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Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict

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Abstract

A special challenge posed by the international humanitarian law (IHL) principle of equality of belligerents in the context of non-international armed conflict is the capacity of armed opposition groups to pass sentences on individuals for acts related to the hostilities. Today this situation is conflated by the concurrent application of international human rights and criminal law. The fair trial provisions of IHL can incorporate their human rights equivalents either qua human rights law or by analogy, recognizing that human rights law does not account for the anomalous relationship between a state and non-state party. It is argued that the preferred solution is the latter. This would put greater focus on the actual fairness of insurgent courts rather than on their legal basis. Moreover, it would be consistent with the equality of belligerents principle, a vital condition to encourage IHL compliance by armed opposition groups.

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That until that day
The dream of lasting peace, world citizenship
Rule of international morality
Will remain but a fleeting illusion
To be pursued, but never attained
Now everywhere is war.

Emperor Haile Selassie I (as immortalized
by Bob Marley in the anthem War)

It is quite likely that if states were to convene today in order to draft Common Article 3, the provision of the Geneva Conventions regulating non-international armed conflict, nothing would come of the effort. Even though the text of Common Article 3 explicitly declares that the ''provisions shall not affect the legal status of the Parties to the conflict'', states are more concerned about the implicit status that the invocation of Common Article 3 grants to armed opposition groups – a de facto recognition of some sort of equality with an entity threatening the state's sovereign status and, quite possibly, very existence. Such apprehension clearly existed prior to 1949, and largely accounts for the historical absence from the law of war of internal armed conflict treaty regulation. It also explains why it has been said that the drafting of Common Article 3 ''gave rise to some of the most prolonged and difficult discussions at the Geneva Conference''.[1] Today, the proliferation of the image of international terrorism, as well as the drastically increased ability of non-state opposition groups not only to wage war, but also to mimic the functions of a state, has struck deeply into the psyche of states.

The principle of equality of belligerents, central to the traditional law of armed conflict, is arguably the most disagreeable aspect for states when it comes to adopting a law of non-international armed conflict. By its very nature, the principle strikes at the central tenet of the state, that being its authority over its constituents. Nevertheless, a humanitarian consensus was reached at the 1949 Diplomatic Conference in Geneva (Geneva Conference) imposing obligations on both state and non-state parties to a conflict, albeit in a trade-off that provided a minimum level of protection for a maximum scope of coverage.

Equality in non-international armed conflict, to the extent it exists, is consequently a more limited concept than in international armed conflict. This is due in part to the above-mentioned compromise based on minimum protection and stemming from the asymmetry of the parties. Most of the provisions of Common Article 3 are strictly limited to fundamental humanitarian protections, such as the prohibition of murder or ill-treatment. The fulfilment of these provisions by belligerent parties requires no legal capacity. Yet one provision of Common Article 3 directly impacts on the domain traditionally reserved to the

1 Joyce Gutteridge, ''The Geneva Conventions of 1949'', *British Yearbook of International Law* (1949), p. 300.

state: the administration of criminal justice. Article 3(1)(d), protecting persons not or no longer taking part in hostilities, prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

Two possible conclusions can be drawn from the wording of Common Article 3(1)(d). The first is that it was adopted by states in a spirit of "inequality" consistent with traditional state monopoly on the administration of justice under domestic law. Under this interpretation, Article 3(1)(d) would effectively prohibit armed opposition groups from passing sentences or carrying out executions (except possibly where they have gained control over existing courts), as armed opposition groups would not be deemed to have the requisite capacity to establish a "regularly constituted" court and/or to legislate to meet the judicial guarantees component. Alternatively, armed opposition groups would have the legal capacity, a conclusion which would require states to accept a parallel non-state legislative and judicial system outside of their authority. The result is either a situation in which the principle of equality loses its effective meaning, or one in which a state is potentially obliged to relinquish fundamental components of its sovereignty to a proven enemy-from-within. Common Article 3 has been supplemented by Additional Protocol II to the Geneva Conventions (AP II), covering situations of non-international armed conflict. Applying only to high-threshold conflicts, it loosens the legal basis requirement while enumerating the judicial guarantees of Common Article 3.

Originally, the dilemma could be pursued within the contained legal regime of international humanitarian law (IHL), but gradually other areas of international law have become essential to the equation. While it is clear today that the international regimes of humanitarian, human rights and criminal law are generally interactive, in 1949 there were no binding international norms of international human rights law or international criminal law relating to non-international armed conflict. The personal scope of coverage of the legal regimes is also asymmetrical, which may lead to gaps in protection: IHL creates obligations on states and armed opposition groups and human rights law imposes obligations on states (and arguably armed opposition groups), whereas international criminal law deals essentially with individual responsibility (while imposing certain obligations at state and arguably armed opposition group level). As international criminal law incorporates human rights standards to interpret Common Article 3(1)(d), the provisions of the three international law regimes become cross-referential. Moreover, any hierarchy in the relationship of the legal regimes must be considered. All of these factors may result in the lack of coherence amongst the regimes, having a potential effect on the equality of belligerents with respect to fair trial guarantees.

The principle of equality of belligerents is especially sensitive in non-international armed conflict, due to the lack of combatant immunity. Effective equality would dictate that both sides would be able to prosecute captured combatants for mere participation in hostilities. In international armed conflict,

this would pose no conceptual problems.[2] Yet non-international armed conflict is a different story. If state authorities alone, due to their traditional monopoly on legislative and judicial organs, are allowed to prosecute rebel soldiers for mere participation in hostilities, and not vice versa, the question of equality comes into question.[3]

An effective principle of equality would require that armed opposition groups have the legal capacity to exercise the rights which flow from the obligations and prohibitions of IHL. Otherwise there is little left to convince them to comply with IHL at all. As the obligations and prohibitions are derived directly from international law, the corresponding rights should also exist in international law. This would compensate for the asymmetrical relationship of the parties, wherein the armed opposition group is a sub-state entity subject to the authority of the state. To the extent that the fair trial provisions of IHL require the right to legislate in order to establish courts and enact penal provisions covering conduct related to the conflict, such capacity should exist independent of the state party. On the other hand, the protection of individuals not (or no longer) participating in hostilities requires that they be afforded proper judicial guarantees if prosecuted for an offence related to hostilities. This balance can be best realized by an interpretation of the IHL penal provisions which grants those armed opposition groups possessing the capability in fact to meet the requirements of the law of non-international armed conflict with the *de jure* capacity to establish courts and legislate relevant penal sanctions, regardless of *de jure* status. Such a balance would demand that these courts operate according to a reasonable interpretation of the judicial guarantee requirements which is sensitive to the asymmetrical relationship between states and armed opposition groups, without reducing the *de facto* level of protection.

After assessing the notion of equality in non-international armed conflicts, this article will first take a critical look at the consequences of the interaction between IHL, human rights law and international criminal law in the context of armed opposition group capacity to pass sentences. Section 2 will then analyse the IHL provisions dealing with the passing of sentences and will be followed by a case study of two armed opposition groups which have done so in El Salvador and Nepal. Finally, in section 4, the issue will be looked at from the perspective of the international and individual responsibility of armed opposition groups and their members or affiliates, before proposing a means of confronting the practical and legal difficulties posed by the qualified prohibition on the passing of sentences.

2 Of course, it is not at issue in international armed conflict, as combatant immunity exists under Geneva Convention III.

3 See Marco Sassòli, ''Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian and International Human Rights Law'', paper submitted to the Armed Group Conference, Vancouver, 13–15 November 2003, p. 12, available at www.armedgroups.org/images/stories/pdfs/sassoli_paper.pdf (last visited 19 September 2007).

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I. Equality of belligerents in non-international armed conflict

1.1. Assessing equality

Although the principle of equality of belligerents in the law of armed conflict is fundamental to the distinction between *jus ad bellum* and *jus in bello*, it does not explicitly appear anywhere in the Geneva Conventions of 1949. In the seminal treatment of the subject, Meyrowitz puts to rest any suggestion that an ''unjust'' belligerent should be treated differently from a ''just'' belligerent, even in situations where one belligerent is deemed an aggressor or during wars of national liberation. He concludes,

> L'égalité des belligérants devant le *jus in bello* est un principe qui sous-tend le droit moderne de la guerre, principe qui allait tellement de soi qu'il n'avait pas besoin d'être formulé. Il est certain que ce principe est toujours solidement établi en droit positif.[4]

More recently this point of view has been affirmed by both the International Committee of the Red Cross (ICRC) and a number of legal commentators.[5]

Yet while the principle is undoubtedly established in the law of international armed conflict, there is good reason to question its status in the law of non-international armed conflict. This is because international law, or the law of nations as it was once termed, traditionally regulates interactions between sovereign and equal states. As Vattel put it, ''A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.''[6] There is of course no such traditional horizontal deference when it comes to the relationship between a state and an armed opposition group, as such groups have been considered to be under the vertical domain of domestic law – even though a dwarf state may be de facto less of a man than a giant armed opposition group.

4 Henri Meyrowitz, *Le Principe de L'égalité des Belligérants Devant Le Droit de La Guerre* Éditions A. Pedone, Paris, 1970, p. 400. Translated: ''The equality of belligerents in *jus in bello* is an underlying principle of the modern law of war, a principle that was so self-evident that it needed no formulation. This principle is certainly still as firmly established as ever in positive law.''

5 See ICRC, *International Humanitarian Law and Challenges of Contemporary Armed Conflicts*, 28th Annual Conference of the Red Cross and Red Crescent, 2–6 December 2003, Geneva, p. 19, stating, ''The principle of the equality of the belligerents underlies the law of armed conflict'', available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/5XRDCC (last visited 27 September 2007); see also Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, ICRC, Geneva, 2005, p. 106; Nathaniel Berman, ''Privileging Combat? Contemporary Conflict and the Legal Construction of War'', *Columbia Journal of Transnational Law*, 2004, Vol. 43, no. 1, p.12, stating, ''The ''equality of belligerents'' in the eyes of *jus in bello*, regardless of their relative merits on *jus ad bellum* grounds, remains a cardinal principle of the law of war''; François Bugnion, ''*Jus ad Bellum* and *Jus in Bello* and Non-International Armed Conflicts'', in T. McCormick (ed.), *Yearbook of International Humanitarian Law*, Vol. 6, T.M.C. Asser Press, The Hague, 2003, p. 174, stating, ''This principle dominates the entire body of the laws and customs of war.''

6 Emerich de Vattel, *Law of Nations*, Preliminaries, para. 18, available at http://www.constitution.org/vattel/vattel_pre.htm (last visited 18 September 2007).

This axiomatic difference renders any analogous extension of the equality principle to internal conflict difficult. Based on the asymmetrical quality of the parties, one may therefore expect that the principle of equality of belligerents has not experienced a smooth transition into the law of non-international armed conflict.

