Armed Opposition Groups

DAVID MATAS*

TO WHAT EXTENT are armed opposition groups bound by international human rights law? On the one hand, these groups perpetrate atrocities as grave as those of governments. On the other hand, they have not signed the international human rights instruments.

The treatment of armed opposition groups poses a dilemma for the international human rights legal community. Ignoring them creates an imbalance. It means holding governments liable for atrocities, but turning a blind eye when the same atrocities are committed by the opposition. Yet, is it possible to judge opposition atrocities in the same way we judge government atrocities, when oppositions are not, in fact, governments?

The whole issue arose at the U.N., under the heading of "irregular armed groups," at the 1990 session of the Commission on Human Rights held in Geneva.[1] Peru and Columbia proposed a resolution on the subject.

The initial proposal was to create a special mechanism—that is, special rapporteurs and working groups—and a separate Commission agenda item for the subject. However, several participants in the debate argued that, under international law, responsibility for human rights violations rested with governments. A focus on violations of armed opposition groups could be used to deflect criticism away from human rights violations by governments.

It is common to hear governments say, in response to allegations of human rights violations, that equal and worse violations are committed by armed opposition groups. Officials contend that what their government is doing is in response to what armed opposition groups do.

Legally, atrocities by the opposition do not justify human rights violations by a government. Nothing should be done to give credence to the argument that what governments do is justifiable, simply because the opposition does it too. Nonetheless, abuses by armed opposition groups cannot be ignored.

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* David Matas is a lawyer in private practice in Winnipeg, Manitoba, Canada. He is the author of *No More: The Battle against Human Rights Violations*, published by Dundurn Press.

1 Summary Record of the 1st Part (Public) of the 54th Meeting, held at the *Palais des Nations*, Geneva, 7 March 1990: Commission on Human Rights, 46th Session. U.N. Document E/CN4/1990/SR54.

At the Commission, Peru eventually proposed a modified resolution which passed on 7 March 1990. Instead of creating a special mechanism, as the first draft proposed, the resolution proposed merely that existing mechanisms, existing special rapporteurs and working groups, pay particular attention to the atrocities of armed opposition groups. Instead of a separate item to be put on the following year's agenda, the resolution merely said that the Commission would consider the question as a matter of high priority at that time. To drive home the point that the issue could not be used to excuse government conduct, the resolution reminded states that all human rights obligations must be honoured at all times.

The resolution as passed went too far for both Sweden and Cuba. Both abstained, but for different reasons. The Swedish government felt that the special rapporteurs and working groups should continue to restrict their work to governments. Generally, the task of these mechanisms is two-fold. First, they have a reporting function, monitoring governments' compliance with international human rights instruments. Secondly, they enter into dialogue with governments about such compliance. Sweden felt that if the mechanisms started looking at armed opposition groups, they would be diverted from their proper function.

The Cuban abstention was blamed on an ambiguity in the resolution. The Peruvian resolution refers to the atrocities committed by "irregular armed groups, regardless of their origins, and by drug traffickers." A preamble talks of "growing links" between irregular armed groups and drug traffickers. When introducing the resolution the Peruvian delegate to the Commission on Human Rights, Mr. de Rivero Barretto, noted that the collusion between drug traffickers and irregular armed groups was becoming increasingly apparent. The Peruvian government representative emphasized that the violence of irregular armed groups acting in collusion with drug traffickers was a new phenomenon quite unrelated to the activities of national liberation movements. It is not altogether clear from the resolution whether it was directed against all irregular armed groups who commit atrocities, or only those irregular armed groups who commit atrocities in collusion with drug traffickers. The resolution, in its operative paragraphs, refers to both drug traffickers and irregular armed groups, but does not link the two.

Cuba seized on this confusion. The Cuban delegate, Rao Kouri, said that his government felt the resolution should have only covered armed groups of drug traffickers not irregular armed groups and drug traffickers. That government also believed that the resolution should have made a clear distinction between national liberation movements and drug traffickers. Cuba said it would not vote against the resolution, but only abstain, because it believed that, legally, peoples have a right to combat national or foreign oppression by any available means. It considered that the resolution did not contradict that proposition.

