Legal Responses to the Use of Force by Nonstate Entities

I. M. Lobo de Souza, PhD*

Nonstate entities are nowadays recognized as one of the main sources of threats to international peace, security, and stability. *The National Security Strategy of the United Kingdom* (2008) lists the "prominence of non-state entities" as one of the "common strands running through the threats [to national and international security]."[1] Security threats posed by nonstate entities are also mentioned six times in the US *National Security Strategy* (2006) and eight times in the US *National Defense Strategy* (2008).[2] The latter characterizes nonstate entities as "potential adversaries" of the United States in the contemporary strategic environment that could "use nuclear, conventional, or unconventional weapons" and "exploit terrorism, electronic, cyber and other forms of warfare."[3]

Nonstate entities have been a source of threat to peace and stability for a long time, but their role has increased dramatically with the end of the Cold War. A position paper presented by the secretary-general of the United Nations (UN) in 1995 notes that important changes took place since 1990, mentioning that "of the five peace-keeping operations that existed in early 1988, four related to inter-state wars and only one . . . to an intra-state conflict," whereas "of the 11 operations established since January 1992 all but 2 (82 per cent) relate to intra-state conflicts." It goes on to describe the peculiar features of those intrastate conflicts, which are fought "not only by regular armies but also by *militias and armed civilians*" (emphasis added) had no clear front lines, inflicted great civilian casualties, and caused humanitarian catastrophes.[4]

*The author, who holds a PhD from the University of London, is a lecturer with the Department of Political Studies and a Research Fellow at the Center for Defense and Security Studies, University of Manitoba.

The report produced by the High-Level Panel on Threats, Challenges and Change in 2004 points out that the biggest security threats facing the world today are "from non-State actors as well as States," and in the discussion of the threats and the policies needed to address them, the panel cites nonstate entities 13 times.[5] In a 2005 report to the World Summit, the UN secretary-general acknowledged the vulnerability of even the most powerful states to "small networks of non-State actors."[6]

This general perception of nonstate entities as a grave threat to peace and security is not the product of imagination: the use of force by nonstate entities has been associated with war crimes, genocide, crimes against humanity, terrorism, gross violations of human rights, piracy, and proliferation of weapons of mass destruction, not to mention wider repercussions to the state and society in or against which they act, such as political instability and the destruction of infrastructure.[7] In 2009 the *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* observed that the proliferation and fragmentation of nonstate armed groups, combined with the asymmetric nature of conflicts, have led them to try to overcome their military inferiority by using strategies that "flagrantly violate international law, including attacks against civilians and the use of civilians to shield military objectives."[8]

In considering ways and means to regulate the armed conduct of nonstate entities, states and international organizations have come to the realization that the limits and regulations on the use of force put in place by the international legal system were not fully designed to address nonstate entities, since it focused mostly on the conduct of states through their officials and organs. This was a grave shortcoming, against which Hedley Bull warned in his study of the role of war in international order:

> In the post-1945 period international society has had a certain success in confining interstate war within limits consistent with the survival of the states system. . . . But as this has happened, war waged by political units other than states has expanded in scope. Civil factions have emerged as violent world actors, challenging the monopoly of international violence which sovereign states have long claimed for themselves, and escaping the restraints and rules by which sovereign states are bound. . . . International society will not be able to afford to allow these new forms of war to lie permanently beyond the compass of its rules.[9]

It is therefore relevant to study what legal responses the international society has devised over the last decades to regulate the use of force on the part of nonstate entities, in particular to hold them directly accountable for

their conduct in armed conflict. The accountability of nonstate entities relates directly to the effectiveness of some of the most relevant sections of international law: the principles of nonuse of force and nonintervention, international human rights law, international humanitarian law, and international criminal law. International norms are supposed to be enforced against violators, even if they are nonstate entities, when mechanisms of enforcement are available; otherwise, they will lack deterrence and will not effectively prevent, contain, and/or suppress the threat posed by those entities. Noticeable developments and trends in recent years reflect the effort of states and international agencies to close the normative and accountability gaps. This article seeks to describe and appraise those developments.

A diverse array of nonstate entities may take part in armed conflicts, such as private security companies, international organizations, armed opposition groups, and self-proclaimed national liberation movements, but this article concerns itself specifically with the last two. This choice is justified not only for delimitation purposes, so as to enable coverage of the issues involved with sufficient depth, but also by the fact that they have been the predominant type of nonstate entity engaged in armed conflicts and that they seem to share some common attributes and to fall (at least partially) under some common set of international regulations. Although the difference between an armed opposition group and a national liberation movement will be recognized when appropriate, it is a fact that many armed opposition groups claim to be national liberation movements, as their names seem to reflect, regardless of whether their real agenda is the promotion of self-determination of the people or group they claim to represent.

Ascertaining the Evolving Normative Framework

There is no question about the applicability of treaty-based international humanitarian law to the conduct of armed groups in situations of armed conflict. Article 3 common to the Geneva Conventions of 1949 expressly enunciates humanitarian rules applicable to *each party* to noninternational armed conflicts, the most frequent type of conflict in which armed groups are involved.[10] The Additional Protocol II (1977), designed to develop and supplement the protections offered by common Article 3 in cases of armed conflict not of an international character, explicitly applies to "dissident armed forces or other organized armed groups." As to armed groups

engaged in an armed conflict for self-determination, Additional Protocol I (1977) is applicable in the circumstances and conditions defined in Articles 1 and 96; moreover, common Article 2, paragraph 3, of the 1949 Geneva Conventions offers them the option to consider themselves bound by the conventions.[11] The Institut de Droit International stated in its Berlin Resolution that when an internal armed conflict occurs between a government's armed forces and those of one or several nonstate entities, or between several nonstate entities, all parties "including non-State entities have the obligation to respect international humanitarian law."[12] In 2004 the Sierra Leone Special Court also had the opportunity to state the same position emphatically: "It is well-settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may be bound by international treaties."[13]

Over the years, state practice has set in motion a progressive expansion of the normative framework applicable to the conduct of armed groups, in a process that is being recognized by law-ascertaining agencies. It does not seem to be in dispute today that *customary humanitarian law* applicable to internal armed conflicts is recognized as encompassing the protections afforded by conventional rules such as common Article 3 of the Geneva Conventions and at least some parts of Protocols I and II. The provisions of Article 3 common to the Geneva Conventions were acknowledged by the International Court of Justice as declaratory of existing principles of customary law.[14] This finding was substantiated by the International Criminal Tribunal for the Former Yugoslavia (ICTY, Trial Chamber) in the *Celebici* case.[15] The same recognition was given to the "core" of Protocol II and Article 75 of Protocol I by the ICTY (Appeals Chamber) in the *Tadic* and *Celebici* cases.[16] But this is only one aspect of the normative development.

Customary processes are also deemed to have led to the creation or crystallization of new customary rules that incorporate *other* conventional provisions of international humanitarian law and are applicable to internal armed conflicts. In this same *Tadic* case, the Appeals Chamber, after a careful examination of state practice as well as the practice of the International Committee of the Red Cross (ICRC) and of international organizations, arrived at the conclusion that "a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts"—more specifically, rules referring to the protection of civilians

and civilian objects, protection of all those who do not (or no longer) take active part in hostilities, and prohibition concerning means and methods of warfare.[17] A recent report produced by the United Nations Fact-Finding Mission on the Gaza Conflict (2009) has endorsed this position: "The developments that have taken place in the past two decades, in particular through the jurisprudence of international tribunals, have led to the conclusion that the substantive rules applicable to either international or non-international armed conflicts are converging."[18]