Common Article 3 binds each party to the conflict. The ICRC Commentary to Article 3 (Geneva Commentary) proclaims that the words ''each party'' mark a step forward in international law.[7] This statement is undoubtedly true, but the final text of AP II of 1977 may just as easily mark a step back. The 1973 ICRC Draft Protocol II was based on Four Principles, one of them being that ''the guarantees should be granted to both sides of such conflicts on a basis of complete equality''.[8] Draft Article 5 clearly enunciated such a principle:

> The rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them.[9]

However, when it became clear that AP II was in serious danger of being rejected at the Diplomatic Conference, Pakistan took the initiative to get rid of ''any provision which made it appear that the two sides were on the same level or had equal rights''.[10] Draft Article 5 was dropped, and the final text included no reference at all to parties to the conflict. The delegate from Zaire justified the rejection of the Draft Protocol, declaring that some of its provisions treated ''a sovereign state and a group of insurgent nationals, a legal Government and a group of outlaws, a subject of international law and a subject of domestic law, on an equal footing''.[11] This statement is especially revealing, as it alludes to the position of many states that did not exist at the time of the Geneva Conference of 1949, and it was reaffirmed at the First Periodical Meeting on Humanitarian Law in 1998, about which Zegveld notes,

> [S]everal states re-emphasized their objections to the qualifications of armed opposition groups as a party to the conflict within the meaning of international humanitarian law. In their view, the better way to deal with internal conflicts is through international criminal prosecution of individuals.[12]

7 International Committee of the Red Cross, *Commentary IV, Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, ICRC, Geneva, 1958, p. 37.

8 Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982, p. 604.

9 ICRC, *Commentary to the Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, ICRC, Geneva, 1973, p. 135.

10 Bothe et al., above note 8, p. 606.

11 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (CDDH), Geneva, 1974–7, Federal Political Dept., Bern, 1978, SR.56, para. 126.

12 Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p.10, at n. 1, citing ICRC, International Conference of the Red Cross and Red Crescent, 31 October–6 November 1999, Geneva, Annex II (1999). Note that the scope of this statement also reflects the opinion of these states with respect to Common Article 3.

One may therefore question the assertion of the Commentary to AP II, which alleges that the Protocol grants "the same rights and impose[s] the same duties on both the established government and the insurgent party".[13] In fact these developments may even cause one to speculate as to the durability of the principle of equality in non-international armed conflict overall.[14]

The issue of how armed opposition groups are bound by IHL cannot be separated from the notion of equality, as only states have the requisite legal personality to become parties to the Geneva Conventions and Additional Protocols. With respect to Common Article 3, the Geneva Commentary suggests that armed opposition groups are bound due to a principle of "effective sovereignty" over territory.[15] Such an argument is compelling from a perspective of equality, as it purports to bind armed opposition groups in the same way that successive governments are bound by the international obligations of their predecessors. The weakness is, however, revealed in its scope of coverage, as, according to the Commentary, only those groups who "claim to represent the country, or part of the country" would be bound.[16]

An alternative yet popular view is that armed opposition groups are bound by nature of the customary status of the obligation requiring them to respect Common Article 3 (as distinct from the customary status of Common Article 3 itself). The Special Court for Sierra Leone (SCSL) has pronounced that

> there is now no doubt that [Common Article 3] is binding on States and insurgents alike, and that insurgents are subject to international humanitarian law … [a] convincing theory is that [insurgents] are bound as a matter of customary international law to observe the obligations declared by [Common Article 3] which is aimed at the protection of humanity.[17]

While this explanation may suffice for purposes of imposing international responsibility, the reasoning does not point towards equality if the practice of states alone determines the customary rule. Surely equality, in the broad, everyday

13 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff Publishers, Geneva, Dordrecht, 1987, para. 4442. The failure to form a consensus on equal application is also highlighted by the different comments of the Belgian and Sudanese delegations to the CDDH. Belgium pointed to Article 1, wherein AP II "develops and supplements" Common Article 3, in order to conclude "the basic sovereign principle that the obligations of the Protocol are equally binding on both Parties to the conflict." (CDDH, Vol. VII, Annex p.76, reproduced in Sassòli and Bouvier, above note 5, p. 964. Sudan stated that AP II is "simply a concession on the part of States". CDDH/SR.56, para. 37.

14 Doswald-Beck argues that equality of belligerents "in every respect" is inappropriate for non-international armed conflict, as states do not accept the principle. Sassòli and Bouvier alternatively contend that while IHL respects the principle of equality in non-international armed conflict, "it cannot request domestic law to do so". See Louise Doswald-Beck, "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?", *International Review of the Red Cross*, no. 864 (December 2006), p. 903; Sassòli and Bouvier, above note 5, p. 108.

15 Commentary IV, above note 7, p. 37.

16 Ibid., p. 37. However, effective sovereignty should not depend on intention but on fact.

17 *Kallon, Kamara, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, SCSL-04-15-PT-060, 13 March 2004, paras. 45, 47.

sense of the term, would demand that in order for insurgents to be bound by a customary rule, their practice would need to be taken into account.

Sassòli, who advocates an ''ownership'' approach to the promotion of respect for IHL by armed opposition groups, claims that these non-state actors already participate in the formation of customary IHL and human rights law.[18] The view that ''rebel practice'' and opinion helps to form the customary law of IHL is supported by the International Criminal Tribunal for the former Yugoslavia (ICTY) *Tadić* Jurisdiction decision and the Report of the UN Commission of Enquiry on Darfur (Darfur Commission).[19] However, it is noteworthy that neither the ICTY Appeals Chamber nor the Darfur Commission pointed to any rebel practice that contradicted IHL norms created by states.[20] One may therefore question whether this partial acceptance of rebel practice is akin to the right to exercise a democratic vote under a totalitarian regime.

Customary International Humanitarian Law (ICRC Study), conversely, does not take rebel practice into consideration, declaring that ''its legal significance is unclear''.[21] Jean-Marie Henckaerts, a co-editor of the ICRC Study, has unequivocally stated that ''Under current international law, only State practice can create customary international law''.[22] While a theory that non-state actor participation in the development of customary law may make a great deal of sense in a post-Westphalian order, it remains controversial.[23] At any rate, the notion that armed opposition groups are bound by the customary nature of their Common Article 3 obligations makes one question the meaning of ''equality'' if they have been unable to participate in its formation.

The binding nature of AP II, which is not fully considered as customary law, is even more problematic. Sivakumaran contends that the only way that

18 Sassòli, above note 3, p. 6. For support of non-state actors forming customary law in general, see R. Gunning, ''Modernizing Customary Law: The Challenge of Human Rights'', *Virginia Journal of International Law*, Vol. 4 (1999), p. 221.

19 *Prosecutor* v. *Duško Tadić*, ICTY, IT-94-1-AR72 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October, 1995, paras. 107–108; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 2005, para. 156, available at www.ohchr.org/english/darfur.htm (last visited 18 September 2007). Note that Antonio Cassese was both the president of the 1995 ICTY Appeals Chamber and the chairman of the 2005 Darfur Commission.

20 For example, with respect to its 2006 conflict with Israel, the leader of Hezbollah is quoted by Amnesty International as saying, ''As long as the enemy undertakes its aggression without limits or red lines, we will also respond without limits or red lines''. Hezbollah is also quoted as stating that it generally respects IHL. See BBC News, ''Hezbollah Accused of War Crimes,'' 14 Sept. 2006, available at http://news.bbc.co.uk/2/hi/middle_east/5343188.stm (last visited 18 September 2007). This practice would be contrary to Rule 148, *Customary International Humanitarian Law* (the ICRC Study), which prohibits belligerent reprisals against civilians. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols., ICRC and Cambridge University Press, Geneva and Cambridge, 2005, Vol. 1, p. 526.

21 Henckaerts and Doswald-Beck, above note 20, p. xxxvi.

22 Jean-Marie Henckaerts, ''Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law'', in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors, 25th-26th October 2002*, Collegium, Vol. 27 (Spring 2003), p. 128.

23 Although the concept with respect to armed opposition groups as *lex ferenda* is supported by both Sivakumaran (see below n. 24) and Henckaerts, above note 22, p.128. Further questions, such as the weight which should be given to rebel practice, remain outside the scope of the current study.

armed opposition groups will be bound in all circumstances is through the principle of domestic legislative jurisdiction, wherein armed opposition groups are simply subject to domestic law.[24] From a perspective of international duties, such an approach removes armed opposition groups from being the addressees of AP II. Yet, as Cassese correctly points out, it is not the status of rebels at domestic law, but at international law, that is at issue.[25] In the case of fair trial guarantees, the distinction is essential, assuming that domestic law would prohibit armed opposition groups from operating courts. Cassese instead looks to the customary law of treaties to conclude that armed opposition groups are only bound based on their consent to be bound.[26] While this conclusion would be consistent with any definition of the principle of equality, the result would be similar to the theory of the Common Article 3 Commentary, as it would leave many armed opposition groups outside of the scope of coverage by AP II.

1.2. Equality vs. parity

The above analysis highlights the dilemma in the application of the principle of equality of belligerents to the vertical relationship between state and non-state entities. It is clear that the principle of equality of belligerents cannot be transposed from international armed conflict if equality is to refer to the rights of the parties in relation to their ability to affect the law, rather than simply to their ability to act under the law.

One way around this problem is to acknowledge that the principle of equality of belligerents is a narrow concept that does not extend to status. The principle does not necessarily mean equal standing, but *equal rights and obligations flowing from the international law norms regulating the subject matter of IHL*. The significance of the term ''international law'' here requires further clarification. First, ''international law'' limits the scope of equality by excluding rules of municipal law, both state and insurgent, from the equation. Second, ''international law'' is not limited to IHL itself, but encompasses all international norms which have a bearing on the rights and obligations flowing from Common Article 3, AP II and the customary law of non-international armed conflict. These additional norms include international human rights law, international criminal law and international terrorism conventions.

We can therefore apply the term ''parity'' to represent a general equality of status as exists between states at international law, while restricting ''equality'' to the notion captured in the definition above. Disparity may mean that states have more general rights and obligations than armed opposition groups, but their rights and obligations with respect to the IHL subject matter should remain equal.

24 Sandesh Sivakumaran, ''Binding Armed Opposition Groups'', *International Comparative Law Quarterly*, Vol. 55 (April 2006), p. 371.

25 Antonio Cassese, ''The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts'', *International Comparative Law Quarterly*, Vol. 30 (April 1981), p. 429.

26 Ibid., pp. 428–30.

For example, the creation of an international norm applying a strict definition of torture contained in the UN Convention against Torture (CAT), a human rights treaty, to the prohibition of torture contained in Common Article 3(1)(a) would in fact create an inequality (favouring the armed opposition group), as the definition requires the act to be committed by a ''public official'' or ''person acting in an official capacity''.[27] In fact, the ICTY *Čelebići* decision[28] reinterpreted the ''traditional'' definition of torture in order to extend the concept of ''official capacity'' to armed opposition groups during armed conflict – in line with the equality principle – although such equality may not necessarily be maintained outside armed conflict. While the severing of equality from parity may suffice to bring most issues which arise in non-international armed conflict under the principle of equality,[29] the capacity of armed opposition groups to pass sentences remains problematic due to the convergence of the different international law regimes.