The Cuban position is significant for what it says about the resolution. If indeed the resolution were restricted only to armed groups of drug traffickers, Cuba would

have felt no need to abstain. The very fact that Cuba felt a need to abstain for the reason it gave, indicates that the resolution was not clearly restricted to armed groups of drug traffickers.

Ambiguity, when it occurs in a U.N. resolution, does not occur by happenstance. It results from an attempt to gloss over a variety of different shades of opinion. There were some delegations that wanted a resolution that dealt with irregular armed groups generally. There were others that sought a linkage with drug trafficking. The ambiguous text was the result.

The legal position of Cuba concerning the right of peoples to combat national or foreign oppression by any available means, although it led to an abstention by Cuba, rather than a vote against, is not correct. The legal position for national liberation movements is different from that of other armed opposition groups. There are acts which national liberation groups can commit which at international law cannot be punished by states as crimes. These same acts, committed by other armed opposition groups, can be punished by states as crimes. However it is not true to say, as Rao Kouri of Cuba did, that national liberation movements have the right to use any available means. If that indeed were true, it would mean national liberation movements could commit atrocities of any dimension with impunity.

Because the resolution, and its subsequent versions in later years at the Commission,[2] have not distinguished between national liberation movements and armed opposition groups, the resolution, at least on in one interpretation, covers those groups. Since the international legal regime for national liberation movements and other armed opposition groups is different, what is considered a crime by an armed opposition group that is not a national liberation movement, may not be a crime when committed by a group that is. The resolution has a lesser scope for national liberation movements, because national liberation movements are free to do more. Nonetheless, despite what the Cuban representative said, they are not free to do anything. The resolution would apply For those acts they are not free to commit.

According to the First Protocol to the Geneva Convention on the Laws of War, armed opposition groups representing a people who are fighting against colonial domination, alien occupation or against racist regimes have a special status. These groups are, in effect, treated like state armies. Their combatants, if captured, are to be considered prisoners of war. They cannot be prosecuted for acts of combat, but only for violations of the laws of war.[3] Other armed opposition groups, not in this special category, have no immunity for acts of combat. Armed opposition groups not fighting colonialism, alien occupation or racist regimes can be prose-

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2 For 1993, see resolution 1993/48.

3 G. Abi-Saab, "Wars of National Liberation and the Laws of War" (1972) 3 Ann. Int'l. Stud. 93; D. Schindler, "Different Types of Armed Conflicts" [1979] II Recueil des Cours 116.

cuted for acts of combat alone, whether or not they commit atrocities. The First Protocol is noteworthy not only because it makes this distinction, but also because it acknowledges national liberation forces have an international status. Opposition groups that fall within this category of fighting colonialism, racism or alien occupation can actually become parties to the First Protocol. If an armed opposition group to which the First Protocol applies undertakes to apply the Geneva Conventions and the Protocol, the group assumes the same rights and obligations as any other Party to the Conventions and the Protocol. What that means for opposition groups that make a undertaking is that the argument about international instruments obliging governments only no longer applies. At least these international instruments, the Geneva Conventions and First Protocol, bind the opposition groups who have undertaken to apply them.

The Geneva Conventions and Protocol contain many obligations that are found in the international human rights instruments. The Conventions and Protocol oblige Parties to treat non-combatants humanely and without discrimination. Murder, torture, the taking of hostages, humiliating and degrading treatment, collective punishment, and sentence and execution without judgment pronounced by a regularly constituted court affording the judicial guarantees recognized as indispensable by civilized people, are all prohibited. Caring for the wounded and sick is required.

