons of liberty. It is furthermore said, and therein lies the second exception, that 'once the fighting reaches a certain magnitude and the insurgent armed forces meet the criteria specified in Article 4A(2),[105] the spirit of Article 3 certainly requires that members of the insurgent forces should not be treated as common criminals'.[106] If the members of armed groups can obtain prisoner-of-war status and everything inherent in it, then by application of the

Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, ICRC, Cambridge University Press, Cambridge, 2009, pp. 451 ff.

103 See René-Jean Wilhelm, 'Problèmes relatifs à la protection de la personne humaine par le droit international des conflits armés ne présentant pas un caractère international', in *Recueil des Cours de l'Académie de Droit International*, Vol. 137, 1972, pp. 393 ff.

104 'The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention'. 1949 Geneva Conventions, Common Art. 3.

105 Third Geneva Convention, Art. 4: 'A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: . . . (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war'.

106 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention (III) Relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 40.

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principle of reciprocity, they must conduct themselves as though they were holding prisoners of war who are enemy troops. There is a certain logic to this. However, the validity of the initial statement remains in doubt. Does the fact that the insurgents have abided by the conditions set out in Article 4A(2) of the Third Geneva Convention automatically give them prisoner-of-war status? There is no treaty provision allowing us to assert this. What is more, it is highly optimistic to state that the parties to the conflict will change the status of those whom they capture without an agreement, whether tacit or express. On the other hand, such a change of status may be dictated by the fear of unfavourable reciprocal treatment of their own members by the enemy.

The right to deprive of liberty without a trial

At the risk of repeating ourselves, positive IHL is a set of humanitarian rules that 'does not limit in any way a State's essential right to suppress an insurrection'[107] and leaves intact 'its powers of trial and sentence . . . its right to appraise aggravating or attenuating circumstances'.[108] In fact, there is in the theory of this body of law no obligation to try persons deprived of their liberty. IHL is not interested in the reasons for the detention, in the grounds or validity for depriving someone of liberty; it is content to require a regularly constituted tribunal or a tribunal offering the essential guarantees of independence and impartiality for prosecution, sentencing, and execution with respect to criminal offences relating to the armed conflict.[109] This single requirement has, in theory, at least the following implication. The members of the armed group have, as a minimum, committed acts that are reprehensible under domestic law by the mere fact of belonging to the group (rebellion, killings, criminal conspiracy, etc.). Those who have been deprived of their liberty (in connection with the armed conflict) are theoretically not entitled to a tribunal with the requisite qualities (a sort of right to a judge) on the basis of IHL alone. In an anti-humanitarian spirit, it simply suffices to start no proceedings against the members of the armed group for them to continue to be deprived of their liberty in the absence of any obligation to bring them before a judge. They will nevertheless have to be released as soon as the reasons for which they were detained cease to exist, meaning at the latest at the end of the armed conflict, according to what is said to be a customary rule.[110] If the government intends to prolong their detention, it is obliged to prosecute them. Indeed, those against whom criminal proceedings are pending or those lawfully convicted and serving a sentence may continue to be detained beyond the end of the armed conflict[111] if it is the

107 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 56.
108 *Ibid.*
109 M. Sassòli and L. M. Olson, above note 100, p. 618.
110 See J.-M. Henckaerts and L. Doswald-Beck, above note 102, pp. 453 ff.
111 *Ibid.*, pp. 551 ff.

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pre-existing government that won the day.[112] This would appear to be the theory in IHL. The law thus appears to be fairly permissive in prohibiting only 'summary justice'.[113] In short, as concerns the subject at hand, IHL seems to depend more on the ability to qualify the various situations being governed. This is due to the absence of a clear stance on the issue, the purely humanitarian nature of this branch of the law, and states' decision not to encroach on their '*domaine reservé*'.

However, the ICRC study on customary law claims that arbitrary deprivation of liberty is prohibited in both IACs and NIACs.[114] If any distinction can be made between the practice of IHL and that of human rights, the prohibition would seem to be based more on state human rights practice than on IHL. In all events, the study, which details state practice as 'recorded' in military manuals, gives wide resonance to a practice based on human rights law (international human rights texts, domestic laws that were also the first texts in history to enshrine human rights). It can be said that beyond the prohibition of 'summary justice', which is covered by IHL, the prohibition of arbitrary deprivation of liberty tends to be a matter of human rights law.[115] Human rights law contains rules of relevance to the arbitrary deprivation of liberty, and the ICRC study tends to refer to them[116] without necessarily being clear as to the nature (human rights law or humanitarian law) of the rule concerned.