2. Convergence of international humanitarian, international human rights and international criminal law

2.1. Human rights implications

While it is no doubt true that the convergence of IHL and international human rights law has for the most part found a comfortable fit, Lubell notes that ''[t]he focus of the arguments is now shifting from the question of if human rights law applies during armed conflict to that of how it applies, and to the practical problems encountered in its application.''[30] The intention here is to concentrate on one aspect that has not been generally tackled: the problem (from the point of view of armed opposition groups) of the convergence with respect to the passing of sentence during non-international armed conflict. Specifically, international human rights law requires that anyone being prosecuted on criminal charges is entitled to a hearing ''by a competent, independent and impartial tribunal established by law''.[31] To the extent that the ''regularly constituted'' requirement of IHL incorporates the ''established by law'' criterion as understood by human

27 Article 1of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 UNTS 85.

28 *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, ICTY, IT-96-21-T, 16 November 1998, para. 473.

29 There are other potential inequalities which remain outside the scope of this paper. See Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2000, Annexed to GA Resolution 54/263, and Article 2 of the Draft Comprehensive Convention on International Terrorism, A/57/37, available at http://hei.unige.ch/~clapham/hrdoc/docs/a-57-37.pdf (last visited 18 September 2007).

30 Noam Lubell, ''Challenges of Applying Human Rights Law to Armed Conflict,'' *International Review of the Red Cross*, no. 860 (December 2005), p. 738.

31 These principles are taken from Article 14 of the ICCPR, and are also expressed in the regional human rights treaties. See ECHR Article 6 and I-ACHR Article 8.

rights law, an armed opposition group may be barred from passing sentences. Furthermore, the judicial guarantees requirement is also at issue due to possible interpretations of the human rights *nullum crimen sine lege* requirement. The equality of belligerents, a principle with which human rights law is not concerned, is a potential casualty of the convergence.

The dilemma can be put in context by looking at how the two separate legal regimes (the law of non-international armed conflict and human rights law) came of age, since at the end of the Second World War neither regime existed in international law. With respect to the negotiations at the Geneva Conference of 1949, Elders points out, "Of course any suggestion that the [1948 Declaration on the Rights of Man] was a binding instrument of international law …would have been met with looks of incredulous surprise."[32] Therefore, in negotiating the codification of minimum humanitarian norms to regulate non-international armed conflict for the first time, it would not have been especially problematic for the Geneva Conference delegates to assume that Common Article 3(1)(d) was a self-contained system which could theoretically be equally applied by state and non-state parties.

2.1.1. Established by law

Although the term "established by law" eventually became the norm of binding human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), it did not make its debut until 1950 in Article 6 of the European Convention on Human Rights. The Nowak commentary states that the word "competent", as appearing in Article 14 of the ICCPR, "merely represents a more specific formulation of established by law", and then continues,

> Both conditions are to ensure that the jurisdictional power of a tribunal is determined generally and independent of the given case, i.e., not arbitrarily by a specific administrative act. The term "law" is … to be understood in the strict sense of a general-abstract parliamentary law or an equivalent, unwritten norm of common law, which must be accessible to all persons subject to it. A law of this sort must establish the tribunals and define the subject matter and territorial scope of their jurisdiction.[33]

The European Court of Human Rights has summarized its case law in the decision of *Coeme et al.* v. *Belgium*, stating that "the object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament".[34] On the other hand, in the *Fals Borda* Communication, the Human Rights Committee

32 David Elders, "The Historical Background of Common Article 3 of the Geneva Conventions", *Case Western Reserve Journal of International Law*, Vol. 11 (1979), pp. 56–7.

33 Manfred Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary*, N. P. Engel, Kehl, 1993, p. 245.

34 *Coeme et al.* v. *Belgium*, European Court of Human Rights, 22 June 2000.

(HRC) did not consider the ''established by law'' criterion, stating that it ''does not deal with questions of constitutionality, but whether a law is in conformity with the Covenant''.[35] This Communication has been the subject of scrutiny, as commentators have noted that ''the constitutionality or legality of a tribunal's existence *is* an issue with which the HRC should be concerned''.[36]

The term ''established by law'' has also been considered by the ICTY Appeals Chamber *Tadić* (jurisdiction) decision. In assessing its own competency, the Court endeavoured to distinguish the international nature of the tribunal in order to loosen the problematic legislative requirement. The Court effectively created a two-tier system affirming in a municipal setting the responsibility of a state to guarantee the right to have criminal charges determined by a tribunal ''established by law''.[37] By contrast, in an international setting, ''established by law'' was watered down to mean ''in accordance with the rule of law'', whereby a tribunal must be established by a competent organ (e.g. the Security Council) and observe requirements of procedural fairness.[38]

The case law of both treaty bodies treats the legal basis of ''established by law'' as a separate requirement from judicial guarantees. On the other hand the ICTY, at least with respect to international tribunals, considers essential guarantees to form part of the legal basis. The latter determination has been properly criticized as rendering ''established by law'' redundant.[39] Yet in none of the determinations were the rights and responsibilities of purely non-state actors considered.

2.1.2. Addressees of the law

A related and important issue in our analysis of the convergence of IHL and human rights law obligations is the asymmetry of the addressees. The imposition of IHL of non-international armed conflict obligations directly on both the state and non-state parties to a conflict is seen as a radical step in international law. Human rights treaties, however, were drafted by states within a more conventional framework, having only the obligations of states in mind. In its 3rd Report on Colombia, the Inter-American Commission of Human Rights stated,

35 *Fals Borda et al.* v. *Columbia*, Human Rights Committee, 46/79, 27 July 1982.

36 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary*, 2nd edn, Oxford University Press, Oxford, 2004, p. 407.

37 *Tadić* (Jurisdiction), above note 19, para. 42.

38 Ibid., para. 45.

39 For criticism, see Jose E. Alvarez, ''Nuremberg Revisited: The *Tadić* Case'', *European Journal of International Law*, Vol. 7, no. 2 (1996), p. 17 of online version available at http://www.ejil.org/journal/Vol7/No2/art7.pdf (last visited 18 September 2007). While the Appeals Chamber seemed to put some emphasis on the Security Council being a competent organ, such an argument is inconsistent with Nowak, above note 33, wherein ''competent'' was equated with ''established by law''. The judgment would also seem to run foul of the theory that the Security Council does not have the competence to legislate.

> [H]umanitarian law rules governing internal hostilities apply equally to and expressly bind all the parties to the conflict, i.e. State security forces, dissident armed groups and all of their respective agents and proxies. In contrast, human rights law generally applies to only one party to the conflict, namely the State and its agents.[40]

In applying human rights law, the Office of the High Commissioner for Human Rights (OHCHR) in Nepal differentiated between ''obligations'' of states and ''commitments'' of armed opposition groups.[41]

Clapham, a strong advocate for extending human rights obligations to non-state actors in general, suggests that even though the HRC goes out of its way to stress that the ICCPR does not create obligations for non-state actors, the ''careful phrasing'' of its General Comment 31 leaves the door open for an interpretation that general international law may in fact extend such obligations.[42] Regarding Darfur, the Human Rights Commission has stated that ''[t]he rebel forces also appear to violate human rights and humanitarian law.''[43] Further examples of international bodies seeming to hold armed opposition groups accountable for human rights violations are quite numerous.[44] It must be concluded that the jury is still out on the human rights law obligations of armed opposition groups.[45]

The implications for our purposes are quite severe. With respect to a legal basis for detention in non-international armed conflict, asymmetry would create a gap in protection for individuals detained by armed opposition groups – IHL is silent on the subject matter and the human rights norm of freedom from arbitrary detention would only apply to the state party.[46] This would in fact allow armed

40 Inter-American Commission of Human Rights, *3rd Report on the Human Rights Situation in Columbia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, ch. 4, para. 13.

41 OHCHR-Nepal, ''OHCHR-Nepal calls on CPN-Maoist to fulfil commitments to stop human rights abuses'', press release, 11 September 2006, available at http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/SEP2006/2006_09_12_HCR_PressRelease_E.pdf (last visited 19 September 2007).

42 Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 328–9. The relevant part of General Comment 31, para. 8, reads, ''[the obligations to ensure respect for the Covenant] are binding on State parties, and do not, as such, have direct horizontal effect as a matter of international law''. Available at http://www.ohchr.org/english/bodies/hrc/comments.htm. Although Clapham does not mention what aspect of the phasing is ''careful'', one can assume that he is referring to ''as such''.

43 E/CN.4/2005/3, CHR, 61st Session, Item 4, *Situation of Human Rights in the Darfur Region of the Sudan*.

44 For examples and discussion, see Clapham, above note 42, pp. 281–5.

45 One should also consider the problem of holding armed opposition groups accountable only during armed conflict, but not before or after. For discussion on human rights obligations of armed groups controlling territory, see Christian Tomuschat, ''The Applicability of Human Rights Law to Insurgent Movements'', in H. Fischer, U. Froissart, W. Heintchel von Heinegg and C. Raap (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Fetschrift für Dieter Fleck*, Berliner Wissenschafts-Verlag, Berlin, 2004, pp. 586–7.

46 The carrying out of executions would still require a fair trial. For discussion on the right to detain without trial see Zegveld, above note 12, pp. 65–7, where she points out that some (but certainly not all) international bodies have dubiously filled the gap by importing either human rights standards for application to armed opposition groups, or by applying the law of occupation by analogy. While asymmetrical application would create disparity, it would not create inequality according to our definition as the norm derives from human rights law rather than IHL.

opposition groups to detain with impunity (from the viewpoint of international law) and would thereby act as a disincentive to provide for fair trials, since their international responsibility would only be invoked on the passing of sentences. Furthermore, the obligation on states to protect human rights may at any rate prevent states from recognizing the capacity of armed opposition groups to create courts if such courts are not considered to be ''established by law''.

2.1.3. Derogations

Another discrepancy to consider is that human rights law allows for derogations from some of its provisions under certain stringent conditions where the ''life of the nation'' or ''security or independence of the State party'' is threatened.[47] For our purposes, such derogation must be strictly required and consistent with other obligations of international law, for example IHL.[48] Already here the problem of applying this principle to armed opposition groups is exposed. First, the personal scope of the capacity to derogate hardly seems to accommodate an armed opposition group. Second, the very existence of an armed opposition group involved in an armed conflict will mean that the derogation regime would tend to become the norm. The issue is especially relevant to the passing of sentence in situations of non-international armed conflict, since the ''established by law'' requirement has been considered a quasi non-derogable human rights obligation,[49] and the *nullum crimen sine lege* requirement is expressly non-derogable.