A more comprehensive study on customary international humanitarian law, sponsored by the ICRC and published in 2005, confirms that many of the customary rules applicable in internal armed conflicts are the same as those applicable in international armed conflicts. In identifying each customary rule, the study summarizes its conclusions by affirming that "the State practice establishes this rule as a norm of customary international law *applicable in both international and non-international armed conflicts*" (emphasis added). The list of customary rules ascertained is very extensive, but in a concise form it can be said to include the principle of distinction (comprising distinction between civilians and combatants and between civilian objects and military objectives, as well as proportionality of and precautions in attacks); rules that afford special protections to certain persons (medical and religious personnel, humanitarian relief personnel, personnel involved in a peacekeeping mission, and journalists), objects (medical and religious objects, humanitarian objects), zones (hospital and safety zones, demilitarized zones), cultural property, and the natural environment; rules that impose prohibitions regarding specific methods of warfare (denial of quarter, starvation and access to humanitarian relief, and deception) and the use of certain weapons (weapons of a nature to cause superfluous injury or unnecessary suffering and weapons that are by nature indiscriminate); and rules that demand humane and nondiscriminatory treatment of civilians and persons hors de combat.[19]

This last normative development is very significant. International humanitarian law in the Geneva Conventions embraces a division between international and noninternational armed conflicts that determines a different—in the sense of wider—set of rules for the former. This division is prescribed in other normative instruments, such as the Rome Statute of the International Criminal Court (Article 8).[20] As a result of this division, the conduct of

armed groups in internal armed conflicts would be under less stringent normative limitations than that of states, even if these groups were the protagonists and the principal source of serious violations of international humanitarian law. This normative aberration in humanitarian treaty law has been uncovered by the International Court of Justice—somewhat for different reasons—when it pointed out in the *Nicaragua* case that the rules defined in common Article 3 constitute a "minimum yardstick" in the event of international armed conflicts, in addition to the other more elaborate rules, and that the application of these minimum rules in the case under review would render the categorization of the conflict senseless.[21] But such realization could have prompted the question of why nonstate entities should be subjected to the *minimum* rules only, while states are governed by the *maximum* rules.

The law-creating, customary processes that brought some rules applicable in international conflicts to the realm of internal conflicts constitute a much-needed development if armed groups are to be held accountable for all their practices during armed conflict. The ICRC has indeed stated—on the basis of its study of customary international humanitarian law—that the distinction between international and internal armed conflicts would have no practical consequence so far as the application of customary international humanitarian law is concerned.[22] This conclusion differs from the International Court of Justice's pronouncement previously cited because the ICRC expressly acknowledges that by virtue of state practice, the "normative framework for non-international armed conflicts is thus more extensive than that contained in treaty law."[23] Thus the provision in Article 3 common to the Geneva Conventions that allows armed groups to conclude special agreements or issue declarations to bring into force all or part of other provisions of the Geneva Conventions has become, due to normative developments, a potentially undesirable drawback because those agreements may cover a restricted set of rules only, falling short of the existing larger framework of already applicable customary and conventional obligations. Even assuming, for the sake of argument, that regardless of any special agreements, all customary rules continue to apply, an armed group's signing of a declaration or agreement more limited in scope may have the adverse effect of misleading it into believing that its conduct is regulated by a less rigorous set of rules.[24]

The normative confluence between rules applicable in international armed conflicts and internal armed conflicts is also salutary because the reality on the ground of armed conflicts does not reflect this clear-cut dichotomy. As the Pre-Trial Chamber I of the International Criminal Court has recently pointed out in the case *Dyilo* (2007), at times it is difficult to draw any sure distinction between international and internal armed conflicts. Citing with approval a statement of the Appeals Chamber of the ICTY on the *Tadic* case, it reaffirmed the complex nature of armed conflicts: "An internal armed conflict that breaks out on the territory of a State may become international—or, depending upon the circumstances, be international in character alongside an internal armed conflict—if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)."[25]

As a matter of fact, the case under consideration seemed to prove the point. Considering the facts of the case, and bearing in mind the relevant geographical area and period, the Pre-Trial Chamber found that from July 2002 to June 2003 there was an armed conflict of an international character, and from June 2003 to December 2003, a noninternational armed conflict. Accordingly, the Pre-Trial Chamber came to the conclusion that sufficient evidence existed to establish the responsibility of the accused for charges of commission of the same war crime as defined in the statute in situations of both international and internal armed conflicts.[26]

In addition to the political and military characteristics of contemporary armed conflicts, a more fundamental reason supports the case for the end of this distinction. In the *Tadic* case, the Appeals Chamber of the ICTY argued cogently that international law has responded to developments in internal armed conflicts (in terms of frequency, level of cruelty, and foreign intervention) in line with the emerging international human rights regime, abandoning the "State-sovereignty-oriented approach" in humanitarian law in favor of a "human-being-oriented approach." It then proceeded to contend that from the perspective of humanitarian protection, this dichotomy is untenable:

> Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted

> "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[27]

Theodor Meron argues that the different thresholds of applicability of international humanitarian law are indeed becoming blurred. He offers as evidence an ICRC study, the fact that "most military manuals do not explicitly distinguish between rules applicable in noninternational conflicts and in international conflicts" and, finally, the lack of any such distinction in the UN regulations on observance by UN forces of international humanitarian law.[28] Subscribing to the foregoing considerations and developments, the Institut de Droit International in its 1999 Berlin Resolution welcomed and encouraged "the progressive adaptation of the principles and rules relating to internal armed conflicts to the principles and rules applicable in international armed conflicts," and advocated the adoption of a convention that would "regulate all armed conflicts and protect all victims, regardless of whether such conflicts are international, non-international or of a mixed character."[29] A renewed codification of customary humanitarian law that incorporates this normative convergence and at the same time eliminates the typology of armed conflicts may indeed enhance the protection of all persons in all situations of conflict. Should this exercise of codification include elements of "progressive development," the convention itself could be a source of new customary, law-creating processes.

International human rights law represents the second relevant set of international norms applicable to the conduct of armed groups in armed conflict. The gradual recognition of the extension of human rights law to the field of armed conflicts has raised new issues regarding its interplay with humanitarian law. The Human Rights Committee's General Comment no. 5 on Article 4 of the International Covenant on Civil and Political Rights, issued in 1981, neither referred to international or internal armed conflict nor tried to define what constituted a "public emergency which threatens the life of a nation." After 20 years, the committee could no longer maintain a general comment that did not reflect the evolving interaction between international human rights law and humanitarian law in situations of armed conflict and its own practice (comments/concluding observations in response to states' reports). Accordingly, in 2001 the committee adopted

General Comment no. 29 on "States of Emergency" (Article 4), meant to replace the previous one (no. 5).[30]

In this new comment, the committee considers international and non-international armed conflicts as situations that qualify as a "public emergency which threatens the life of a nation," in which case rules of international humanitarian law become applicable "in addition to" the provisions in Articles 4 and 5 of the Covenant. In other words, the Covenant would continue to be applicable even in situations of armed conflict. The committee also conveyed its understanding as to which rights are protected by the Covenant in those situations and thus are, according to Article 4, paragraph 2, nonderogable (albeit susceptible of being subjected to justified restrictions, in conformity with requirements specified in Article 18, paragraph 3).[31] In the committee's interpretation of Article 4, no measure derogating from the provisions of the Covenant may be inconsistent with the rules of international humanitarian law, and no state party may invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law (which include some fundamental human rights).[32]

The interpretation given by the committee in General Comment 29 was subsequently endorsed in General Comment 31, which asserts even more directly that the Covenant "applies also in situations of armed conflict to which the rules of international humanitarian law are applicable."[33] One important comment added was that both spheres of law were "complementary, not mutually exclusive" and that covenant rights could be interpreted by reference to the more specific rules of international humanitarian law.

The Human Rights Committee's position in General Comments 29 and 31 was congruent with the developing jurisprudence of the International Court of Justice. The court had already stated in 1996 that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[34] In 2004, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the court elaborated further on its earlier position (which was cited), saying that "*more generally*, the Court considers that the protection offered by *human rights conventions* does not cease in case of *armed conflict*, save through the effect of provisions for

derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights" (emphasis added).[35] Here the court refines its previous statement in two ways: it deems *all* human rights conventions applicable and extends their field of application to cover not only situations of war (in the strict, legal sense) but also situations of armed conflict. Furthermore, because the court makes no distinction between international and noninternational armed conflicts (which might not have been an easy task in the case under review anyway), it is reasonable to assume that its view encompasses any type of armed conflict.