The significance of the First Protocol, and its application to armed opposition groups should not, however, be overestimated. Not every armed opposition group can sign the Protocol, even if it wished to. The group must, first of all, be involved in a war against colonialism, a racist regime, or alien occupation. There are many armed opposition groups that do not fit into these categories at all. For instance, in Peru which moved the motion about armed opposition groups at the UN Commission on Human Rights, there is an active armed opposition group, the Shining Path or Sendero Luminoso, which has been guilty of the worst form of atrocities. Yet, it would be pointless to conduct a campaign to have the Shining Path undertake to commit itself to the First Protocol of the Geneva Conventions. The battle the Shining Path has waged in Peru is not a battle against colonialism, racism or alien control.

It is not every national liberation movement that can sign on to the First Protocol. The only groups that can sign are authorities representing a people. Representativity is not a self-defining term. An authority does not represent a people simply because it says it does. An objective measurement has to be made whether the authority is, in fact, representative.

Wars of national liberation do not allow for elections to determine representativity. In the absence of elections, other indicators have to be used. The one most commonly relied upon is international recognition.

Some states will recognize a national liberation movement as a provisional government of a territory even when it is not in control of the territory. For instance, the Polisario has been recognized by 35 states as the government in exile of the Western Sahara. Yet Morocco remains in control of the territory.

The United Nation and regional organizations, as well, recognize liberation movements, not as governments in exile, but as legitimate representatives of their peoples. The U.N. recognized, for instance, the P.L.O. as the legitimate representative of the Palestinian people. During the days of apartheid, the Organization of African Unity recognized the African National Congress and the Panafricanist Congress of Azania as representatives of the South African people.

Other authorities which claim to represent a national liberation movement have been found not to be representative, and for that reason, not able to invoke the First Protocol. In the case of *The State* v. *Filberto Ojeda Rios*, Ojeda was charged in Puerto Rico with resisting arrest. He claimed prisoner of war status as a leader of *Los Macheteros* (the Machete wielders), a national liberation movement fighting against what it claimed was colonial domination of Puerto Rico by the U.S. The U.S. courts rejected the claim of Ojeda. One reason that was given was that there was no evidence before the courts that either Ojeda or Los Macheteros had the allegiance of the population of Puerto Rico or recognition by foreign states or intergovernmental organizations.[4]

The First Protocol allows national liberation movements to sign on when the movement is engaged in an armed conflict with a state signatory to the Protocol. That requirement poses yet a further limitation. If the armed conflict is with a state not a signatory to the Protocol, then depositing an undertaking becomes impossible. Neither Israel nor South Africa, the main targets of these provisions of Protocol I, have signed the Protocol.

Because of this last requirement, the value of the undertaking procedure in the First Protocol in committing national liberation movements to humanitarian law is limited. More significant are the common articles of the four Geneva Conventions of 1949 concerning scope of application. One common article states "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."[5] There is a similar

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[4] Report and Recommendation of J.A. Castellanos, U.S. Magistrate, 5 January 1989, incorporating findings of the District Court of Hartford, Connecticut, 10 February 1988.

[5] Article 2(3).

provision in the First Protocol.[6] Another common article of the Conventions states that "it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention."[7] There is a view amongst international legal scholars that the word "Powers" in these provisions is not limited to states. It also includes national liberation movements.

In fact, although no national liberation movement has deposited an undertaking under the First Protocol, a number have made declarations of accession to the Geneva Conventions. For instance both the African National Congress and the Palestinian Liberation Organization have made much declarations. South African and Israel, though not signatories to the First Protocol, have both signed and ratified the four Geneva Conventions.

Once a national liberation movement accepts and applies or undertakes to be bound by the Conventions and Protocol, it can be held accountable for violations of the obligations the same way as governments. The asymmetry between armed opposition groups and governments disappear. Both may accept the same international instruments.

Because there is at least these international instruments that armed opposition groups can accept, those concerned with respect for human rights internationally can promote acceptance by national liberation movements. An integral part of human rights promotion is persuading governments to sign the international human rights instruments. A campaign of acceptance, at least for humanitarian law, can be directed to national liberation movements as well as governments.