2.2. International criminal law: completing the circle

Until the 1995 ICTY *Tadić* (Jurisdiction) decision, the same ''incredulous looks'' associated with the suggestion that human rights instruments imposed obligations in 1949 would have followed a suggestion that breaches of Common Article 3 attract international individual criminal responsibility.[50] The Appeals Chamber, using a very thin retrospective of state practice and *opinio juris*, came to the conclusion that customary law creates individual criminal liability for Common

47 ICCPR Article 4; ECHR Article 15; I-ACHR Article 27

48 Ibid.

49 See General Comment 29, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16 and Article 27(2) of the Inter-American Convention on Human Rights. While the Comment considers that ''fundamental guarantees must be respected during a state of emergency'', it does not make reference to ''established by law'', instead stating that ''only a court of law may try and convict a person for a criminal offence.'' Article 27 prohibits derogations from the judicial guarantees essential to the protection of non-derogable rights, a notion which would be invoked and create a special regime in cases of the death penalty.

50 See Theodor Meron, ''International Criminalization of Internal Atrocities'', *American Journal of International Law*, Vol. 89, no. 3 (1995), pp.559–63, where he notes that even the ICRC did not recognize such liability. Meron argues that criminalization has been confused with jurisdiction, which in his view accounts for the conservative view towards the individual responsibility of Common Article 3 violations. The Security Council, however, had already, and for the first time, criminalized violations of Common Article 3 in the ICTR Statute, and Meron points to some sources in the early 1990s (all Western) which had advocated the criminalization of Common Article 3.

Article 3 breaches.[51] Certainly the ruling was a catalyst for self-fulfilling prophecy, as today, just over ten years later, the notion is established as a treaty obligation on the more than 100 states parties to the ICC.[52]

The imposition of criminal responsibility for breaches of Common Article 3(1)(d) under Article 8(2)(c)(iv) of the ICC Statute complicates the puzzle with respect to equality of belligerents. First, it adds a further personal scope of coverage to the subject matter of Common Article 3, already made complex by the asymmetrical application of IHL and human rights law. This can lead to different outcomes for different classes of subjects exposed to different standards, for example, when it comes to command responsibility. Second, Article 21(3) of the ICC statute declares that the application and interpretation of the relevant law ''must be consistent with internationally recognized human rights''.[53] In effect, this creates what Pellet critically calls a ''super-legality'', wherein a hierarchy of norms gives an ''intrinsic superiority'' to certain rules due to their subject matter rather than their source.[54] Although one may be tempted to conclude that Article 21(3) refers only to procedural measures of the ICC, Arsanjani calls the provision ''sweeping language'', creating a standard ''against which all the law applied by the court should be tested''.[55] Accordingly, ''regularly constituted'' could be interpreted to encompass the state-centric human rights notion of ''established by law'' when it comes to individual responsibility but not necessarily state responsibility.

The principle of complementarity means that much of the effect of the ICC Statute will be realized within domestic jurisdictions controlled by courts of the state party, outside the scrutiny of international mechanisms. It is conceivable that a state, under cover of Article 21(3), may prosecute (or threaten the prosecution of) individuals associated with insurgent courts for the sake of political leverage, even when the armed opposition group in general, and these individuals specifically, respected IHL. The result would be a disturbing situation wherein the cross-referential interaction of IHL, human rights law and international criminal law would impose more exacting conditions for individual penal responsibility than for international responsibility.

51 ICTY, *Tadić* (Jurisdiction), above note 19, paras. 128–134.
52 ICC Statute Article 8(2)(c). It was easier for the ICC treaty drafters to include emerging law, or create new law, as ICC jurisdiction is not retroactive, whereas the ICTY jurisdiction applies retroactively.
53 ICC Statute, Article 21(3).
54 Alain Pellet, ''Applicable Law'', in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 1079.
55 M. Arsanjani, ''The Rome Statute of the International Criminal Court'', *American Journal of International Law*, Vol. 93 (1999), p. 29.

3. The passing of sentences under international humanitarian law

3.1. Common Article 3(1)(d) and Additional Protocol II Article 6(2)

The text of Common Article 3(1)(d) prohibits both governments and armed opposition groups from passing sentence unless by a ''regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples''. This article is divisible into two requirements, the first – ''regularly constituted court'' – addressing the legal basis for passing sentence, and the second addressing the judicial guarantees. While such proscriptive language does not in itself provide any legal basis for the establishment and operation of courts by armed opposition groups, it does not explicitly prohibit it either. Zegveld, in her seminal text on accountability of armed opposition groups, notes that the prohibition ''does not make clear what specifically is expected from armed opposition groups''.[56]

AP II, which ''develops and supplements [Common Article 3] without modifying its existing conditions of application'',[57] also divides the prohibition into two parts. The *chapeau* of Article 6(2) prevents the passing of sentences ''except pursuant to a conviction by a court offering all the essential guarantees of independence and impartiality''. In relation to Common Article 3, the first requirement drops the ''regularly constituted'' qualifying provision of what type of court is necessary, while the second requirement substitutes one standard of guarantees (i.e. independence and impartiality) for the other (i.e. recognized as indispensable by civilized peoples).

When it comes to the second prohibition, AP II does exactly what it purports to do, enumerating a list of six guarantees in the following sub-sections. These substitutions succeed in developing and supplementing the prohibition without modifying it. With respect to the first prohibition, however, by simply removing the qualifier ''regularly constituted court'', Article 6 does nothing to ''develop or supplement'' the Common Article 3 prohibition. It in fact loosens it. Furthermore, it is hard to reconcile the deletion of the ''regularly constituted'' requirement with the disclaimer regarding the unmodified application of Common Article 3. Yet the reason for the deletion is clear enough. The ICRC Commentary to the Draft Additional Protocols of 1973 admits that ''the words ''regularly constituted'', qualifying the word ''court'' in Common Article 3, were removed, as some experts considered that it was not very likely that such a court could be regularly constituted within the meaning of national legislation if it were set up by the insurgent party''.[58] One may therefore be justified in questioning, in the specific case of the legal basis for the passing of sentences, whether this

56 Zegveld, above note 12, p. 69.
57 Article 1(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II).
58 ICRC, *Commentary to Draft Additional Protocols*, above note 9, p. 142.

Protocol which purports to develop Common Article 3 does not, in fact, end up contradicting it.

The problem, however, goes beyond mere consistency of application. First, the lack of universal ratification, especially in countries experiencing internal conflict, means that AP II often does not apply to situations of non-international armed conflict. Second, the threshold gap means that a conflict may trigger the application of Common Article 3 but not AP II.[59] In either case, it is difficult to imagine how the provisions of Common Article 3 can be ''developed and supplemented'' by further provisions of AP II which do not necessarily apply to the situation at all. It is also difficult to reconcile the fact that a provision which applies to a lower threshold of conflict (i.e. Common Article 3) is actually narrower in terms of the conditions under which it will allow the passing of sentences (i.e. the requirement of ''regularly constituted court'').[60] This specific anomaly relevant to the passing of sentences actually contradicts the Commentary to AP II on the general relationship between AP II and Common Article 3:

> The Conference chose in favour of the solution which makes the scope of protection dependent on intensity of the conflict. Thus, in circumstances where the conditions of application of the Protocol are met, the Protocol and Common Article 3 will apply simultaneously, as the Protocol's field of application is included in the broader one of Common Article 3.[61]

Yet one must not lose sight of the essential reality: a court established by law can still result in an unfair trial, while one which offers all the essential guarantees cannot. Therefore a disproportionate emphasis on the legal basis requirement at the expense of judicial guarantees could result in the weakening of protection for those not, or no longer, participating in hostilities, especially when one considers that these courts will continue to operate whether they meet international obligations or not.

3.1.1. The first requirement: legal basis

One aspect of the term ''regularly constituted court'' on which many authorities tend to agree is that the definition is difficult to pin down.[62] The US Supreme Court, in its recent landmark *Hamdan* decision, notes that the term is ''not

59 For a comprehensive analysis of the threshold gap, see Zegve1d, above note 12, pp. 134–46 and Sandoz et al., above note 13, paras. 4446–4479. For a cautionary note on whether the gap does in fact exist, see Francoise Hampson, ''Human Rights and Humanitarian Law in Internal Armed Conflict'', in Michael Meyer (ed.), *Armed Conflict and the New Law*, Vol. 1, British Institute of International and Comparative Law, London, 1989, p. 67.

60 On ''regularly constituted court'' as a more difficult prerequisite than AP II, see Peter Rowe, *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, 2006. See also below on ONUSAL.

61 Sandoz et al., above note 13, para. 4457.

62 See for example, Zegveld, above note 12, p. 69.

specifically defined in either Common Article 3 or its accompanying commentary".[63] In order to help clarify the term, the *Hamdan* majority looked to the Commentary on Article 66 of Geneva Convention IV, which associates the "properly (or regularly) constituted courts" of an occupying power with its own "ordinary military courts".[64] Article 66 declares that an occupying power may establish such courts in the territory it occupies for the purposes of adjudicating breaches of the laws it enacts under the exceptional authority of Article 64. Yet the fact that the Civilian Convention creates an explicit legal basis for courts of the occupying power, while Common Article 3 contains no such explicit basis, is not particularly relevant in considering the meaning of "regularly constituted" with respect to an armed opposition group. The Civilian Convention is of course only applicable to conflicts between states, and therefore does not consider the disparity between states and armed opposition groups when it comes to the legal basis for establishing courts. In the case of *Hamdan*, the Supreme Court was only concerned with the courts established by the state party, and did not touch on issues that could be prejudicial to the rights of armed opposition groups. This illustrates that for the purposes of non-international armed conflict, the definition of "regularly constituted court" must be seen as particularly nuanced in relation to definitions of similar terms appearing in the Geneva Conventions dealing with international armed conflict.

The ICRC Study concludes that in both international armed conflict and non-international armed conflict, the customary standard for passing sentence is a "fair trial offering all the essential guarantees".[65] Unfortunately, in discussing this rule the analysis does not distinguish between the two types of conflict, even though it does so, for example, with regard to the Rule on Detention. One may wonder whether an opportunity to provide for some nuance with respect to the anomaly of disparity in non-international armed conflict was therefore lost. Even though the Rule itself does not make reference to the Common Article 3 standard, the accompanying discussion nevertheless makes a determinative finding on the requirements of "regularly constituted court" in the context of both Common Article 3 regulating non-international armed conflict and Additional Protocol I Article 75 regulating international armed conflict. However, the definition is not based on analysis of state practice or *opinio juris*, but rather is limited to the opinion of the authors. After establishing that human rights treaties require the "competent tribunal" and "established by law" criteria, the ICRC Study declares, "A court is regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country."[66] The Introduction to the ICRC Study further states that "international humanitarian law contains concepts the interpretation of which needs to include a reference to human rights law, for example the provision that no one may be convicted for a

63 *Hamdan v. Rumsfeld*, USSC, 548U.S. (2006), p. 69.
64 ICRC, *Commentary IV*, above note 7, p. 340.
65 See Rule 100 in Henckaerts and Doswald Beck, above note 20, Vol. 1, p. 353.
66 Ibid., p. 355.

crime other than by a "regularly constituted court…"".[67] The human rights *renvoi* suggests a state monopoly interpretation. Yet, as has been shown above in section 2, human rights obligations did not exist at the time when Common Article 3 was drafted.