In 2004 the Inter-American Court of Human Rights rendered a judgment on preliminary objections in the case *Serrano-Cruz Sisters v. El Salvador* that covered the relationship between human rights law and humanitarian law thoroughly. The respondent state challenged the jurisdiction *rationae materiae* of the court on the ground that the facts of the case occurred in the context of a noninternational armed conflict that called for the application of international humanitarian law as *lex specialis*, whereas the court had jurisdiction to interpret and apply human rights treaties only. El Salvador also stressed the distinction between both branches of law in terms of provisions and instruments, and noted that they "have developed independently" so that while humanitarian law applied in situations of emergency and national disorder, human rights law applied in times of peace. The Inter-American Court rejected this objection, stating unequivocally that "international human rights law is fully in force during internal or international armed conflicts." It also highlighted the convergence and complementarity of international human rights law and international humanitarian law in protecting all persons during internal or international armed conflict. Those conclusions were supported, in the court's view, by Article 27 of the American Convention on Human Rights, which sets forth its application even "in time of war, public danger, or other emergency that threatens the independence or security of a State Party," subject to certain limited and justified derogations; Article 3 common to the Geneva Conventions, which establishes the obligation to provide "humane treatment"; Additional Protocol II, when it states that "international instruments relating to human rights offer a basic protection to the human person" and refers, in its Article 4, to "fundamental guarantees"; and Additional Protocol I, when again article 75 protects "fundamental guarantees." In the court's reasoning, the allusion to

"fundamental guarantees" would indicate entitlement to such guarantees originating from international human rights as well.[36]

Recognition of the application of international human rights law in situations of armed conflict—internal or international—has been granted in other venues as well. The 1999 Berlin Resolution of the Institut de Droit International concluded that nonstate parties to armed conflicts have the obligation to respect "international humanitarian law as well as fundamental human rights," defining the latter as "the principles and rules of international law guaranteeing fundamental human rights."[37] In the same vein, the *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* (2009) conveys an unambiguous position on the normative framework applicable to the conduct of armed groups: "Armed groups are bound by international humanitarian law and must refrain from committing acts that would impair the enjoyment of human rights."[38] But surely an important manifestation of *opinio juris generalis* is found in the Vienna Declaration and Programme of Action, adopted by acclamation by representatives of 173 states in the 1993 World Conference on Human Rights. This declaration called upon states and *all parties* to armed conflicts "strictly to observe international humanitarian law . . . as well as minimum standards for protection of human rights, as laid down in international conventions."[39] If any doubt existed about the type of armed conflict this statement alluded to, in the same declaration the conference recommends that the United Nations "assume a more active role in the promotion and protection of human rights in ensuring full respect for international humanitarian law in *all situations of armed conflict*" (emphasis added).[40]

The applicability of both international human rights law and international humanitarian law to armed conflicts may give rise to questions regarding the possibility of conflict between their norms and their mechanisms of control and accountability. In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the court suggested tentatively the relationship between both spheres of law: "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[41]

When the last scenario is verified, as it was in the situation submitted to its consideration, the court thought that it should take into account both branches of international law while treating international humanitarian law as *lex specialis*.[42] This approach has been endorsed by the UN special rapporteur in extrajudicial, summary, or arbitrary executions and by a joint report submitted by holders of five mandates of special procedures of the Commission on Human Rights in 2006.[43]

A growing understanding of the convergence and complementarity of international human rights law and international humanitarian law could potentially improve the level of protection because they would apply to *all* persons involved in situations of armed conflict, international or internal, and attract the joint operation of organs and mechanisms of protection from both branches. The relationship between both branches of international law rests on and is informed by a common foundation. The International Criminal Court (Appeals Chamber) in the *Celebici* case has correctly pointed out that both branches of law share the same focus (respect for human values and the dignity of the human person) and "a common 'core' of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted," the object of which is the protection of the human person.[44]

Furthermore, as the Inter-American Court of Human Rights has observed, an undeniable normative convergence exists between a number of conventional and customary rules of humanitarian law and the equivalent rules of human rights law (e.g., the minimum protections of common Article 3 of the Geneva Conventions would be analogous in content with some of the fundamental guarantees of the human person found in international human rights instruments, such as the International Covenant on Civil and Political Rights). The Vienna Declaration and Programme of Action (1993) has in fact singled out some common protections, such as freedom from torture, which are reaffirmed by the signatories as a right "under human rights law and international humanitarian law" that must be protected "in times of internal or international disturbance or armed conflicts."[45] Jean Pictet went beyond the contents of particular rules and elaborated a list of *principles* common to what he calls the Law of Geneva and the Law of Human Rights. Those principles, which cover several specific

rules, include the principles of inviolability, nondiscrimination, and security of the person.[46]

Cançado Trindade has long advocated that the convergence between international human rights law, international humanitarian law, and international refugee law is expressed not only at the normative level but also at the hermeneutic and operational levels, and that many human rights and humanitarian norms belong to the domain of *jus cogens* and impose corresponding obligations *erga omnes* of protection.[47] The concept of *erga omnes* obligations finds endorsement in the jurisprudence of the International Court of Justice.[48] Although much discussed in doctrine, it carries a practical implication to the extent that, as the court has explained, the *erga omnes* nature of obligations means that they are the concern of all states and that all states have a *legal interest* in their protection.[49]

Given the inexorable normative expansion of the *corpus* of humanitarian rules that govern the conduct of armed groups in armed conflicts, and the growing interaction, complementarity, and convergence between human rights law and humanitarian law, one might be excused to think that these developments alone would necessarily enhance compliance with those rules and promote a higher degree of protection for civilians. However, one must address practical and legal issues. For instance, Andrew Clapham draws attention to the difficulty governments have in recognizing the existence of a situation of internal armed conflict or in accepting that an armed group may have territorial control and exercise authority, and ultimately in conceding the application of humanitarian law. From the legal perspective, as the ICTY has pointed out, the parties' acknowledgement of the reality of an armed conflict is not a legal prerequisite for its existence and the resulting incidence of international humanitarian law.[50] But Clapham is right in underscoring the significance of the *attitude* of governments because the expectation of reciprocity of treatment often determines the level of compliance by the armed group with humanitarian and human rights norms.[51] The other major issue concerns the effectiveness of international norms, which depends to a large extent on the successful operation of procedures and mechanisms designed to promote and monitor compliance—and in case of violation, to enforce those rules. In this field, some remarkable developments have taken place.

Accountability of Armed Groups

In the past, the procedures and mechanisms for control and monitoring of compliance with human rights and humanitarian law obligations had been entirely state-focused and largely dissociated from each other in their operation. The international human rights system is backed by a complex of treaty-based organs (including judicial organs at the regional level); nongovernmental organizations; international organizations; and the procedures of individual or group petition, interstate communication, universal periodic review, and periodic reports. The humanitarian law system presents a less developed support structure, with the institution of protecting powers and the actions undertaken by the ICRC. One significant shift perceived in recent years is the mounting interaction between both support structures and a realignment of focus to include nonstate entities. Fundamentally, the activities of human rights bodies are progressively compensating for the deficiencies in the apparatus of the humanitarian law regime related to accountability.[52]

In response to periodic reports submitted by states embroiled in internal armed conflict, the Human Rights Committee has made recommendations that touch upon matters of both human rights law and humanitarian law. For instance, the concluding observations of the committee on the third periodic report of the Democratic Republic of the Congo (DRC) (2006) recommended that that country take "all necessary steps to strengthen its capacity to protect civilians in the zones of armed conflict, especially women and children," and pursue its efforts to eradicate "forced recruitment of children into armed militias." With regard to forced disappearances or summary and/or arbitrary executions committed by armed groups, the committee recommended that the DRC "open inquiries," "appropriately prosecute and punish the perpetrators of such acts," and grant reparations to victims or their families.[53]

At the regional level, the Inter-American Court of Human Rights has extensive case law that deals with situations of internal armed conflicts and the interaction between human rights law and humanitarian law.[54] In those cases, it explicitly acknowledges that it may rely on humanitarian law to interpret the provisions of the American Convention (i.e., to determine the content and scope of those provisions as they are applied). In some of those cases, even though a state is the sole defendant in the procedure, the court

found it necessary to draw attention to the possibility of individual criminal responsibility for the members of nonstate entities arising out of breaches of humanitarian law and human rights obligations.