The problem the human rights community faces with these instruments is not persuading armed opposition groups to declare acceptance of them. Armed opposition groups have had a history of being quite eager to declare acceptance. The problem is rather whether the human rights community would want to urge acceptance, and acknowledge its consequence. For, the consequence is not only that the humanitarian laws of war apply to the national liberation movement. The consequence is also that these same laws apply to states combatting national liberation movements, including the law of prisoners of war.

According to the Third Geneva Convention, prisoners of war may not be sentenced in the courts of the detaining power to any penalties except those provided for in respect of members of the armed forces of the detaining power who have committed the same acts.[8] What that means, as I mentioned earlier, is that

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6 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, article 96(2).

7 Articles 60/59/139/155.

8 Geneva Convention Relative to the Treatment of Prisoners of War, of 12 August 1949 (Geneva Convention III). *Entered into force* 21 October 1950, article 87.

a member of a national liberation movement cannot be prosecuted for an act of combat.

Israel does not recognize the Palestinian Liberation Organization as entitled to prisoner of war status.[9] The apartheid government of South Africa never recognized that the African National Congress had prisoner of war status.[10] The United States has signed Protocol I but has not ratified it. Ronald Reagan, when he was President of the U.S., sent a message to the Senate advising against ratification. One of the reasons he gave was that to view wars of national liberation as international armed conflict, which Protocol I does, "politicizes humanitarian law."[11]

Even if asking national liberation movements to apply or to declare accession to the Geneva Conventions and the First Protocol is a legal possibility, human rights organizations may wish to stay away from any such request, because it is so politically charged. It is, in effect, taking sides in a dispute between the parties, over whether members of the national liberation movement are entitled to prisoner of war status.

The humanitarian laws of war do not just apply to international armed conflict. They also apply to internal armed conflict. The rules of prisoner of war status do not apply. But the rule against killing non-combatants, against torture, cruel and degrading treatment, and against the taking of hostages do apply. There are minimum provisions of the four Geneva Conventions that apply even when the armed conflict is not of an international charter.

As well there is a separate Protocol, Protocol II of 1977, that deals specifically with non-international armed conflicts and elaborates these minimum provisions. The question that arises is whether the minimum provisions of the Four Conventions and Protocol II can bind armed opposition groups. There is no provision in Protocol II, like there is in Protocol I, to allow armed opposition groups involved in a conflict of an internal character to declare accession to the Protocol. The Protocol applies only in the territory of a signatory state, and only where the dissident armed forces are able to implement the Protocol.[12] This provision introduces an element of reciprocity. But it is reciprocity in ability, not in willingness. States which have acceded to the Protocol are supposed to apply it where dissident armed forces are able to implement the Protocol, whether the dissident armed forces are willing to implement the Protocol or not.

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[9] W.T. Mallison & S.V. Mallison, *The Palestine Problem in International Law and World Order* (Essex, England: Longman, 1986) at 343.

[10] G. Murray, "Southern Africa and the Geneva Protocols" [1984] I.C.L.Q. 462.

[11] (1987) 81 A.J.I.L. 910.

[12] Protocol Addition to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, article 1(1).

Common Article Three to the Conventions states that in case of armed conflict not of an international character occurring in the territory of a signatory party, each party to the conflict shall be bound to apply the listed minimum provision. There are only two limitations on the obligation. One is that conflict be on the territory of a signatory party. That limitation is not one of any real substance, since the Geneva Conventions have virtually universal adherence. The second is that there be an armed conflict. According to the Red Cross commentary on the Conventions, any conflict is an armed conflict once there are armed forces engaged in hostilities. They are conflicts similar to international wars, within the confines of a single country.[13]

The Second Protocol is much more specific about its application. Armed conflict is defined not to include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence. The dissident armed forces must be under responsible command, and exercise control over part of the territory of the state. Responsible commands means there is an organization which is capable of imposing discipline. The Protocol applies only as between a government and insurgents. It does not apply to warring insurgent factions battling amongst themselves. It is more limited in its scope than Common Article Three, but more detailed in its obligations. The substantive obligations about humane treatment, fair trial, treatment of the wounded and sick are spelled out in detail. While the Second Protocol does not have the wide adherence that the Geneva Conventions do. It, nonetheless, has support that Protocol I does not have. Then U.S. President Reagan, for instance, at the time he advised the Senate against ratifying Protocol I, advised in favour of ratifying Protocol II. France has acceded to Protocol II, but not to Protocol I.