To put it more clearly, the IHL of IACs and human rights law contain various rules on the subject. The question is whether these rules can be called into play, and which one in particular. First, however, let us consider what each body contains in the way of rules. The rules of the former relate in particular to resident civilians who are citizens of the enemy state and to civilians in occupied territories. Civilians who are citizens of the enemy state, for example, can only be interned if the security of the power in whose hands the civilians find themselves makes it absolutely necessary to do so.[117] Additional Protocol I requires that the persons concerned be informed without delay, in a language that they understand, of the reasons why that measure has been taken.[118] A court or administrative board must consider the decision to intern each person concerned as soon as possible, and, if the internment is maintained, reconsider it periodically (every six months). The Protecting Power must be notified of any major decisions relating to the internment,[119] which must end with the minimum delay possible and in any event as soon as the circumstances justifying the internment have ceased to exist.[120]

112 If the armed group is victorious, it seems unlikely that any of its members will continue to be detained.
113 R.-J. Wilhelm, above note 103, esp. p. 391.
114 Deprivation of liberty may be arbitrary if committed without respect for the grounds for detention and procedures set out in international law. See J.-M. Henckaerts and L. Doswald-Beck, above note 102, pp. 344 ff.
115 M. Sassòli and L. M. Olson, above note 100, p. 618.
116 *Ibid.*
117 Fourth Geneva Convention, Art. 42. The case of civilians interned in occupied territory for imperative security reasons is set out in Article 78 of the Fourth Geneva Convention, with procedures that are on the whole similar to those for the internment of civilians who are citizens of the enemy state.
118 Additional Protocol I, Art. 75, para. 3.
119 Fourth Geneva Convention, Art. 43.
120 Additional Protocol I, Art. 75, para. 3.

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Prisoners of war, for their part, may see their detention prolonged with no particular procedure being undertaken until the end of active hostilities,[121] unless they are released earlier for health reasons[122] or on other grounds, such as the good will of the Detaining Power.[123]

Human rights law, for its part, provides that the deprivation of liberty must be lawful. In this regard, the International Covenant on Civil and Political Rights (ICCPR), a universal treaty, sets forth the general idea according to which every individual has the right to liberty and security of person. Arbitrary arrest and detention are therefore prohibited; no one may be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who is arrested must be informed, at the time of the arrest, of the reasons for it, and promptly informed of any charges against them. Anyone deprived of liberty on a criminal charge must be brought promptly before a judge, and must be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention. Anyone who has been the victim of unlawful arrest or detention is entitled to compensation.[124] The African Charter on Human and Peoples' Rights, a regional treaty, also stipulates that every individual has the right to liberty and to security of person, and that no one may be deprived of their liberty except for reasons and on conditions previously laid down by law.[125] In particular, no one may be arbitrarily arrested or detained.[126]

Other, non-binding texts are in the same vein. Examples are the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[127] (Principles 2, 10, and 32[128]) and the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines)[129] (points 25 to 27[130]).

121 Third Geneva Convention, Art. 118.

122 *Ibid.*, Art. 109.

123 IHL does not make it obligatory to take prisoners of war and detain them until the end of the hostilities. A party to the conflict can therefore decide to allow the prisoners of war to leave because, for example, the detaining armed forces are needed elsewhere or no longer have the material means of detaining prisoners of war. The main idea underlying all this is that one cannot get rid of prisoners of war by killing them.

124 ICCPR, Art. 9.

125 African Charter on Human and Peoples' Rights, Art. 6.

126 See also Article 5 of the European Convention on Human Rights, of 4 November 1950, or Article 7 of the American Convention on Human Rights, of 22 November 1969.

127 Adopted by United Nations General Assembly resolution 43/173 of 9 December 1988.

128 Principle 2: 'Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.' Principle 10: 'Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.' Principle 32: '1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful. 2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.'

129 Resolution adopted at the 32nd ordinary session of the African Commission on Human and Peoples' Rights, 23 October 2002, Banjul, Gambia.

130 'B. Safeguards during the Pre-trial Process. States should: . . . 25. Ensure that all detained persons are informed immediately of the reasons for their detention. 26. Ensure that all persons arrested are promptly informed of any charges against them. 27. Ensure that all persons deprived of their liberty are brought

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We shall now turn to the use of rules other than those of the IHL of NIACs pertaining to the question of the lawfulness of depriving someone of their liberty. We shall generally limit our discussion, with regard to human rights law, to the universal binding rules of the ICCPR; the African Charter is considered only secondarily.