In the *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), the International Court of Justice found both human rights law and international humanitarian law applicable to the armed conflict in the territory of the DRC, holding that Uganda had violated its obligations under international human rights law and international humanitarian law. The interesting part of the judgement was the finding that Uganda had violated human rights and humanitarian obligations because it failed, as an occupying power, "to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district."[55] The facts of the case show that Uganda failed to avoid, control, or suppress activities by ethnic militias and armed groups in that district.[56]

The examples given above not only indicate a trend but also reveal the limitations of human rights organs and procedures, and of the International Court of Justice, in dealing *directly* with armed groups when they disrespect human rights and humanitarian laws. The powers, competences, and mandates established by their constituent instruments or by decisions of organs to which they are subordinate ultimately restrict their actions (decisions and/or recommendations) to states. Be that as it may, the 2004 report submitted to the Commission on Human Rights by the special rapporteur on extrajudicial, summary, or arbitrary executions advanced an extraordinary proposal that tried to address this limitation to a specific mandate. The rapporteur first reaffirmed that his mandate included humanitarian law, and for that reason violations of the right to life could be and had been dealt with in the context of international and noninternational armed conflicts. The report then proposed that armed opposition groups become the object of the rapporteur's mandate, especially if the group exercises "significant control over territory and population" and possesses an "identifiable political structure." In such a situation, the report suggested, the rapporteur could address complaints about executions directly to the armed group concerned, and that group could be called to respect human rights norms; moreover, should the rapporteur conclude that those rules were violated, the armed group could become the object of condemnation. The urgency

underlying the commission's acceptance of the proposed changes in the mandate was justified on the following ground: "In an era when non-State actors are becoming ever more important in world affairs, the Commission risks handicapping itself significantly if it does not respond in a realistic but principled manner."[57] Regrettably, the Human Rights Commission took no concrete action on this proposal. Although this attempt ultimately proved unsuccessful, human rights organs have devised different ways to circumvent mandate limitations in order to make armed groups' conduct the object of express considerations.

In the aftermath of the armed conflict that affected Lebanon and Israel in 2006, four human rights mandate holders visited Lebanon at the invitation of the two governments. Their final report states that they undertook their mission in accordance with their respective mandates and "on their own initiative in response to a suggestion by the President of the Human Rights Council." One of the mission's main objectives involved "assess[ing], from the perspective of international human rights and humanitarian law as covered by their respective mandates, the impact on the civilian populations of the armed conflict." The report conceded that Hezbollah was a nonstate actor and thus could not be a party to human rights treaties. However, it then stated that Hezbollah was "subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights" and that this was particularly so because it exercised significant control over territory and population and had an identifiable political structure. In a footnote, the report also added that Hezbollah could be deemed a de facto authority and an organ of the Lebanese state, subject to the international obligations assumed by Lebanon. With regard to Hezbollah's actions, the report concluded that "in many instances, Hezbollah violated the applicable principles of humanitarian law" and recommended that the Human Rights Council investigate some actions which constituted a clear violation of humanitarian law and could also amount to war crimes. Furthermore, the report addressed some recommendations to Hezbollah, requiring it, inter alia, to "publicly affirm that it is bound by international humanitarian law" and train its fighters on international humanitarian law standards, informing them "of the possibility of criminal prosecution for serious violations thereof."[58]

This joint report managed to evade traditional limitations inserted on mandates due to political reasons. The Commission of Inquiry on Lebanon

established by the Human Rights Council to investigate the same conflict, by contrast, had a mandate that prevented it from examining and assessing the actions of Hezbollah. Paragraph 7 of the Human Rights Council resolution S-2/1 and the respective Terms of Reference clearly limited the mandate of the commission to assess Israel's conduct, with no mention of either Hezbollah or Lebanon; indeed, the report focused almost entirely on Israel's actions. Yet, the Report of the Commission included a general recommendation that the council "promote and monitor the obligation to 'respect and ensure respect' of the international humanitarian law by all parties in a conflict, *including non-State actors*" (emphasis added).[59]

More recently (2009), based on HRC Resolution S/9-1, the president of the Human Rights Council established a United Nations Fact-Finding Mission on the Gaza Conflict, which set the following terms of reference for the mandate: "To investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip."[60] However "unbalanced" the legal basis of the mandate, the commission decided to go further and beyond, making some very interesting findings. In defining the applicable law, the final report observed the existence of an ongoing *convergence* between human rights protections and humanitarian law protections, and the fact that the relationship between those two branches in regard to nonstate entities' obligations is evolving in order to enhance the protection and enjoyment of human rights in all circumstances. The report also stated the commission's view that "non-State actors that exercise government-like functions over a territory have a duty to respect human rights." With regard to the specific nature of armed groups that constitute national liberation movements and/or resistance movements (the situation under consideration), the commission expressed the view that any "action of resistance pursuant to the right to self-determination should be exercised with full respect of other human rights and IHL [international humanitarian law]."[61] Armed with those assumptions, the report found that Palestinian armed groups committed acts contrary to international humanitarian law, some of which constituted war crimes and could amount to crimes against humanity. The report also concluded that Palestinian armed groups and security services—some of them associated with Gaza or Palestine authorities—violated human rights pro-

tections. In the end, the report called for investigation and full accountability.[62] As a matter of follow-up, the UN General Assembly in Resolution 64/10 urged the Palestinian side to undertake investigations "in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission, towards ensuring accountability and justice."[63]

It is remarkable that the pursuit of enjoyment of the right to self-determination by nonstate entities through armed struggle was seen in the preceding cases as subject to limitations imposed by human rights law and international humanitarian law. Admittedly, Protocol I to the Geneva Conventions was designed to provide humanitarian protections in this type of armed conflict, and some of its provisions are considered part of customary law. But the problem is that a substantial number of states have shown great reluctance to include in the definition of terrorism, acts performed by armed groups in their struggle for liberation and self-determination in situations of foreign occupation, subjugation, and colonial domination.[64] The exclusion of armed actions taken by armed groups in situations of national liberation from the definition of terrorism might have given rise to the misconception that those groups are allowed to cause death or serious bodily harm to civilians or noncombatants in order to achieve their ends. Recognition of the application of human rights law and international humanitarian law even in situations of armed struggle for self-determination and liberation draws the legal line between legality and illegality and enhances the protection of civilians and noncombatants who otherwise might have been affected by the unending discussion about the definition of terrorism.

A 2009 report produced by the Human Rights Unit of the United Nations Assistance Mission to Afghanistan also made a negative assessment of the belligerent conduct of armed groups within Afghanistan. After reviewing the tactics employed by armed opposition groups in the conflict (including the Taliban) and the number of civilian casualties, it came to the conclusion that they were disrespecting the principles of distinction and proportionality when conducting their operations by disregarding civilians and using indiscriminate tactics. The report concluded by recalling that "all persons engaged with the armed opposition have an obligation to comply with the requirements of international humanitarian law."[65]

Organs and procedures originating from the international human rights system are but some of the several sources of pressure being placed against armed groups to make them conform their behavior to human rights law and humanitarian law. The political organs of the UN, in particular the Security Council, have played a pivotal role in the effort to restrain armed groups and hold them accountable for violations of humanitarian law and human rights law.

The Security Council deals with armed groups from a distinct, wider perspective generated by its position as the organ within the UN system that holds primary responsibility for the maintenance of international peace and security. Therefore, the council has dealt with armed groups in the context of a threat to or breach of international peace and security, with the general goal of removing the threat and maintaining or restoring international (or regional) peace and security.