One possibility is that the ICRC Study takes a *lex specialis* approach, wherein the substance of the law is determined by the more detailed rule. In two advisory opinions, the ICJ has ruled that when it comes to armed conflict, it is IHL which becomes the *lex specialis*.[68] Yet in the case of passing sentences related to an armed conflict, a *lex specialis* favouring the human rights obligations would be tenable, as the provisions of the ICCPR, the ECHR and the American Convention on Human Rights (ACHR) are all more detailed than Common Article 3 when it comes to procedural due process.[69] Another possibility is that the ICRC Study applies a *lex posterior* approach, wherein the development of new and overarching legal norms affects the interpretation of existing norms.[70] Still, both of these approaches require more attention when it comes to the regulation of non-international armed conflict; to the extent that human rights obligations do not apply to armed opposition groups, there is no *lex specialis* or *lex posterior* regulating their conduct at all. A better explanation would be a quasi-*lex posterior* approach in which the human rights "prescribed by law" criteria is imported into the IHL "regularly constituted" legal basis definition. It would also be consistent with Paust, who asserts that Common Article 3(1)(d) "incorporates customary human rights into due process by reference, and thus, all of the provisions of Article 14 of the International Covenant on Civil and Political Rights".[71]

In a pre-AP II discussion on the meaning of Common Article 3(1)(d), James Bond advocated a functional approach to the requirements, noting that "Guerrillas, after all, are not apt to carry black robes and white wigs in their backpacks."[72] His cocktail of criteria was based on appropriateness, "whether the appropriate authorities, operating under appropriate powers, created the court

67 Ibid., p. xxxi.

68 *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004, para. 106.

69 See William Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya", *European Journal of International Law*, Vol. 16, no. 4 (2005).

70 Further evidence suggesting an adoption of the *lex posterior* approach is found in the ICRC Study, above note 20, at p. 349: "Since the adoption of the Geneva Conventions, there has been a significant development in international human rights law relating to the procedures required to prevent arbitrary deprivation of liberty." One of the editors of the ICRC study has also stated that, "…international humanitarian law rules, although very advanced by 1949 standards, have now fallen behind the protections provided by Human Rights treaties", see Louise Doswald-Beck, "Human Rights and Humanitarian Law: Are there Some Individuals Bereft of all Legal Protection?", *ASIL Proceedings* 2004, p. 356.

71 Jordan J. Paust, "Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees", *Columbia Journal of Transnational Law*, Vol. 43 (2005), n. 25 at p. 818.

72 James Bond, "Application of the Law of War to Internal Conflict", *Georgia Journal of International and Comparative Law*, Vol. 3, no. 2 (1973), p. 372.

under appropriate standards''.[73] While this definition at least provides some implicit recognition of the problems associated with disparity, it is not necessarily helpful in answering the question raised by Zegveld above, as to what specifically is expected of armed opposition groups. It is especially the first two criteria that are problematic, as they relate to the legal basis requirement, while the third criterion relates to the judicial guarantees requirement.

In none of the definitions already discussed has precision been an essential feature. These definitions have been framed in the context of international responsibility, an area of law often intentionally laced with the ambiguity of political expediency. Yet the same cannot be said when it comes to individual criminal responsibility. In drafting the Elements of Crime of the Statute of the ICC, states were faced with the task of creating sufficient specificity to meet the requirements of the legality (i.e. *nullum crimen sine lege*) general principle of international criminal law.[74] There were no legal precedents to work from, as individual responsibility for non-international armed conflict did not generally exist at international law prior to the ICTY *Tadić* (Jurisdiction) decision of 1995, and none of the subsequent trials from either ad hoc tribunal was faced with the issue of insurgent courts.[75] Of course the Elements were drafted in the specific context of the criminal responsibility of the individual, but as the wording of ICC Article 8(2)(c) is functionally identical to that of Common Article 3, the Elements are still a useful tool of interpretation.[76] The definition of the Elements of Crime is also valuable in that it was drafted by signatories of the ICC Statute, and thereby represents the views of a number of states.[77]

Element 4 of Article 8(2)(c)(iv) surprisingly borrows from AP II Article 6(2) in defining a ''regularly constituted'' court:

> There was no previous judgement pronounced by a court, or the court that rendered judgement was not ''regularly constituted'', that is, *it did not afford the essential guarantees of independence and impartiality*, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law. (emphasis added)

The repetition of the words ''the court that rendered judgment'' indicates that the definition of ''regularly constituted court'' is limited to that in italics above, specifically ''independence and impartiality''. The final phrase would then

73 Ibid., p. 372.

74 For discussion of the extent to which *nullum crimen sine lege* forms a general principle of international criminal law, see Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, pp. 139–56.

75 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2002, p. 409.

76 The relevant section of ICC Article 8(2)(c)(iv) prohibits ''The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.'' The difference in wording indicates a recognition of the dated terminology of Common Article 3 but does not represent a substantive effect.

77 According to ICC Article 9, the Elements of Crime are not definitive but ''assist the Court in the interpretation and application of articles 6, 7 and 8''.

refer to the second requirement of judicial guarantees as separate from the legal basis itself. Such an interpretation, however, confuses the definition of the legal basis of Common Article 3 with that of the essential guarantees of AP II. The adopted Element can be compared with an earlier draft proposal by Belgium which did in fact correctly separate the legal basis and essential guarantees. It listed three distinct situations where the passing of sentence would amount to a war crime: ''either no previous judgment was pronounced, or the previous judgment was not pronounced by a regularly constituted court or did not offer all the essential guarantees which are generally recognised as indispensable''.[78]

The uneasy relationship between AP II Article 6(2) and Common Article 3(1)(d) has already been discussed above, where it was noted that the ''regularly constituted court'' requirement was adapted based on the concerns of some experts who thought that armed opposition groups would not be able to establish such courts under the meaning of national law. It therefore appears odd that the drafters of the Elements of Crime simply imported the AP II Article 6(2) standard (and the wrong one, at that) to define ''regularly constituted court'', when the drafters of the actual ICC Statute maintained the Common Article 3(1)(d) wording. As the discussion on equality of belligerents has revealed, AP II only survived by removing all reference to the parties. Furthermore, the high threshold, including the requirement of territorial control to the extent that armed opposition groups would be able to implement the Protocol, was a vital condition to get states to agree to adopt AP II.[79] It is of further interest to note that the threshold for the application of Article 8(2)(c)(iv) has been set objectively lower than that of AP II, as the former requires neither territorial control nor ability to implement the provisions of the Article.[80] The gap therefore becomes actual rather than theoretical, at least in terms of individual responsibility. The Elements of Crime at any rate takes the view that, with respect to the legal basis, the IHL of AP II becomes the *lex specialis* for any non-international armed conflict. The lack of any qualification to the word ''court'' in AP II Article 6(2) would justify an interpretation that this provision does not incorporate the ''established by law'' requirements of human rights law and would allow for the establishment of ad hoc courts.[81]

From the above analysis, it is clear that there is no agreement on the meaning of the term ''regularly constituted court'' when it comes to the insurgent party. Proposed definitions either brush over the nuances of disparity, are vague, or fail to adequately engage the substantive differences between Common Article 3

78 PCNICC/1999/WGEC/DP.13, reproduced in Eva LaHaye, ''Violations of Common Article 3'', in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure & Evidence*, Transnational Publishers, Ardsley, NY, 2001, p. 212.

79 See for example CDDH/SR.49/ANNEX, explanation of vote on Material Field of Application, statement of Ghana.

80 ICC Article 8(2)(d) states, ''Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.''

81 To the extent that ''established by law'' may be considered non-derogable, this reasoning would be problematic. See below.

and AP II. The impact of AP II Article 6(2) has been to highlight the problem of Common Article 3(1)(d), but even if AP II is considered to be the *lex specialis* with respect to human rights law, it does not provide a universal solution, due to both the application gap and the threshold gap.

3.1.2. The second requirement: judicial guarantees

As has already been noted, when it comes to judicial guarantees, AP II clarifies Common Article 3 without expanding it. Therefore the AP II standards can be applied universally with respect to the second prohibition. Most of the guarantees listed in Article 6(2)(a–f) are not affected by the disparity between states and armed opposition groups, although armed opposition groups may find them difficult to apply due to factual capabilities. They are conceptually no different than, for example, the requirement to provide education to children under Article 4(3)(a). It is only the first sentence of Article 6(2)(c), an enumeration of the *nullum crimen sine lege* principle, that presents a potential inequality problem.

The relevant provision states, ''no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed''. The Commentary points out the difficulty caused by disparity, or the ''special context of non-international armed conflicts'', explaining that ''The possible coexistence of two sorts of national legislation, namely that of the States and that of the insurgents, makes the concept of national law rather complicated in this context.''[82] Zegveld asserts that since the final wording seems to have come from Article 15 of the ICCPR, the provision ''must therefore be understood as referring to state law''.[83] Bothe et al. take a more expansive view, asserting that the deletion of the ICCPR ''national and international law'' terminology at the CDDH ''should be understood as broadening, not as limiting the concept of ''law''''.[84] The broader view would mean that armed opposition groups would be able to meet the *nullum crimen sine lege* criterion by relying on international law with respect to international crimes, while relying on either existing state legislation or their own existing ''legislation'' to prosecute crimes related to the mere participation in hostilities. Under the narrow view, armed opposition groups would not be able to rely on their own ''legislation'' with respect to mere participation-related crimes, although they could apply existing government legislation, for example, trying government soldiers for murder.

3.1.3. The diplomatic conferences

It is easy to imagine the objections that states, especially those engaged in non-international armed conflict, would have to recognizing a right of armed

82 Sandoz et al., above note 13, paras. 4604–4605.
83 Zegveld, above note 12, p. 187.
84 Bothe et al., above note 8, p. 652.

opposition groups to establish courts. Unfortunately, the intention of the drafters of Common Article 3 is difficult to discern from the Official Records of the Geneva Conference. The discussions had been mainly focused on whether the Geneva Conventions should apply in their entirety in cases of non-international armed conflict, and it was only towards the end of the Conference that the 2nd Working Party of the Special Committee came up with an exhaustive, limited list of provisions which were to become Common Article 3.[85] The Official Records give no indication as to how the passing of sentences prohibition ended up in the enumerated list, and contain no discussion on the meaning of "regularly constituted court".