In conflicts not of an international character, governments can prosecute the insurgents for acts of combat. Governments will invariably view acts of insurgency as internal rather than international in character, for that reason. For the non-governmental community suggesting a conflict is one to which Protocol II applies may be as political as suggesting the conflict is one to which Protocol I applies. Opting for Protocol II may be seen to be taking the side of governments, against insurgents, just as opting for Protocol I may be seen to be taking the side of national liberation movements against governments.

The best source for obligations imposed on dissident armed groups is the minimum provisions in the Conventions. Relying on the minimum provisions has the advantage of not forcing a decision on whether the conflict is international or internal in character. Common Article Three sets out minimum provisions for internal conflict. Because they are a minimum, if the conflict is international, these provisions would apply in any case. The Geneva Conventions, unlike the Protocols,

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[13] J. De Preux, *The Geneva Conventions of August 12, 1949*, 2d ed, vol. 3 (Geneva: International Committee of the Red Cross, 1970) at 3–7.

have virtually universal acceptance. The limitation of armed conflict in the Conventions, because it is not defined, gives considerable flexibility to allow human rights organizations to intervene in almost any situation they would wish to do so. And the Conventions, unlike the Protocols, apply to conflicts between armed opposition groups. They are not restricted to conflicts between governments and armed opposition groups.

The Geneva Conventions and Protocols are instruments that purport to obligate armed opposition groups to respect international standards. How can they have the effect of creating an obligation on armed opposition groups? The answer is easy for national liberation movements that have formally made an undertaking to apply the Conventions and First Protocol, and deposited a unilateral declaration to that effect. The answer is the same for national liberation movements that have informally accepted and applied the Geneva Conventions and the First Protocol. In these cases, humanitarian law applies to a national liberation movement, because the movement has taken the obligations upon itself.

But how can humanitarian law, or international human rights law obligate an armed opposition group that is not a national liberation movement? The answer to that is threefold. One answer is state succession. A second answer lies in the nature of state obligations. A third answer is part of international criminal law.

Armed opposition groups, once in power, are responsible for all acts they have committed in opposition. If an armed opposition group commits atrocities before it forms the government, then the government it forms is considered a violator of international human rights standards, because of those atrocities. This principle remains the same whether the new government governs all or only part of the territory of the state against which the opposition group rebelled.

The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens states:

> In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official or employee of a revolutionary or insurrectionary group is, for the purposes of the Convention, attributable to the State in which the group established itself as the government.[14]

It does not matter whether the opposition that committed the violations was, at the time, in control of territory or not. It does not matter whether, at the time of violation, there was armed conflict or merely sporadic acts of violence. It does not matter whether the opposition, at the time of the violation, was cohesive and organized or more in the nature of a mob. In all of these cases, once the perpetra-

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[14] Article 18(1) at (1961) 55 A.J.I.L. 576.

tors accede to government, the principle of state responsibility applies.[15] For instance, the United States government held the Cuban government responsible for violations of the laws of war committed by Castro rebels before they formed the government. That was not just a political position. It was the legal opinion of the law officers of the U.S. government.[16]

Irregular armed groups can be divided into two categories. There are those whose violations are merely criminal in nature. These groups have no intention of forming a government. They pursue their armed activities merely for personal gain.

The second group is those whose violations are political. They wish to seize the government of the state. Or they wish to lead a secession, to form the government of part of the territory of the state.