In the discharge of its functions according to the charter, the council sometimes has to engage armed groups involved in an internal conflict in order to initiate or support a political process that might lead to reconciliation, demobilization, disarmament, and reintegration of the members of those groups into society. But the political obstacles in the way are usually challenging. Andres Franco's study identifies a number of them, starting with the necessary consensus that has to emerge between the permanent members regarding their perceptions of the role of the armed group(s) and the measures that need to be taken in order to address the conflict. The author also notes the disparate reality between, on the one hand, the powers of the Security Council and its global role and, on the other hand, the decentralized, local nature of military, political, and economic support to those armed groups. This last obstacle, in particular, might entail the need for the Security Council to utilize regional organizations as a medium of communications between the council and the armed groups or as the leading agent of the council for an enforcement action or peacekeeping operation.[66]

One concedes that the political goals and limitations that guide and sometimes determine the Security Council's decisions and measures or, at times, inaction are responsible for some striking failures to properly address a humanitarian crisis resulting from armed conflicts, especially in the post–Cold War years and in situations of intrastate conflicts. The tragedies in Rwanda and Darfur offer vivid testimony to the limitations of the Security

Council.[67] Notwithstanding its political limitations, the cumulative practice of the council has produced some positive effects on the promotion of respect for human rights and humanitarian norms in armed conflicts and the accountability of armed groups for violations of those norms. The actions undertaken by the council on this field have been reinforced by a reinterpretation of its functions conveyed in the *2005 World Summit Outcome*. This document states that UN members are prepared to take collective action "through the Security Council, in accordance with the Charter, including Chapter VII . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[68] Applied to the traditional mandate of the Security Council, this statement would imply a shift of focus on the part of the council's activities, which would now concentrate on the protection of civilians in armed conflicts; at the same time, it would mean that the legality of any humanitarian intervention is clearly contingent upon its being undertaken within the framework of the UN collective security system.[69] In Resolution 1674 (2006), the council reaffirmed this new interpretation of its mandate.

The protection of civilians in armed conflict has indeed been on the Security Council agenda for the past 10 years, and in the consideration of this topic, the council has adopted 11 resolutions to date.[70] A recent resolution on this matter (1894 [2009]) reveals the culmination of a gradual evolution in the council's policy options to deal with intrastate conflicts and armed groups. The resolution firstly expresses a general demand that parties to armed conflict "comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law." An inquiry into the practice of the Security Council shows that on many situations, the council has demanded that the parties to the conflict respect humanitarian and human rights norms, and has called for the cessation of and has condemned any violation thereof.[71]

The second important point in Resolution 1894 is that the council declares its readiness to respond to systematic, flagrant, and widespread violations of applicable international humanitarian and human rights law in situations of armed conflict that may constitute a threat to international peace and security. The practice of the Security Council confirms this policy. The majority of armed conflicts since the end of the Cold War, particularly

those in Africa, has given rise to humanitarian disasters, and the Security Council has reacted by making the determination, regarding many of those situations, that they constitute a threat to or breach of international or regional peace and security. This determination, of course, is a preliminary step to allow the council to resort to the powers granted under chapter 7 of the charter. Subsequent to this determination, and having regard to the failure of states and armed groups to respond to the peacemaking initiatives endorsed by it or to comply with its resolutions, the council has been prepared to make use of the full range of tools and powers available to it under the charter.

In some cases, the Security Council has adopted decisions and provisional measures under Article 40 of the UN Charter. In Resolution 1464 (2003), for instance, the council determined that threats to stability in Côte d'Ivoire constituted "a threat to international peace and security in the region" and then called upon all states neighboring Côte d'Ivoire to "support the peace process by preventing any action that might undermine the security and territorial integrity of Côte d'Ivoire, *particularly the movement of armed groups and mercenaries across their borders* and illicit trafficking and proliferation of arms in the region" (emphasis added).[72] Addressing the situation in Sierra Leone in 2003, the Security Council demanded that the armed forces of Liberia and "any armed groups" refrain from illegal incursions into its territory.[73] Two years earlier, the Security Council had expressed its continued deep concern at the reports of human rights abuses and attacks committed by the Revolutionary United Front (RUF), "the Civil Defence Forces (CDF) and other armed groups and individuals" against the civilian population in Sierra Leone, and demanded that these acts cease immediately.[74] More generally, the Security Council considered the situation in West Africa in 2001, demanding that all states in the region take action to prevent "armed individuals and groups" from using their territory to prepare and commit attacks on neighboring countries and refrain from any action that might contribute to further destabilization of the situation on the borders between Guinea, Liberia, and Sierra Leone.[75]

The Security Council has also gone beyond provisional measures and imposed *sanctions* under chapter 7 against nonstate entities and their leadership. Targeted sanctions, for instance, have been imposed against the National Union for the Total Independence of Angola (UNITA) (resolutions 864

[1993], 1127 [1997], and 1173 [1998]); the Taliban and al-Qaeda (resolutions 1267 [1999], 1333 [2000], 1390 [2002], 1455 [2003], 1526 [2004], 1617 [2005], 1735 [2006], and 1822 [2008]); the RUF in Sierra Leone (resolutions 1132 [2007] and 1171 [1998]); the Democratic Forces for the Liberation of Rwanda (FDLR), ex-Armed Forces of Rwanda (FAR)/ Interahamwe, and other Rwandan armed groups operating in the eastern part of the DRC (resolutions 1804 and 1807 [2008]); and armed groups operating in Somalia (resolution 1844 [2008]).

In some situations of internal conflict, the Security Council has authorized peacekeeping forces and states to *use force* for the purposes specified in its resolution or to implement a peacekeeping mandate. In 2003 the council estimated that the internal conflict in Côte d'Ivoire required it to authorize, in accordance with chapter 8, the Economic Community of West African States and French forces to "take the necessary steps to guarantee the security and freedom of movement of their personnel and to ensure, without prejudice to the responsibilities of the Government of National Reconciliation, the protection of civilians immediately threatened with physical violence within their zones of operation." For that purpose, the council noted that they could use "the means available to them."[76] It issued similar authorization in the situation of the DRC: since 2000 the Security Council has been renewing a mandate to the peacekeeping operation in place (UN Organization Mission in the Democratic Republic of the Congo [MONUC]), which contains a chapter 7 authorization to ensure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence. Resolution 1794 (2007), for instance, reaffirms MONUC's mandate to "use all necessary means" to that end.[77] Other cases include Somalia and Afghanistan.[78] In this last one, since 2001 the Security Council has endowed the International Security Assistance Force (ISAF) with a chapter 7 mandate to assist the Afghan government in the maintenance of security, and has expressly authorized ISAF's members "to take all necessary measures to fulfill its mandate."[79] One might ask against whom the Security Council has authorized ISAF to use force. Resolutions 1707 (2006) and 1833 (2008), for example, afford an indication of the addressees by referring to entities deemed to be affecting the security situation in Afghanistan: Taliban, al-Qaeda, illegally armed groups or other extremist groups, and those involved in the narcotics trade. The foregoing instances show a consolidated practice of the

Security Council. It comes as no surprise, then, that in Resolution 1894 the Security Council reaffirmed "its practice of ensuring that mandates of UN peacekeeping and other relevant missions include, where appropriate and on a case-by-case basis, provisions regarding the protection of civilians."[80]

All those measures originating from the Security Council have served to put the actions of armed groups under restraint and—perhaps to a lesser degree—compel them to observe the requirements of humanitarian law and human rights law. But they do not exhaust the array of powers of the Security Council, which has resorted to the application of justice mechanisms to ensure the accountability of armed groups and the prevention or containment of further violations of humanitarian and human rights rules.

Resolution 1894 affirms the council's strong opposition to impunity for serious violations of international humanitarian law and human rights law and its role in ending impunity. It then refers to the existing full range of justice and reconciliation mechanisms, which includes national, international, and "mixed" criminal courts and tribunals; truth and reconciliation commissions; and national reparation programs for victims and institutional reforms. The Security Council recognizes the principle of complementarity and emphasizes the importance of accountability through national mechanisms, yet it still sees the need for international cooperation and its active engagement in the creation and operation of some justice mechanisms.