One important difference between the negotiations in 1949 and those in 1974–7 is that in the latter instance states were aware of their human rights obligations and hence the "established by law" requirement. While the discussions at the CDDH related the sensitivity of the issue, they did little to clarify it. The CDDH negotiations were based on the 1973 AP II draft Article 10 which stipulated:

> No sentence shall be passed or penalty inflicted upon a person found guilty of an offence in relation to the armed conflict without previous judgment pronounced by a court offering the guarantees of independence and impartiality which are generally recognized as essential …[86]

The ICRC delegate began the discussion by emphasizing that draft Article 10 should be considered in light of the fact that Article 1 on the high threshold of application, including territorial control, had already been passed by the drafting committee.[87] The intention of such a comment was most probably to ensure that states recognized that the adoption of a provision with a wider scope of application than Common Article 3 would only be applicable to high-threshold conflicts. She then stated that it was no longer hypothetical for armed opposition groups to be in a position to try persons, and added, "La Partie insurgée pourrait utiliser à cette fin les tribunaux existant sur la partie du territoire qu'elle contrôle et qui pourraient continuer à fonctionner, ou pourrait créer des tribunaux populaires."[88] The ICRC was therefore in favour of the right of armed opposition groups to establish courts, at least in conflicts wherein the armed opposition group asserts territorial control and meets the other AP II threshold requirements. Significantly, the ICRC delegate framed this assertion in the context of the subsequently abandoned draft Article 5 on equality of rights and obligations of the parties, implying that equality of belligerents was an underlying principle of the legal basis interpretation.[89]

Many state delegates, recognizing the difficulties in reconciling disparity and equality in terms of insurgent courts, also made reference to draft Article 5

85 See 28th Meeting of the Special Committee, *Official Records*, II-B, p. 83.
86 CDDH/1.
87 CDDH/I/SR.33, para. 24.
88 Ibid., para. 24. The French text is presented above as authoritative due to ambiguity in the English text.
89 Ibid., para. 24; see also above, on draft Article 5.

and counselled caution in drafting the provision on due process.[90] The UK delegate stated that ''the principle that ''the rights and duties of the Parties to the conflict under the present Protocol are equally valid for all of them'' must clearly be given special consideration when provisions concerning penal law were being drafted''.[91] Yet none of the state delegate statements referred to above indicated whether they agreed with the ICRC delegate on the legal basis issue. It was only the Nigerian delegate who explicitly recognized that rebels ''could certainly set up courts with a genuine legal basis''.[92] The general warnings in connection with draft Article 5, and the subsequent jettisoning of that article, suggest that many states recognized with apprehension that their monopoly on the legislative and judicial branches of government was at stake.

With respect to the second prohibition regarding judicial guarantees, states also voiced their concern over the scope of the *nullum crimen sine lege* principle as discussed above. Although the initial ICRC draft only contained the term ''law'', intermediate drafts contained the expression ''national or international law''[93] as imported directly from Article 15 of the ICCPR.[94] This formulation was not well received. The Argentinean delegate expressed concern over the ambiguity of the term ''national law'', questioning whether a government involved in an non-international armed conflict would ''recognize the idea of ''rebel law''''.[95] The Mexican delegate called the meaning ''vague'', noting that ''no clear idea of it had emerged from the debate''.[96] Some delegations threatened that they would vote to exclude the entire sub-paragraph (d) if the wording was maintained,[97] and in the end the Conference reverted to the original, unqualified ''law''.[98]

3.2. Evidence of practice in the passing of sentences by armed opposition groups

The vast majority of evidence of actual practice on the issue of insurgent courts is either not well documented or remains confidential.[99] While the current study

90 In addition to the UK delegate, see Spanish delegate, CDDH/I/SR.34, para. 28, and Soviet delegate, CDDH/I/SR.34, para. 42.
91 CDDH/I/SR.29, para. 45.
92 CDDH/I/SR.34, para.20.
93 CDDH/I; CDDH/I/GT/88.
94 ICCPR Article 15 states:1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.
95 CDDH /I/SR.64, para. 54.
96 Ibid., para. 78.
97 CDDH/I/262, fn. 1.
98 The actual wording adopted was proposed by the Pakistan amendment, CDDH/427.
99 In personal correspondence with Knut Dörmann, Deputy Director of ICRC Legal Division, the author was informed that no ICRC experience with insurgent courts exists in the public domain. ICRC archives are kept confidential for forty years.

does not purport to present a full survey of practice, it will look at two cases where relevant information is available. Rebel practice and opinion is presented without prejudice to the issue of whether it goes towards the formation of customary law. The author submits that a comprehensive survey on practice concerning rebel courts would be a valuable endeavour for any future research, as well as for international efforts to promote armed group compliance with IHL.

3.2.1. The El Salvador conflict

The conflict in El Salvador during the 1980s and 1990s is one of the few in which insurgent courts have received any international attention whatsoever. Security Council Resolution 693(1991) established the UN Observer Mission in El Salvador (ONUSAL), which interpreted its mission to include compliance with IHL as well as human rights commitments of the parties to the conflict.[100] Significantly, the El Salvador conflict was the first instance of the application of AP II,[101] and therefore provides some insight into the relationship between the requirements of the two non-international armed conflict instruments. During the El Salvador conflict the Farabundo Martí National Liberation Front (FMLN) passed sentence on, and executed, suspected government agents and collaborators. The group stressed that it was "endeavouring to assure that its methods of struggle comply with the stipulations of Article 3 of the Geneva Conventions and Additional Protocol II", and pointed to AP II Article 6(2) as the legal basis for its rebel courts.[102] The FMLN further alleged that compliance "does not require the tribunal to have been set up according to government law in effect".[103]

In its Third Report, the ONUSAL Human Rights Division confirmed the norm of AP II 6(2) to be a "broader precept" than that of Common Article 3(1)(d), and in the same paragraph ONUSAL proclaimed that the "regularly constituted court" requirement is one which "an insurgent force may have difficulty meeting" while agreeing that "any responsible and organized entity can and must observe the principles established in article 6 of Additional Protocol II".[104] The Report goes on to consider the principles of independence and impartiality, which suggests that ONUSAL applied the AP II legal basis requirement exclusively.

The FMLN sentenced individuals under its own "penal procedural law" that contained precise sanctions for each of the commonly committed infractions

100 Tathiana Flores Acuña, *The United Nations Mission in El Salvador: A Humanitarian Law Perspective*, Kluwer Law International, The Hague, 1995, pp. 36–40.

101 Michel Veuthey, Preface to ibid., p. xiii.

102 Letter from Commander Nidia Diaz, Director, FMLN Secretariat for the Promotion and Protection of Human Rights, 19 October 1988 (hereinafter FMLN Memo), partially reproduced in Americas Watch, *Violation of Fair Trial Guarantees by the FMLN's Ad Hoc Courts*, Americas Watch, New York and Washington, 1990.

103 Ibid.

104 A/46/876, S23580, ONUSAL Human Rights Division, *Third Report*, para. 111. The latter statement is a reiteration of the *Commentary to the Additional Protocols*, above note 13, para. 4597.

in relation to the armed conflict.[105] Consequently, the *nullum crimen sine lege* problem of the second prohibition was at issue. In its memo the FMLN justified its actions:

> Nor is it necessary according to [the government law] that the guilt of the accused must be proven; rather Protocol II presupposes the coexistence of ''national legislation of the State with insurgent legislation''. As a result of this interpretation, each of the contending parties shall be able to try according to their own law in effect.[106]

Furthermore, the FMLN argued that the ''type of tribunal and law required by Protocol II have had to have been adapted to the existence and capacity of the contending party''.[107]

The watchdog organization Americas Watch agreed with the opinion of the FMLN that ''Article 6 of Protocol II undeniably presupposes that either of the contending parties has the authority to try and punish penal infractions committed in relation to the armed conflict''.[108] Americas Watch expressly agreed with the FMLN interpretation that AP II envisions two sets of national legislation, whereby the armed opposition group may have legislative authority over the territory it controls, but it did not accept that the standards should be adjusted according to the capacity of the party,[109] a reference to its physical capability rather than legal capacity. As Zegveld notes, ONUSAL implicitly accepted the right of the FMLN to legislate over the territory it controlled by the fact that it examined the armed group's penal provisions.[110]

The El Salvador conflict also provides evidence of practice on armed opposition group prosecution of its own members for violations of the laws of war. According to Human Rights Watch, the FMLN announced that it would prosecute two of its own members for the January 1991 summary execution of two US servicemen after their helicopter had been shot down. The El Salvador government demanded that the FMLN members be handed over to its own state judicial system, and warned that any national or foreign individuals participating in an FMLN trial would be subject to prosecution under El Salvador law. The trial apparently never took place, since the FMLN decided instead to hand over the accused to the national truth and reconciliation process.[111] Human Rights Watch ''expressed ''disappointment'' that the FMLN had not made more progress in fulfilling its obligations under international law to punish gross abusers'',[112] although it is not clear that such an obligation in fact existed at the time, or even

105 FMLN Memo at Americas Watch, above note 102, p. 511.
106 Ibid.
107 Ibid., p. 510.
108 Americas Watch, above note 102, p. 512, citing the FMLN Memo.
109 Ibid., p. 513. However, Americas Watch was unable to obtain the alleged penal code after several attempts, and concluded that the essential guarantee requirements were not met.
110 Zegveld, above note 12, p. 70.
111 Human Rights Watch, ''El Salvador'', *1992 Annual Report*, available at http://www.hrw.org/reports/1992/WR92/AMW-08.htm#TopOfPage (last visited 18 September 2007).
112 Ibid.

does now.[113] ONUSAL did not report on the incident at all, most likely because it considered incidents which occurred prior to the launching of the Human Rights Verification Mission on 23 July 1991 to be outside its competence, ''save in exceptional circumstances''.[114]

3.2.2. The Nepal conflict

The question looms as to what would have been the outcome had the El Salvador conflict been one in which AP II did not apply and the ''regularly constituted'' court requirement was the only one applicable. Such a question becomes relevant to the recent conflict in Nepal between the Communist Party of Nepal-Maoist (CPN-M) insurgent group and government forces. Although the factual situation of territorial control and sustained military operations (including 13,000 killed over a decade-long conflict)[115] indicates that the AP II threshold has most likely been met, Nepal is not a party to the Protocol, and therefore Common Article 3 remains the only applicable conventional standard. A comprehensive peace agreement was signed in late 2006, which seems to be holding in general at the time of writing.

The CPN-M established ''People's Courts'', which operated during hostilities and reportedly blossomed after the cessation of hostilities. Furthermore, the CPN-M has created its own ''wartime and transitional'' comprehensive public legal code from 2003/04, which covers civil provisions as well as penal provisions both related and unrelated to the conflict.[116] Article 2(9) established the legal basis of People's Courts, stipulating that prosecutions shall be carried out ''by the Peoples' Prosecutor and decisions by the peoples' Court''. Article 4(1) creates a duty to safeguard the Communist Party of Nepal, the Peoples' Liberation Army, the Peoples Government and the Central Peoples' Council, while Article 4(4)&(5) states:

> 4. Whoever commits or attempts to conspire or join the enemy or commits dishonesty against these agencies, persons, institutions and ideologies in defiance of the aforementioned duty, shall be punished with 10 years labour imprisonment based on the opinion of the ordinary people depending on the stage, planning, situation and severity of the offence.
> 5. Whoever collects arms, money or property with the intent to commit an insurgency against the Peoples' Government by creating hostility,

113 See below. At the time of the incident, violations of Common Article 3 were not considered to entail individual criminal responsibility at international law. Even though the victims were agents of another state, the conflict, at least in this context, remained non-international, as the United States was allied with the El Salvador government. Therefore there was no international obligation to prosecute, although the situation would be different today in the light of the individual responsibility in non-international armed conflict.