The IHL of IACs is less detailed than human rights law, but the latter is weakened by the absence of specific deadlines (for appeals, for example) and by the fact that it allows derogations. As concerns the possibility to derogate from human rights law, NIACs are accepted,[131] almost without demur,[132] as one of the worst situations imperilling the very existence of a nation. In the context of such a conflict, the government authorities can therefore decide to derogate from human rights law except for rights with respect to which there may be no derogation (the hard core). Article 4 of the ICCPR does not classify the rights cited above (from the Covenant) as rights from which there may be no derogation. The African Charter does not, for its part, contain a hard core of human rights, at least not expressly.[133] It has been pointed out that, logically, by remaining silent, the African states intended to avoid a new treaty-based rule on the subject while reserving the right to invoke the rule existing in general international law.[134] Thus, if treaty-based law is strictly construed, the entire question of the lawfulness of deprivation of liberty could be the object of a derogation on the part of the government authorities in a NIAC. People could be detained without regard for the specific grounds required for such a measure, and would be unable to contest the decision to detain them before a judge.

Does the right to derogate from human rights rules on the lawfulness of deprivation of liberty exist outside the treaties? According to the Human Rights Committee, the list set out in Article 4 of the ICCPR is not exhaustive. It holds that the category of peremptory norms extends beyond the list of non-derogable provisions as given in Article 4, paragraph 2. States parties may in no circumstances invoke Article 4 of the ICCPR as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty, or by deviating from fundamental principles of fair trial, including the presumption of

promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice. . . .'

131 Frédéric Sudre, *Droit international et européen des droits de l'homme*, 5th edition, Presses Universitaires de France, Paris, 2001, pp. 165–166.

132 It can in fact be asked whether NIACs do not call into question almost exclusively the existence of the governing classes and political regimes in place rather than the existence of the nation. In the case of several recent conflicts in Africa, it was *inter alia* to combat the imminent demise of the nation that certain citizens launched an armed conflict. Examples are Rwanda, Côte d'Ivoire, and Sudan.

133 Keba M'Baye does not entirely agree, but sees a hard core of African human rights (Articles 2 to 7 of the African Charter) in the peremptory form of the wording. See Keba M'Baye, *Les droits de l'homme en Afrique*, Pedone, Paris, 1992, pp. 167 ff.

134 Fatsah Ouguergouz, 'La charte africaine des droits de l'homme et des peuples. Historique, portée juridique et contribution à la protection des droits de l'homme en Afrique', Dissertation, University of Geneva, Graduate Institute of International Studies, Geneva, 1991, p. 305.

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innocence.[135] The Inter-American Court of Human Rights, which is not universal, adopted more or less the same position in its advisory opinion of 30 January 1987, when it ruled that the clause of derogation did not authorize the suspension of the requisite judicial guarantees, such as *habeas corpus*.[136] Thus, although under the letter of the law Article 9 of the ICCPR may be subject to derogation in some cases, in practice it would seem that its scope as an article from which derogations are permitted is limited (in particular with regard to *habeas corpus*). This corrected aspect of human rights, added to the fact that its provisions are fairly detailed (except for the above-mentioned absence of a deadline, contrary to IHL), is an argument in favour of the application of human rights rules as *lex specialis* in terms of the law of IACs. There is also an argument against the use by analogy of the provisions of the law of IACs. The main conventions on the two types of conflict (international and non-international) having been negotiated during the same periods of time, if states had wanted there to be a similarity in the provisions on the lawfulness of deprivation of liberty, it would have sufficed for them to 'transpose' the relevant provisions in the case of NIACs, at least the provisions that had been watered down. Moreover – and this is another argument in favour of the application of human rights rules – human rights law applies at all times, both in international and non-international conflicts.

The above paragraphs suffice to show that the human rights of a member of an armed group in the hands of government forces, notably the right to be brought before a judge or a similar body, must be respected.

Would we reach a different conclusion if it were the armed group depriving someone of their liberty? The most logical reasoning is that, if the deprivation of liberty is groundless, it is not necessary to gauge whether armed groups can hold persons without trial. They must release the people whom they detain. We can take the discussion one step further, however, by abstracting in spirit and on the basis of the observation that there exists a *de facto* situation of deprivation of liberty. We can essentially transpose what we have already said with regard to deprivation of liberty by government forces. There is no reason for one of the parties to the conflict to be bound by the rules governing the lawfulness of deprivation of liberty and the other not, when *jus in bello* advocates the equality of the belligerents. In view of prior developments, the point is to ensure respect for human rights by armed groups detaining people. Given the private-entity nature of armed groups, various

135 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, p. 187, available at: http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf (last visited 17 January 2012).

136 Inter-American Court of Human Rights, *Habeas Corpus* in Emergency Situations (Arts. 27(2), 25(1), and 7(6) American Convention on Human Rights), Advisory Opinion OC-8-87 of 30 January 1987 (Requested by the Inter-American Commission on Human Rights), in *International Legal Materials*, No. 2, 1988, p. 512. The American Convention on Human Rights, for its part, is silent and prohibits the right of derogation only in respect of the following rights (Art. 27): the right to juridical personality (Art. 3), the right to life (Art. 4), the right to humane treatment (Art. 5), freedom from slavery (Art. 6), freedom from *ex post facto* laws (Art. 9), freedom of conscience and religion (Art. 12), the rights of the family (Art. 17), the right to a name (Art. 18), the rights of the child (Art. 19), the right to nationality (Art. 20), and the right to participate in government (Art. 23). It is also prohibited to suspend the judicial guarantees essential for the protection of these rights.