With regard to several situations, the council brought to light its assessment of violations and demanded justice, at times making reference to a specific means. For instance, in resolution 1633 (2005), the council reiterated its "serious concern at all violations of human rights and international humanitarian law" in Côte d'Ivoire, urging the Ivorian authorities to "investigate these violations without delay in order to put an end to impunity." In resolution 1736 (2006), the council deplored the "persistence of violations of human rights and international humanitarian law" carried out by militias and foreign armed groups in the DRC and stressed the "urgent need for those responsible for these crimes to be brought to justice."[81]

In the situation concerning the armed conflict within Sierra Leone, the Security Council originated the creation of a mixed tribunal, eventually set up by the 2002 agreement between the UN and the Government of Sierra Leone. The Special Court resulted from Resolution 1315, which had requested that the secretary-general negotiate an agreement with the

Government of Sierra Leone to create an independent special court with jurisdiction over crimes against humanity, war crimes, and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. Thus far the court has tried (or is trying) leaders of the three major armed groups that participated in the Sierra Leonean conflict: the Armed Forces Revolutionary Council, CDF, and RUF. Notably, in its most recent annual report (2009), the court refers to the cases not by the names of the accused but by the names of the armed groups they represent.[82]

Establishment of the ad hoc International Criminal Tribunal for the ICTY in 1993, by resolution 827, and of the ad hoc International Criminal Tribunal for Rwanda (ICTR), by resolution 955 (1994), represented a milestone in the activities of the Security Council. Both tribunals were endowed with power to exercise jurisdiction over persons responsible for genocide and other serious violations of international humanitarian law. The ICTR, in particular, has had the opportunity to try individuals associated with armed groups or militias for the commission of those violations.[83] Their creation and operation were a vital phase of the process that started with the Nuremberg Tribunal and ended with the establishment of the International Criminal Court (ICC), which is currently trying several individuals for various counts of war crimes and/or crimes against humanity. The significance of these trials is that those individuals allegedly held positions of leadership in 11 major armed groups operating in at least four different countries, some of which undertook transborder armed actions.[84] All of those cases were referred to the ICC by African countries who fell victim to the actions of those armed groups, with the exception of Sudan, referred by the Security Council (Resolution 1593 [2005]). Looking at the wider picture, one has to agree with Kenneth Anderson when he says that, in a sense, "the tribunals of international criminal law represent simply a new branch of collective security itself through the UN, a means of pursuing peace and justice."[85]

In the *Genocide* case, the International Court of Justice stated that the Genocide Convention (1948) did not provide for the criminal responsibility of states as distinct from the international responsibility of states, following a general line of reasoning first advanced in the Nuremberg Judgment and later endorsed by the International Law Commission's Articles on the

Responsibility of States for Internationally Wrongful Acts.[86] Similar grounds may be invoked to justify the conclusion that armed groups cannot be criminally liable internationally for their violations of international humanitarian law, while their international responsibility for their own wrongful conduct could be invoked.[87] However, there seems to be no doubt about the international criminal responsibility of their members arising out of their violations of humanitarian protections, even in the context of internal conflicts. In the *Celebici* case, the Appeals Chamber of the ICC noted that violations of international humanitarian law applicable to internal conflicts could be "criminally enforced at the international level," a view fully endorsed by the UN secretary-general's report on the establishment of a Special Court for Sierra Leone.[88]

Some may think that international law should develop norms and mechanisms that would allow armed groups to be criminally responsible as an entity for the commission of crimes under international law. Whatever future course the international legal system takes, one may contend that when an international tribunal tries individuals, it is trying them for their responsibility as perpetrators or coperpetrators of acts while they were members of that given group. In this sense, the trial of leaders of armed groups makes those entities also sit on trial, and as a result, their legitimacy and political clout—in particular if they claim to be taking part in a struggle for self-determination—can be seriously undermined. Besides, the possibility always exists that armed groups are judged as criminal organizations, or are held criminally liable, by the domestic legal system of the state(s) in which they operate.

Hopefully, the work of national courts, international tribunals, and mixed courts in bringing to justice members of armed groups responsible for violations of humanitarian law and human rights law is sending a deterrent message to all existing and future armed groups and ultimately putting an end to a horrible cycle of impunity. In particular the fact that all cases tried by the ICC thus far originate from Africa—and count on the support of the respective governments, with the exception of Sudan—is a good development in the road to rid this continent of the criminal armed groups that have plagued it for so long. But the jurisprudence of those courts has also offered a contribution to the enhancement of accountability of armed groups by developing international criminal law. Richard Goldstone, for

instance, recalls how the work of international courts has led to the recognition of gender-related offenses as a war crime.[89]

States other than the host state represent a last line of defense against armed groups that commit serious violations of international humanitarian law and human rights law. It has been noted that many of those rights have the character of *jus cogens* and give rise to obligations *erga omnes*. From the accountability point of view, in the view of the Institut de Droit International, the special nature of the obligations entails that not only "every State and every non-State entity participating in an armed conflict are legally bound *vis-à-vis* each other as well as all other members of the international community to respect international humanitarian law in all circumstances," but also that all states are "legally entitled to demand respect for this body of law."[90] In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice shared its view that Article 1 of the Fourth Geneva Convention—identical in content to Article 1 of the other three conventions—imposed on every state party to the convention, "whether or not it is a party to a specific conflict," the obligation "to ensure that the requirements of the instruments in question are complied with."[91] How can states parties to the Geneva Conventions discharge their obligation to ensure that armed groups within other states comply with international humanitarian law as embodied in the conventions? One resource is furnished by a common provision found in the four Geneva Conventions (Articles 49 [I], 50 [II], 129 [III], and 146 [IV]), which establishes the universal jurisdiction mechanism applicable to grave breaches of international humanitarian law. On account of that common provision, for serious violations of those norms, the *erga omnes* nature of the corresponding obligations authorizes the application of the principle of universal jurisdiction. Therefore, if, for instance, an individual who is a member or former member of an armed group accused of grave breaches of international humanitarian law is found in the territory of a state of which he is not a national, that state's courts could arguably hear national criminal law procedures instituted with a view to prosecuting that individual for war crimes.

An insightful study by Roger O'Keefe on the application of the universal jurisdiction mechanism, however, reveals that it is hardly applied and is subject to limitations and criticisms. One such problem, according to

O'Keefe, is the ambiguous wording of the said provision, which does not expressly attribute the jurisdictional base(s) upon which state courts may be authorized to exercise jurisdiction, leaving open issues such as the legality of trial in absentia. O'Keefe also identifies the problem of the relatively small number of cases of due incorporation of the mechanism into the domestic legal order, in particular with regard to civil law countries.[92] Finally, states rarely show the necessary political will to have this mechanism in place, which can be costly; represent an undesirable intervention in the domestic affairs of another country, which could establish a bad precedent against them; and give rise to a diplomatic dispute.

Concluding Remarks

The international legal system has responded to the challenges posed by nonstate entities—in particular, armed groups—with normative, institutional, and procedural developments designed to regulate and attach legal consequences to their conduct and, further still, make them and their members accountable. Nevertheless, admittedly, a long and arduous road lies ahead. The expectation is that, given any necessary adaptation, nonstate entities will eventually be subjected to at least the same legal constraints and level of accountability as the states themselves in the use of armed force—thus constituting a response to Hedley Bull's warning, mentioned above. Other vital issues need further development and clarification, such as the attribution of state responsibility in cases of association between states and nonstate entities. Yet the developments mentioned in this article reveal that the process of humanization of *jus in bello* is inexorable and makes international humanitarian law and human rights law bound to become a necessary consideration in the decision of armed groups to resort to armed force and the way it is used.