114 ONUSAL Human Rights Division, *First Report*, A/45/1055, para. 8.

115 BBC News, ''Violent clashes amid Nepal curfew,'' 10 April 2006, available at http://news.bbc.co.uk/2/hi/south_asia/4894474.stm (last visited 18 September 2007).

116 United Revolutionary Peoples' Council Nepal, Public Legal Code, 2060 (2003/2004), unofficial English translation (copy on file with the author).

> confrontation, and hatred, in order to weaken fraternity at the national, regional, and international levels, and in relations with friendly nations, shall be punished with labour imprisonment not exceeding five years and the money and goods as collected shall be confiscated.

These provisions clearly provide ''legislative'' authority for the passing of sentence on individuals for acts hostile to the armed opposition group. The Code does not provide sanctions for specific war crimes, but it does for murder, battery, sexual offences (only if the victim is a woman), illegal detention and theft in general.[117] It is not the intention of the author here to analyse whether the judicial guarantees are in line with the standards of the law of non-international armed conflict. However, what can be determined is that this ''national'' law provides both a legal basis and meets the *nullum crimen sine lege* requirements for the enumerated provisions (assuming, of course, that it is in fact national law). Under AP II these courts would most likely be prima facie acceptable, while under the ''regularly constituted'' requirement of Common Article 3, they would be problematic under a definition which incorporates human rights provisions qua human rights.

The OHCHR has stated, ''OHCHR believes that the abductions, related investigations and punishment related to the ''people's courts'', including holding people in private houses, fail to provide minimum guarantees of due process and fair trial by an independent court''.[118] The same report further declares that internal investigations of ''abuses'' by CPN-M members ''cannot substitute for prosecutions carried out in a state court''.[119] There is no mention in the report of whether the OHCHR applies IHL at all, and if so, whether its comments apply only to a post-conflict situation, in which human rights law would be the only applicable regime.[120] Yet it does note ''the need to ensure full implementation of the CPN-M's repeatedly stated commitment to human rights and humanitarian principles''.[121] At any rate, the OHCHR seems to indicate that state courts are the only tribunals which may prosecute criminal acts.

4. Passing sentence on the capacity to pass sentence

4.1. The scenarios of prosecution

There are two distinct situations in which an armed opposition group would consider prosecutions in relation to the armed conflict: (i) for the perpetration of international crimes, by either its own members, opposing forces or civilians; and

117 See Public Legal Code, Articles 6, 7, 9, 12 &16.

118 OHCHR-Nepal, *Human Rights Abuses by the CPN-M, Summary of Concerns*, September 2006, p. 4, available at http://nepal.ohchr.org/reports.htm (last visited 18 September 2007).

119 Ibid., p. 8.

120 The OHCHR-Nepal mandate includes the monitoring of IHL as per the 10 April 1995 agreement with the government of Nepal. See http://nepal.ohchr.org/en/index.html (last visited 18 September 2007).

121 OHCHR-Nepal, above note 118, p. 8.

(ii) for merely participating in, or aiding in the participation in, hostilities against the armed opposition group.

The following analysis will examine whether either of these situations impose further international law obligations on armed opposition groups and/or their members in terms of responsibility to punish, and how these obligations may interact with the ''passing of sentences'' prohibitions of Common Article 3 and AP II.

4.1.1. Armed opposition group prosecution of perpetrators of international crimes

A general trend of international law has developed in which there should be no impunity for international crimes committed during armed conflict.[122] The prohibition on impunity covers all individuals, whether part of state armed forces or rebel forces, or civilians (including political office holders). In certain circumstances, international law may (or may not) impose obligations on either entities[123] or individuals to prosecute suspected perpetrators of international crimes in relation to an armed conflict. The scope of these obligations is somewhat different; individual responsibility encompasses only superior–subordinate relationships, and therefore does not cover crimes committed by the opposing party, while international responsibility may do so, depending on the circumstance, as it can involve universal jurisdiction or jurisdiction based on the territoriality or nationality principles.

International Responsibility. The penal-sanctions provision of the Geneva Convention grave-breach regime requires the high contracting party to ''enact legislation necessary to provide effective penal sanctions'' for persons responsible for grave breaches, and to ''bring such persons … before its own courts'' or ''hand such persons over for trial to another High Contracting Party''.[124] The grave-breach regime includes crimes that are also considered to be crimes in non-international armed conflict, such as wilful killing and torture, but the *Tadić* Appeals Chamber ruled that grave breaches only apply to international armed conflict as the law currently stands.[125]

The overwhelming view,[126] supported by *Nicaragua*,[127] is that common Article 1 requiring states to ''respect and ensure respect'' for the Geneva

122 See, for example, Philippe Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice*, Oxford University Press, Oxford, 2003, p. x.

123 The term ''entity'' is used to include both armed opposition group and state responsibility.

124 Convention I Article 50; Convention II Article 50; Convention III Article 129; Convention IV Article 146.

125 ICTY, *Tadić* (Jurisdiction), above note 19, paras. 80–84. If grave breaches were to apply to non-international armed conflict (as the United States argued in *Tadić*), questions of equality would arise since the obligation only applies to states.

126 See Laurence Boisson de Chazournes and Luigi Condorelli, ''Common Article One of the Geneva Conventions Revisited: Protecting Collective Interests'', *International Review of the Red Cross*, no. 837 (March 2000).

127 ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, para 220.

Conventions now applies to non-international armed conflict, even though the Commentary to the Geneva Conventions expressly states that it does not.[128] Yet these opinions only consider whether the obligation applies either to the state engaged in such a conflict or to other states (the latter being the situation in *Nicaragua*). Zegveld considers the applicability of Common Article 1 to armed opposition groups, suggesting that ''it may be inferred that it applies equally to armed opposition groups''.[129] She further surmises that an obligation to prosecute ''may be deduced'', but she then fails to find much international practice to support such an obligation. However, the fact that Common Article 3 binds ''each party to the conflict'', while Common Article 1 refers distinctly to undertakings of the ''High Contracting Parties'', rather indicates that conventional obligations of armed opposition groups are limited to those contained in Common Article 3, and can not be ''deduced'' so easily.

The ICRC Study finds a parallel customary obligation in Rule 139: ''each party to the conflict must respect and ensure respect for international humanitarian law''.[130] Yet for the ''ensure respect'' obligation of armed opposition groups, the evidence is not convincing, as it is limited to state participants in the conflicts in the former Yugoslavia (where it was unclear at the time whether the law of non-international armed conflict applied at all), two instances of intervention by the UN Security Council and the practice of the ICRC, a non-state entity. In terms of obligation to prosecute, Rule 158 of the ICRC Study, applying to both international armed conflict and non-international armed conflict, finds that

> States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.[131]

The difference *ratione personae* between Rule 139 and Rule 158 indicates that the ICRC Study finds an obligation on states to prosecute war crimes in non-international armed conflict, while no similar obligation is extended to armed opposition groups. Henckaerts, a co-editor of the Customary Study, has stated in another context that IHL imposes an obligation to prosecute war criminals without clarifying whether this obligation is on both the state and non-state party to a non-international armed conflict.[132] As discussed above with respect to the FMLN, Human Rights Watch seems to consider there to be an international obligation on armed opposition groups to prosecute ''gross abusers''. Although the report does not clarify the obligation, one can assume that it refers to war crimes committed by members of its own ranks. If an IHL obligation exists, but only for the state, it would result in inequality of belligerents (creating a heavier burden on the state) as per our definition of section 1.

128 *Commentary IV*, above note 7, p. 16.
129 Zegveld, above note 12, p. 67.
130 Rule 139, Henckaerts and Doswald-Beck, above note 20, Vol. I, pp. 495–8.
131 Rule 158, ibid., pp. 607–11.
132 Henckaerts, above note 22, p. 133.

Individual responsibility. The jurisprudence of the ad hoc tribunals,[133] the findings of the ICRC Study[134] and the provisions of the ICC Statute[135] all conclude that from the individual penal responsibility perspective, the obligation to punish is the same in non-international armed conflict as it is in international armed conflict. Moreover, in all cases, there is no indication that the responsibility is not the same for both state and armed opposition group superiors. The standard requires commanders and superiors to take all necessary and reasonable measures within their power,[136] and it can be assumed that the "punishment" required for any war crime, crime against humanity or genocide would require penal prosecution – that is, would not be able to be met with mere disciplinary action. Paragraphs (a)(ii) and (b)(iii) of Article 28 of the ICC Statute require a superior or commander to take "all necessary and reasonable measures within his or her power to prevent or repress" crimes. The law as such, however, does not necessarily mean that armed opposition group superiors have an obligation to bring suspected war criminals before their own courts.[137] For the purposes of prosecution, the armed opposition group superior may hand over a suspected war criminal to the established government, or to another state, if a willing one can be found.[138] In fact, Acuña claims that with respect to the El Salvador conflict, the ICRC stated that, "in the presence of a serious violation of international humanitarian law, the rebels should have recourse to the national system of administration of justice".[139] The problem, however, is that armed opposition group superiors will most likely not be willing to discharge their duty by engaging the government party, and it is hardly reasonable that the law requires them to do so. What if the armed opposition group superior has reason to fear that the government courts are not independent and impartial, and no other state were willing?

Respect for IHL by armed opposition groups will not be gained by imposing obligations without considering corresponding rights. If they do not have the option to hand over suspects to their own system of criminal justice or to another state, then armed opposition group superiors may find themselves in the untenable position of having to hand over prisoners to the opposing state party in

133 ICTY Appeals Chamber, *Prosecutor v. Hadzihasanovic et al.*, ICTY, IT-94-1-AR72 (Decision On Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) (2003), para. 18: "wherever customary international law recognizes that a war crime can be committed by a member of an organized military force, it also recognizes that a commander can be penally sanctioned".

134 Rule 153, Henckaerts and Doswald-Beck, above note 20, p. 558: "Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible." This Rule is listed as applying to non-international armed conflicts.

135 ICC Statute Article 28, entitled "Responsibility of commanders and other superiors", imposes criminal responsibility "for crimes within the jurisdiction of the Court". This clearly includes Articles 8(2)(c) and (e) regulating non-international conflict.

136 The *Hadzihasanovic* Decision, above note 133, does not include the "within their power" condition.

137 Crimes Against Humanity and Genocide are also covered by command responsibility, raising questions of obligations of armed opposition groups outside an armed conflict context.

138 This could also raise legal questions with regards to extradition.

139 Acuña, above note 100, n. 247 at p. 6.

order to discharge their individual obligations. It is more likely than not that in such a situation members of armed opposition groups would consider the impositions of international justice to be overly burdensome and prejudicial towards them, with the result that overall compliance would suffer.

4.1.2. Prosecution for mere participation in hostilities

Even more controversial is the ability of armed opposition groups to pass sentence on individuals – either government soldiers or others – for mere participation in hostilities or for aiding in such participation. Both the legal basis requirement and the *nullum crimen sine lege* criterion of the judicial guarantees requirement would pose potential problems for conflicts governed by Common Article 3. AP II conflicts would be less problematic, at least from the standpoint of IHL, due to the lack of legal basis requirement.