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questions may arise with regard to the difficulty of applying human rights.[137] The first is general and relates to the armed group's submission to human rights law. Classic human rights doctrine maintains that human rights law is binding only on states, and that human rights standards cannot be applied to acts committed by private individuals or groups.[138] This position is gradually evolving, making it possible to evoke other difficulties. The second difficulty is practical in nature. It relates to the legitimate doubt about the availability of a court, substantive rules, or procedural law within the armed group. Armed groups that have lasted a certain time, that have had prolonged control over territory, and that intend to resemble a form of state can work to remove that doubt. In other cases, the doubt will subsist. Generally speaking, however, it will remain necessary to strive to interpret the concept of lawfulness.

Concluding remarks on deprivation of liberty

In the context of NIACs, the deprivation of liberty is one of the best fields for highlighting the inequality of the parties to the conflict in international law. That inequality can be felt in the two main branches of law relative to the subject: IHL and international human rights law.

And yet, when it comes to IHL, the starting point is that the belligerents are equal in law.[139] Were this not to be the case – were the law not, as a minimum, to raise the non-state party to the conflict to a certain rank – it would be utopian to hope for any compliance with humanitarian law. Here one speaks about equality in terms of rights and duties, and not in terms of the effect on status in general.[140] Deprivation of liberty is a field that tangibly restricts the extension of the scope of the law of IACs to armed conflicts that are non-international in character. It reflects, in short, the tendency to multiply both the rights and the obligations of parties to NIACs. By increasing the rights and obligations of both parties at the same time (in the interests of equality), the risk is that the armed group will be rendered incapable of discharging all its obligations. It can legitimately be asked, for example, whether it is wise to transpose all the rules of law on prisoners of war to persons deprived of liberty in NIACs. Do the armed groups operating in such situations have the means of applying all the rules relating to prisoners of war? The answer is no. Furthermore, IHL, despite its laudable intentions to humanize armed conflicts, does not ignore the need to maintain a certain difference between government troops and armed groups. Shielding the members of armed groups from any charges arising from the armed conflict – in the same way as prisoners of war are – is tantamount to legalizing armed action against the state authorities and, in principle, to granting those unhappy with the state the right to take up arms, a question on which IHL has opted to remain silent. It is therefore preferable for the scope of the law of IACs to be

137 M. Sassòli and L. M. Olson, above note 100, pp. 622 ff.

138 Daniel O'Donnell, 'Trends in the application of international humanitarian law by United Nations human rights mechanisms', in *International Review of the Red Cross*, No. 324, 1998, pp. 481–504.

139 E. David, above note 63, p. 613.

140 1949 Geneva Conventions, Common Article 3, final sentence.

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extended via the consent of the parties to the conflict. In fact, the reality of NIACs is that they are not entirely free of domestic law. Making certain aspects of such conflicts subject to international law (notably treatment of persons, in the narrow sense) does not affect the very essence of this type of conflict, which remains internal.

International human rights law, for its part, is not predicated on the principle of the belligerents' equality. It takes no account of armed groups, not even when dealing with the case of an NIAC.[141] In omitting armed groups, international human rights law does not promote the belligerents' equality. On the contrary, without actually saying so, it tips the scales in favour of armed groups in that it stipulates clear obligations only for government forces.

Conclusion

No armed group, whether it is an ordinary armed group or one rising up to emancipate a people, exists in international law on its mere say-so. It exists because, and especially in the light of, its ability to fundamentally challenge the established public order. An armed group exists at the earliest at the start of an armed conflict in which it has a stake. It is fleeting in nature compared to the state, and always seems to take international law by surprise. The law, in turn, remains aloof from the subject, especially since, in general, armed groups are not desired or wanted (unlike international organizations, for example, which have 'an international right'). Unlike other entities, such as the state and the international organizations, armed groups should not exist; in other words, their existence is not usual in international law. Armed groups are born to disturb order, in the physical and legal sense. Their *de facto* existence and the far reach of their actions in the modern world do not suffice to do away with the idea that there is something abnormal about their existence. The main obstacle is the state, which continues to dominate international law, even though it has been dealt practical setbacks, both peacefully (by individuals, civil society, various schools of thought and philosophy) and by violence (terrorists or armed groups).

141 The point is illustrated by the following example relating to deprivation of liberty: 'Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority'. Principle 1, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by UN Economic and Social Council resolution 1989/65 of 24 May 1989.

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