Notes

1. Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an Interdependent World* (Norwich, United Kingdom: Stationery Office, March 2008), 22, http://interactive.cabinetoffice.gov.uk/documents/security/national_security_strategy.pdf.

2. White House, *The National Security Strategy of the United States of America* (Washington, DC: White House, March 2006); and Department of Defense, *National Defense Strategy* (Washington, DC: Department

of Defense, June 2008). In 2009 the national intelligence strategy divulged that "non-state and sub-state actors increasingly impact" the US national security. Office of the Director of National Intelligence, *The National Intelligence Strategy of the United States of America* (Washington, DC: Office of the Director of National Intelligence, August 2009), 3.

3. Department of Defense, *National Defense Strategy*, 11.

4. See *Supplement to an Agenda for Peace*, UN Doc. A/50/60, S/1995/1, 3 January 1995, 3–7.

5. United Nations, High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (New York: United Nations Department of Public Information, 2004), 1, 9.

6. *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005, 21 March 2005, par. 8.

7. The sheer number and variety of terms and expressions utilized to name nonstate entities that engage in armed activities do not add much clarity to their understanding, particularly when the lack of consensual definition or categorization follows suit. Since this inquiry is not concerned with the study of the legal typology of nonstate entities, general expressions such as "armed groups" and "nonstate entities" will be used as good alternatives to describe the same subjects.

8. See *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2009/277, 29 May 2009, par. 24.

9. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd ed. (New York: Columbia University Press, 2002), 192–93.

10. See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949. The International Committee of the Red Cross (ICRC) Commentary explains that the expression includes nonsignatory parties that may not yet be in existence and that are "not even required to represent a legal entity capable of undertaking international obligations," using the term *insurgents* to name them (p. 36).

11. See Yves Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), 1091, par. 3771.

12. See "Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in Which Non-State Entities Are Parties" (Session of Berlin, 1999), par. II.

13. Prosecutor against Sam Hinga Norman, Defence Preliminary Motion Based on Lack of Jurisdiction, Appeals Chamber, Case SCSL-2004-14-AR72(E), par. 22.

14. In the Nicaragua case, the court stated that the rules of Article 3 of the Geneva Conventions are "rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (Corfu Channel, Merits, International Court of Justice (I.C.J.) Reports 1949, p. 22)." Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, par. 218. Later on, in the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the court reaffirmed the same view: "It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, par. 79.

15. This is the relevant passage: "While in 1949 the insertion of a provision concerning internal armed conflicts into the Geneva Conventions may have been innovative, there can be no question that the protections and prohibitions enunciated in that provision have come to form part of customary international law." International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Zejnil Delalic et al., Trial Judgement, Case no. IT-96-21-T, 16 November 1998, par. 301. See also International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Prosecutor v. Zejnil Delalic et al., Judgement, Case no. IT-96-21-A (Celebici case), 20 February 2001, par. 148.

16. With regard to Protocol II, the Appeals Chamber stated that "many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles." Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Prosecutor v. Dusko Tadic a/k/a "Dule," Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, par. 117. As to Protocol I, the Trial Chamber in the Celibici case added, "Nor is it necessary for the Trial Chamber to discuss the provisions of article 75 of Additional Protocol I, which apply in international armed conflicts. These provisions are clearly based upon the prohibitions contained in common article 3 and may also constitute customary international law." International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Zejnil Delalic et al., Trial Judgement, Case no. IT-96-21-T, 16 November 1998, par. 314.

17. "Appeals Chamber" (note 16), par. 127.

18. UN Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza conflict*, A/HRC/12/48, 25 September 2009, par. 281.

19. See Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. 1, *Rules* (Cambridge, United Kingdom: Cambridge University Press, 2005), 3–494.

20. Although in this case it should be understood from the perspective of international criminal law (i.e., the application of an enforcement regime).

21. According to the court, "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts. . . . Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for one or for the other category of conflict." See Nicaragua case (note 14), pars. 215, 219.

22. *Study on Customary International Humanitarian Law*, Doc. 30IC/07/8.3 Geneva, October 2007, 3.

23. Ibid.

24. By contrast the *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* (2009) seems to approve the conclusion of such agreements since it would send "a clear signal" to the groups' members which might "lead to the establishment of appropriate internal disciplinary measures" and "provide an important basis for follow-up interventions" (par. 42).

25. International Criminal Court, Pre-Trial Chamber I, Prosecutor v. Dyilo (2007), Decision on the Confirmation of Charges, ICC-01/04-01/06, par. 209.

26. Ibid., pars. 268–85.

27. See Tadic case (note 16), pars. 96–97.

28. Theodor Meron, "The Humanization of Humanitarian Law," *American Journal of International Law* 94, no. 2 (April 2000): 261–62.

29. See "Resolution" (note 12), par. XI.

30. Human Rights Committee, General Comment no. 29 (2001), CCPR/C/21/Rev.1/Add.11.

31. According to the committee, the following rights are nonderogable even in situations of armed conflict (irrespective of whether it is international or noninternational): Article 6 (right to life), Article 7 (prohibition of torture or cruel, inhuman, or degrading punishment, or of medical or scientific experimentation without consent), Article 8, pars. 1 and 2 (prohibition of slavery, slave trade, and servitude), Article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), Article 15 (the principle of legality in the field of criminal law—that is, the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), Article 16 (the recognition of everyone as a person before the law), and Article 18 (freedom of thought, conscience, and religion).

32. The examples given by the committee include the taking of hostages, the imposition of collective punishments, and arbitrary deprivations of liberty or deviation from fundamental principles of fair trial, including the presumption of innocence.

33. General Comment no. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004, CCPR/C/21/Rev.1/Add.13, par. 11.

34. See *Legality of the Threat or Use of Nuclear Weapons* (note 14), par. 25.

35. I.C.J. Reports 2004, par. 106. This position is going to be reiterated by the court in the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Merits, I.C.J. Reports 2005, par. 216.

36. Inter-American Court of Human Rights, Judgment of November 23, 2004 (Preliminary Objections), pars. 107–19. Although this is a case in which the court has had to deal with this contention explicitly by reason of the objection, there were other cases of internal armed conflict where the court deemed applicable the American Convention on Human Rights (see, e.g., Inter-American Court of Human Rights, Case of Bámaca-Velásquez v. Guatemala, Judgment of November 25, 2000 [Merits], pars. 143, 174, 207–8).

37. See "Resolution" (note 12), pars. II, IV.

38. *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, par. 39.

39. In the 1968 International Conference on Human Rights in Teheran, the parties adopted Resolution XXIII, which urged all states members of the UN to ensure that "in all armed conflicts the inhabitants and belligerents are protected" in accordance with "the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience."

40. *Vienna Declaration and Programme of Action*, UN General Assembly Doc. A/CONF.157/23, 12 July 1993, pars. 29, 96.

41. See I.C.J. Reports 2004, par. 106.

42. Ibid.

43. See *Report of Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/2005/7, 2004, par. 50; and *Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention; the Special Rapporteur on the Independence of Judges and Lawyers; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Special Rapporteur on Freedom of Religion or Belief; and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, E/CN.4/2006/120, 2006, par. 19.

44. International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Prosecutor v. Zejnil Delalic et al., Judgement, Case no. IT-96-21-A, 20 February 2001, par. 149.

45. See *Vienna* (note 40), par. 56.

46. Jean Pictet, *Development and Principles of International Humanitarian Law* (Netherlands: Martinus Nijhoff, 1985), 63–67.

47. Inter-American Court of Human Rights, Case of Las Palmeras v. Colombia, Judgment of February 4, 2000 (Preliminary Objections), Separate Opinion of Judge Trindade, pars. 7–12; and A. A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI* (Santiago: Ed. Juridica, 2001), 183–261.

48. Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, pars. 33–34; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, par. 29; Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, I.C.J. Reports 2007, pars. 147, 185; and Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, par. 64.

49. See, inter alia, Michael Byers, "Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules," *Nordic Journal of International Law* 66 (1997): 211–39; and Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge, United Kingdom: Cambridge University Press,

2005), 2–424. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, par. 155. In this case, the court stated that the *erga omnes* obligations recognized as applying in the situation placed "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem" (par. 159).