Unlike the prosecution of international crimes, international law is silent on this subject matter, so armed opposition groups would not be able to rely on further international law obligations to suggest subsequently flowing rights. Here, the disparity between states and armed opposition groups is most prevalent. States would consider similar conduct by armed opposition group members or supporters to fall under domestic criminal legislation and therefore would have the right (and possibly even the obligation, from a human rights point of view) to prosecute rebels and rebel collaborators.

The limited practice from section 3 shows that armed opposition groups have created penal codes for the purpose of punishing enemy soldiers or civilians for mere-participation-type crimes, and have established courts to judge such violations in both Common Article 3 and AP II-governed conflicts.[140] A new trend may be emerging where armed opposition groups are showing an increasing ability not just to mimic the functions of the state, but to deliver services, including the administration of justice, more efficiently if not more effectively than the state.[141] As the propaganda value has not gone unnoticed, it is likely that more and more armed opposition groups who control territory will create parallel justice systems.

While it is not necessarily in the best interests of humanity to grant broad legislative and judicial powers to non-state actors, it must be remembered that IHL is rooted in the realities and exigencies of armed conflict, wherein the principle of equality of belligerents has been considered to be crucial for compliance with IHL. The legal capacity of armed opposition groups to administer justice remains tempered in that IHL would only envision such rights in situations amounting to armed conflict, and then only for conduct related to hostilities.

140 for a statement by the Maoist rebel leader indicating that informers may be tried and executed by People's Courts, see Charles Haviland/BBC News, ''Meeting Nepal's Maoist Leader'', 16 June 2006, available at http://news.bbc.co.uk/2/hi/south_asia/4707058.stm (last visited 18 September 2007).

141 Charles Haviland/BBC News, ''Parallel Justice, Maoist Style'', 14 October 2006, available at http://news.bbc.co.uk/2/hi/south_asia/6048272.stm (last visited 18 September 2007).

4.2. Towards a solution

A realistic solution should aim towards levelling the playing field, so that both sides of a non-international armed conflict will determine that it is in their best interest to refrain from carrying out the harshest measures.[142] If it is generally acknowledged that armed opposition groups can establish and operate courts, there will be greater leverage towards creating ad hoc agreements with respect to analogous prisoner-of-war status and/or postponement of the death penalty. At the end of hostilities there is always a greater chance that amnesties will be granted for participation-related offences by whichever party ends up forming the government.[143]

With these considerations in mind, a realistic solution should entail a mixture involving a loose interpretation of the legal basis, with emphasis on the judicial guarantees requirement. This would recognize that the rights implied by the prohibitions of Common Article 3 would be granted to those groups capable of fulfilling the conditions to exercise those rights. In fact, this would shift the focus back on to the obligations associated with the functioning of courts. In reality, an IHL norm that all but prevents armed opposition groups from operating courts will remain merely a norm. These courts would continue to exist, but their ''illegal'' nature would obstruct efforts to improve compliance with judicial guarantees. Therefore there is reason to believe that the protection of those individuals not or no longer participating in hostilities would at least be maintained, or even increased. Furthermore, the solution would be consistent with an effective equality of belligerents principle. The value of this final point should not be lost in encouraging the compliance of armed groups with IHL obligations. Armed opposition groups which have no interest in complying will not be swayed by international prohibitions. Others will be more likely to work towards compliance if they feel that the law allows them to meet their obligations without it being prejudicial towards them.

It is also important to consider at this juncture that the threshold of Common Article 3 should not be reduced to irrelevancy. IHL contains compromise solutions that should not be applied in situations short of substantial armed conflict. If the IHL of non-international armed conflict is to also entail rights for the non-state party, it is important that rights only arise in situations for which they were considered. Moreover, the different legal basis standards for Common Article 3 and AP II conflicts also remain relevant for practical reasons related to the control of territory. In conflicts where armed opposition groups do not have control of territory, it will be very difficult to meet the ''regularly constituted'' standard, even in a loose interpretation; it is hard to imagine that

142 A preferred solution would be to recognize PoW status in non-international armed conflict, or even to prohibit the death penalty until the end of hostilities, but states have been consistently unwilling to do so.

143 Both AP II Article 6(5) and the ICRC Customary Study Rule 159 state that at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty, The ICRC study explicitly excludes those accused or convicted of war crimes.

''basement'' or ''portable'' courts would be considered ''regularly constituted''. When armed opposition groups control territory, however, the relevance of ''regularly constituted'' is reduced, as the proper means to establish courts would be available. Therefore the legal basis difference under a loose interpretation of ''regularly constituted'' actually acts as a safeguard in situations short of control of territory, while becoming largely obsolete when armed opposition groups do control territory. Besides being consistent with the equality of belligerents, it conforms to the spirit in which AP II was adopted, above, wherein control of territory appeared to be an essential precondition in negotiating AP II Article 6(2). Finally, as the provisions of AP II do not have customary law status in their entirety, and as many states involved in non-international armed conflict are not parties to the Protocol, the proposed solution would nevertheless reduce the practical differences between the standards.

As has been shown, human rights law was scripted only with states in mind, while IHL, under the principle of equality of belligerents, contemplates equal rights and obligations of states and armed opposition groups. It has also been shown that the philosophical origins of the two regimes differ in key respects. Provost warns that ''cross-pollination'' between IHL and human rights ''must be done with an appreciation of the fundamental differences between the normative frameworks of human rights and humanitarian law''.[144] In circumstances such as the passing of sentences related to the armed conflict, cross-pollination may be undesirable. Therefore it is valid to question the approach, above, wherein Common Article 3(1)(d) incorporates all of ICCPR Article 14.

Instead, we can revisit the Bond definition in order to derive its meaning.[145] Since ''appropriate'' is based on circumstance, the ambiguity of the term is in fact its strong point. The ''appropriate authorities'' become those with obligations under Common Article 3, while the ''appropriate powers'' include those necessary to overcome the disparity of parties to a non-international armed conflict. IHL fair trial guarantees could import human rights law not qua human rights law, but by analogy, such that the equality of belligerents is respected. The legal basis requirement would thereby be met by insurgent ''legislation'' which establishes a penal tribunal. As already stated, the third criterion of ''appropriate standards'' is the definitive safeguard upon which any insurgent court must ultimately be judged, and upon which the most attention should be directed. On the other hand, it is important that in applying standards derived from the case law of the various human rights treaty bodies or various international standards, an IHL interpretation takes disparity into account. For example, the UN Basic Principles on the Independence of the Judiciary require constitutional protection of judicial independence, as well as statutory tenure standards for judges,[146] while

144 René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, p. 117.

145 Above, at note 72.

146 Articles 1 and 11, Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

case law requires independence from the executive.[147] To overcome disparity, focus should be on fairness rather than any institutional requirements.

The proposed solution of respecting the equality of belligerents wherever rights and obligations flow from international law norms regulating the subject matter of IHL is certainly not without drawbacks when it comes to fair trial rights. From a practical point of view, problems such as the uncertainty of territorial jurisdiction of insurgent penal legislation, as well as the subjecting of individuals to different and potentially contradictory criminal legislation, must be recognized as serious challenges. On the other hand, it would be contrary to the interests of justice if the hierarchy established by the ICC Statute provided an excuse for states to prosecute otherwise compliant insurgent personnel. Legal questions remain as to whether the term "law" is flexible enough to allow for armed opposition groups to create courts and legislation when the interaction of international criminal, humanitarian and human rights law comes out in the wash. Yet even to the extent that fair trial guarantees represent either non-derogable rights or peremptory norms, the creativity of the ICTY Appeals Chamber in defining special contexts of "established by law" can provide inspiration for accommodating interpretations which respect the equality of belligerents in non-international armed conflict. Otherwise, as was noted above, armed opposition groups will have the incentive simply to detain individuals indefinitely in order to avoid their international obligations. Such a solution is certainly far from perfect, but perfect solutions will have to wait "until that day".

Conclusion

By nature, insurgent groups are transient. Neither their own members nor their adversaries want them to remain as insurgent groups. The very idea of a "regularly constituted" court therefore seems to be hostile to their nature, as the term "regular" implies continuity of some sort. One may easily question how institutions can be built to ensure the proper administration of justice when the goal of all concerned is to eliminate the status quo. "Jungle justice", in its pejorative sense, is primitive and brutal, like the unscrupulous rebels whom one may imagine occupy the territory. The deadly serious implications of criminal justice warrant a cautious approach to any legal principle which purports to extend its administration to entities outside state control.

One such principle is the equality of belligerents in non-international armed conflict. This paper has argued that in order for the international humanitarian law principle of equality to be effective, the fair trial guarantees should not incorporate human rights criteria which *de jure* prohibit an armed opposition group from establishing courts and passing sentences for offences related to the armed conflict. While such an approach may appear ill-advised, two

147 See collection of case law in Henckaerts and Doswald-Beck, above note 20, Vol. 1, p. 356.

considerations should be taken into account. First, the number of breaches of fair trial guarantees perpetrated by ''regularly constituted'' state courts would fill volumes. Second, insurgent courts will continue to operate whether or not they are sanctioned by international law.

Recently, the London *Guardian* quoted Mullah Omar, leader of the transient Taliban (once government, now armed opposition group) as intending to try President Hamid Karzai ''in an Islamic court for the ''massacre'' of Afghan civilians''.[148] Right or wrong, it is doubtful whether many Western observers would expect the fair trial guarantees to be observed if Karzai is captured. In Nepal, on the other hand, the OHCHR reports that local residents have reacted positively to Maoist People's Courts with respect to serious crimes, and that in many cases these courts have been sought out by citizens due in part to ''lack of trust'' in the state criminal justice system.[149] Such courts and the particular circumstances may or may not be governed by Common Article 3, but the OHCHR evaluation should at least deflect the prejudicial view of insurgent courts in general.

There are to date no instances in which an international body has accepted a sentence passed by an insurgent court to be in conformity with the obligations imposed by either Common Article 3 or AP II. However, there is also precious little reported practice to consider. This paper has further argued that the crucial aspect for the protection of individuals facing prosecution by insurgent courts is not the legal basis of those courts, but rather the judicial guarantees they offer. The challenges of establishing courts which offer all the fundamental guarantees are formidable. To a transient group, they become enormous. It is unlikely that all but the most organized armed opposition groups would be able to meet the standards. However, many armed opposition groups will endeavour to create such courts either out of a desire for justice or to influence public opinion. Some will be more sincere than others. No matter, the international engagement of such efforts will not only potentially result in improved compliance with fair trial requirements, but will also create opportunities for broader armed opposition group engagement to encourage compliance with the law of non-international armed conflict in general.

148 Jason Burke, ''Taliban Plan to Fight Through the Winter'', *Guardian*, 29 October 2006.
149 OHCHR-Nepal, above note 118, p. 4.