For this second group, the politically motivated irregular armed groups, the principle of state responsibility can be invoked. They may of course fail in their ambitions. But, if they succeed, they will be held accountable, for what they do in opposition, for the whole range of international human rights standards. Acts committed by insurgents before they form the government will be treated as acts of the government, once the insurgents form the government. Governments can be reminded to keep their promises, their international obligations. Insurgents can be asked to be consistent with their wish to form the government. Forming the government means becoming responsible internationally in the future for what they are doing now.

Even for the unsuccessful revolutionary, there is a relevant legal doctrine. It is that treaties made on behalf of the state bind the state as a whole, and not just the government. Treaties in existence when a dispute commences are binding on the insurgent community.[17]

It is not only human rights organizations that invoke human rights standards against violating governments— indeed, often more vehemently than human rights organizations, insurgents themselves invoke such standards. Political opponents of a contested regime are often the first to point to violations or alleged violations by perpetrator governments. When armed opposition groups are protesting human rights violations by perpetrator governments, then the opposition can be justifiably held up to the standards they invoke from their opponents in government. These standards they assert governments should respect, armed opposition groups can,

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[15] D.P. O'Connell, *International Law*, 2d ed., vol. 2 (London: Stevens and Sons, 1970) at 968.

[16] A. Whiteman, 8 Dig. Int'l L. 819 (Washington, D.C.: Dept. of State Publications, 1967).

[17] A.D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 676; A. Lysaght "Protocol II and Common Article 3" 1983 Amer. U.L.R. 9; and I.C.R.C Commentary on the Additional Protocols at 1345.

as well be asked to respect, not merely for the sake of consistency, but also because of international law.

The obligation a state undertakes it may well undertake on behalf of its citizens. Yet reminding a citizen who was not involved in the making of the commitment of the duty owed may not have the same force as reminding the organs of the state which committed the state internationally. However, once the citizen starts invoking the duty against the government, then the human rights community can invoke the duty owed by the citizen as forcefully as it can remind the government of its duty. So, for instance, Colombia proclaimed independence in 1822 from Spain. Colombia rebels of 1824 seized a U.S. ship and confiscated the cargo. After Colombia became independent, it split up, in 1830, into three states—Venezuela, Ecuador, and Colombia. The United States sued Ecuador for the value of the cargo, after Colombia had won independence from Spain. The U.S. relied on a U.S. Spanish treaty signed in 1795 before the Colombian War of Independence had begun. An international board of arbitration found in favour of the United States. The board held that the treaty with Spain was binding on all Spanish subjects, including the Colombian rebels.[18]

Nigel Rodley has argued that international human rights instruments bind only governments and not armed opposition groups, because the instruments are directed to governments.[19] That position either misrepresents the international instruments or confuses governments with states. Yet international human rights instruments do not say governments should do this, and governments should not do that. They contain generalized assertions of rights and freedoms. For instance, the prohibition against torture in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not state that public officials shall not commit torture. Instead those instruments state no one shall be subjected to torture. To restrict these obligations just to government officials is to narrow the scope of their literal meaning and the purpose of the constraints which is, after all, not to regulate governments, but to assert the human rights of individuals.

In some cases, the instruments are quite specific about their reach beyond the government to all citizens. The International Covenant on Civil and Political Rights has each state party undertaking to ensure that any person whose rights or freedoms recognized by the Covenant are violated shall have an effective remedy "notwithstanding that the violation has been committed by persons acting in an

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[18] D.P. O'Connell, *State Succession in Municipal Law and International Law*, vol. 2, at 92–93; A. Moore, "International Law Digest" vol. 5, at 341.

[19] Paper delivered to the Banff Conference on Human Rights, 11 November 1990.

official capacity."[20] The implication is that persons who do not act in an official capacity can violate rights and freedoms recognized by the Covenant. The obligation includes providing an effective remedy when a non-official violates rights and freedoms. The Covenant elsewhere states that nothing in the Covenant may be interpreted as implying for "any state, group or person" any right to perform any act aimed at the destruction of rights and freedoms.[21] Again, the implication is that the Covenant applies to groups and persons directly. Otherwise the caution would have been pointless. Governments represent states, but they are not states. A state includes all of its citizens, governmental officials and non-governmental civilians as well. When a government undertakes an obligation on behalf of the state, the obligation is undertaken on behalf the whole state, governmental and non-governmental people alike, and not just on behalf of the government.