50. International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Milan Milutinović et al., Judgement, Case no. IT-05-87-T, 26 February 2009, par. 125.

51. Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations," *International Review of the Red Cross* 88, no. 863 (September 2006): 510.

52. This article does not intend to address the issue of whether or when an armed group is or becomes a subject of international law capable of being held accountable. For a discussion of this matter, see Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge, United Kingdom: Cambridge University Press, 2002), 133–52. Zegveld argues that the legal personality of armed groups is imparted by international treaties (e.g., Geneva Conventions) on the objective ground that they are parties to a recognized internal armed conflict. See Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," *American Journal of International Law* 98, no. 1 (2004): 22–24. Watkin supports the application of human rights accountability mechanisms in situations of armed conflict but notes that consideration must be taken of the nature of warfare and the "unique aspects of international humanitarian law."

53. *Concluding Observations of the Human Rights Committee: Democratic Republic of the Congo*, CCPR/C/COD/CO/3, 2006, pars. 13, 15, 18.

54. See Case of Bámaca Velásquez, Judgment of November 25, 2000, Series C, no. 70, pars. 143, 174, 207, 213, 214; Case of Bámaca Velásquez, Reparations (Article 63[1] American Convention on Human Rights), Judgment of February 22, 2002, Series C, no. 91, par. 85; Case of Molina Theissen, Reparations (Art 63[1] American Convention on Human Rights), Judgment of July 3, 2004, Series C, no. 108, par. 41; Case of Molina Theissen, Judgment of May 4, 2004, Series C, no. 106, pars. 40 and 47(3,4); and Case of the Serrano-Cruz Sisters v. El Salvador, Judgment of November 23, 2004 (Preliminary Objections), pars. 107–19.

55. See I.C.J. Reports 2005 (note 35), pars. 209, 216–20, and 345, item 3.

56. In the Genocide case, the court reached the conclusion that acts of genocide had been committed at Srebrenica, and, in the consideration of the facts of the case, the involvement of paramilitary militias was acknowledged. The core issue, however, was whether those acts could be attributed to Serbia and thus capable of engaging its international responsibility. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (note 48), pp. 385–414.

57. See *Report of Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/2005/7, 2004, par. 76.

58. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, A/HRC/2/7, 2 October 2006, pars. 1–3, 19, 100, 105–6.

59. *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1*, A/HRC/3/2, 23 November 2006, par. 349(g).

60. *The Grave Violations of Human Rights in the Occupied Territory Particularly Due to the Recent Israeli Military Attack against the Occupied Gaza Strip*, A/HRC/S-9/L.1, 12 January 2009, par. 14.

61. *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, 25 September 2009, pars. 284, 305, 308.

62. Ibid., pars. 1911, 1950–65; and *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48 (ADVANCE 1), 23 September 2009, pars. 78–80, 97–102, 108–9.

63. *Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, A/RES/64/10, 1 December 2009, par. 4.

64. See Article 2(a) of the Arab Convention for the Suppression of Terrorism, adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice (1998); Resolution 53/25-P, par. 1, and Resolution 54/25-P, par. 5, adopted by the Twenty-Fifth Session of the Islamic Conference of Foreign Ministers; Article 2(a) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999); and Article 3(1) of the Organization of African Unity's Convention on the Prevention and Combating of Terrorism (1999).

65. United Nations Assistance Mission to Afghanistan, *Mid Year Bulletin on Protection of Civilians in Armed Conflict*, 2009, par. 31.

66. Andres Franco, "Armed Non-State Actors," in *The UN Security Council: From the Cold War to the 21st Century,* ed. David M. Malone (Boulder, CO: Lynne Rienner, 2004), 120–29.

67. See *Report of the International Commission of Inquiry on Darfur*, UN Doc. S/2005/60, 1 February 2005; and *Report of the Independent Commission of Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, UN Doc. S/1999/1257, 16 December 1999.

68. *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 2005, par. 139.

69. By contrast, Stahn observes that the possibility of unilateral humanitarian intervention was not "categorically" rejected in the outcome document; hence the concept of responsibility to protect arguably was not meant to preclude such action but to "make clear that the collective security system shall remain the primary forum for military action." See Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?," *American Journal of International Law* 101 (2007): 119–20.

70. Resolutions S/RES/1265 (1999), S/RES/1296 (2000), S/RES/1325 (2000), S/RES/1612 (2005), S/RES/1674 (2006), S/RES/1738 (2006), S/RES/1820 (2008), S/RES/1882 (2009), S/RES/1888 (2009), S/RES/1889 (2009), and S/RES/1894 (2009).

71. S/RES/1894 (2009). See also, for example, S/RES/1493 (2003), par. 8; S/RES/1464 (2003), par. 7; S/RES/1828 (2008), par. 11; S/RES/1574 (2003), par. 11; and S/RES/1814 (2008), par. 17.

72. S/RES/1464 (2003).

73. S/RES/1470 (2003).

74. S/RES/1497 (2003).

75. S/RES/1343 (2001).

76. S/RES/1464 (2003).

77. S/RES/1794 (2007).

78. By Resolution 794 (1992), the Security Council, acting under chapter 7, authorized the secretary-general and member states cooperating to "use all necessary means" to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.

79. See S/RES/1386 (2001), S/RES/1413 (2002), S/RES/1444 (2002), S/RES/1510 (2003), S/RES/1563 (2004), S/RES/1623 (2005), S/RES/1707 (2006), S/RES/1776 (2007), S/RES/1833 (2008), and S/RES/1890 (2009).

80. S/RES/1894 (2009).

81. S/RES/1633 (2005); and S/RES/1736 (2006).

82. See *Sixth Annual Report of the Special Court for Sierra Leone of the President of the Special Court for Sierra Leone*, June 2008 to May 2009, 32–33, http://www.sc-sl.org/LinkClick.aspx?fileticket=%2FuI3lqaO5D0%3D&tabid=53.

83. See, inter alia, the cases Prosecutor v. Yusuf Munyakazi, ICTR-97-36, in which he allegedly participated in a National Republican Movement for Democracy and Development (MRND) militia; and Prosecutor v. Jean Baptiste Gatete (ICTR-2000-61-I), regarding the Interahamwe militia.

84. The list of armed groups includes *Uganda*: the Lord's Resistance Army; *Democratic Republic of the Congo*: Union des Patriotes Congolais (UPC), Forces patriotiques pour la libération du Congo (FPLC), Force de résistance patriotique en Ituri (FRPI), Front des nationalistes et intégrationnistes (FNI), and Congrès national pour la défense du people (CNDP); *Central African Republic*: Mouvement de libération du Congo (Movement for the Liberation of Congo [MLC]); and *Sudan*: Militia/Janjaweed, United Resistance Front, and Popular Defence Force (PDF).

85. See Kenneth Anderson, "The Rise of International Criminal Law: Intended and Unintended Consequences," *European Journal of International Law* 20, no. 2 (2009): 353–54.

86. See Genocide case (note 48), pars. 167, 170, 178.

87. The International Law Commission seems to have admitted this possibility in its commentary on Article 10 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts: "A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces." See UN International Law Commission, *Report on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001)*, 52, http://untreaty.un.org/ilc/reports/2001/2001report.htm.

88. See Celebici case (note 15), par. 171. *The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, par. 14, reads as follows: "Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused."

89. See Richard Goldstone, "Assessing the Work of the United Nations War Crimes Tribunal," *Stanford Journal of International Law* 33, no. 1 (Winter 1997): 6.

90. See "Resolution" (note 12), par. V.

91. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, par. 158.

92. See Roger O'Keefe, "The Grave Breaches Regime and Universal Jurisdiction," *Journal of International Criminal Justice* 7, no. 4 (2009): 830–31. On this possibility, see also the *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, A/HRC/10/20, 11 February 2009, par. 38, which suggests that some national courts could prosecute war crimes allegedly committed in the Gaza conflict.