It becomes a matter of interpretation of the particular obligation to determine whether or not it is restricted to government officials. To be sure, there are some international obligations and instruments including some international human rights obligations which are addressed specifically and only to public officials. For instance, the Convention Against Torture defines torture to be an act by which severe pain or suffering is intentionally inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[22] The Code of Conduct for Law Enforcement Officials, as its very name indicates, applies only to officials.

However, the more specific instruments must not be used to read down the more general instruments. The specific does not limit the general. Indeed, the Convention Against Torture states that its definition of torture is "without prejudice" to any international instrument which contains provisions of wider application.[23] When the Universal Declaration of Human Rights, for instance, says everyone has the right to life, it does not say nor mean say that everyone has the right to have public officials respect the right to life. The Declaration means that everyone has the right to have his/her state, that is the government and all the citizens of the state, respect the right to life.[24]

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20 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 999 U.N.T.S. 171, *entered into force* 23 March 1976, article 2(3)(a).

21 *Supra* note 20, at article 5(1).

22 Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment. G.A. res. 39146, annex 39, U.N. GAOR Supp. (No. 51) at 197, *entered into force* 26 June 1987, article 1(1).

23 *Ibid.* at article 1(2).

24 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948), article 3.

The fourth basis of obligation is international criminal law. Not every violation of international human rights law is an international crime, but many human rights violations are international crimes. War crimes, crimes against humanity, genocide, grave breaches of the Geneva Conventions, torture, extrajudicial executions are all international crimes. There is both a universal jurisdiction and a universal duty to prosecute such international crimes.

These international crimes are not just crimes that can be committed by agents of government. Anyone, whether in government or not, is guilty of such a crime, and subject to punishment, if the wrongful act was committed. The notion that private individuals, having no connection with government, can be guilty of crimes under international law was established after World War II, in the cases of Flick, I.G. Farben, Krupp, and Zyklon B.

In the Zyklon B. case, two civilian industrialists were sentenced to death as war criminals for supplying poison gas to concentration camps, knowing of its use there for murder.[25] In the Flick case, Flick was a steel industrialist convicted for using slave labour in his factories and making voluntary financial contribution to the criminal organization, the S.S. He was sentenced to seven years in prison.[26]

The U.S. Military Tribunal that tried Flick stated: "Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in propria persona. There is no justification for a limitation of responsibility to public officials."[27]

The judgment in the I.G. Farben case cited this passage with approval. The judgment in the Krupp trial said much the same thing in other words.[28]

So, for an armed opposition group, it may not be possible to say to them, you have violated your international commitments to respect human rights. But it is possible to say something very similar. One can say, you have violated standards which apply to you because of an obligation your state has undertaken on your behalf. Or, you have violated standards which apply to you and to which you have held your governmental opponents accountable. Or, you have committed an international crime. Or, you have committed an act for which you will be held accountable at international law if you should form a government, which you purport to want to do. Or, you have violated the humanitarian law of armed

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[25] *Law Reports of the Trials of War Criminals* [L.R.W.T.C.], vol. 5, at 59; *History of the U.N. War Crimes Commission* (1948).

[26] L.R.T.W.C., vol. 11, at 1.

[27] *Ibid.* at 18.

[28] L.R.T.W.C., vol. 15, at 60.

conflict, which applies to you by virtue of the Geneva Conventions. Or, in the case of national liberation movements, you have violated the humanitarian laws of armed conflict, which you have accepted or undertaken to apply.

The verbal formulation may be different when judging armed opposition groups than when judging governments. However, there is no reason why an armed opposition group cannot be reproached for an act that would be a violation of international human rights standards if committed by governments. The difference in formulation is a difference in form, not a difference in substance. To use the difference in formulation to generate a substantially different approach belies the international legal reality. It creates an imbalance that is not required by international law.