

**Jungle Justice: Passing Sentence on the Equality of Belligerents in
Non-International Armed Conflict**

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Summary

The equality of belligerents is an underlying principle of International Humanitarian Law. When it comes to non-international armed conflict, the principle faces special challenges due to the vertical relationship between a state and non-state party to a conflict. One such challenge is the IHL prohibition on the passing of sentences without fair trial guarantees. The question arises whether insurgent courts may pass sentence a) on perpetrators of international crimes, and b) in the absence of combatant immunity, on individuals for the mere participation in hostilities. The common Article 3 (to the Geneva Conventions) requirements of a 'regularly constituted court' and '*nullum crimen sine lege*' raise the question of the capacity of an armed opposition group to create legislation for purposes of meeting both of these obligations. Additional Protocol II adds further complexity. While the principle of equality does not necessarily require that the parties have equal status, to be effective, it is argued that it does require *equal rights and obligations flowing from international law norms regulating the subject-matter of International Humanitarian Law*. This means that insurgent groups that have the factual capability to meet the fair trial guarantees should also have the *de jure* capacity to do so. Since the obligations are imposed directly by international law, the necessary rights should also exist independent of the state.

Originally, the issue could be pursued within the contained legal regime of International Humanitarian Law, but gradually, other areas of international law have developed and are now essential to the equation. Human rights law requires that courts be 'established by law', but it only contemplates the existence of state operated courts. International criminal law now imposes individual responsibility for breaches of fair trial provisions in non-international armed conflict. Although there is no consistency with respect to the addressees of each of these regimes, the impact of their cross-referential relationship puts the equality of belligerents principle into question.

The fair trial provisions of International Humanitarian Law can either incorporate their human rights equivalents *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 bound by its obligations. It is argued that the preferred solution is the latter. This would put greater focus on the actual fairness of insurgent courts rather than their legal basis. Moreover, it would be consistent with the equality of belligerents principle, an essential condition to encourage International Humanitarian Law compliance by armed opposition groups.

List of Abbreviations

APII	Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts
CA3	Common Article 3 to the Geneva Conventions of 12 August 1949
CPN-M	Communist Party of Nepal-Maoist
ECHR	European Court of Human Rights
FMLN	Frente Farabundo Martí para la Liberación Nacional
HRC	Human Rights Committee
IAC	International Armed Conflict
I-ACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant for Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
NIAC	Non-International Armed Conflict
OHCHR	Office of the High Commissioner for Human Rights
ONUSAL	United Nations Observer Mission in El Salvador

INTRODUCTION

*That until that day
The dream of lasting peace, world citizenship
Rule of international morality
Will remain in 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 (CA3), the provision of the Geneva Conventions regulating non-international armed conflict (NIAC), nothing would come of the effort. Even though the text of CA3 explicitly declares that the ‘provisions shall not affect the legal status of the Parties to the conflict’,¹ states are more concerned about the implicit status that the invocation of CA3 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 of treaty regulation of internal armed conflict in the law of war. It also explains why it has been said that the drafting of CA3 ‘gave rise to some of the most prolonged and difficult discussions at the Geneva Conference’.² Today, the proliferation of the image of international terrorism as well as the drastically increased ability of non-state opposition groups to not only wage war, but also 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 NIAC. 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.

¹ CA3 to: *Convention [No.I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31-83; *Convention [No. II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85-133; *Convention [No. III] relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135-285; *Convention [No. IV] relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287-417.

² Joyce Gutteridge, “The Geneva Conventions of 1949”, *British Yearbook of International Law*, 1949, p. 300.

Equality in NIAC, to the extent it exists, is consequently a more limited concept than in international armed conflict (IAC). This is due in part to the above-mentioned compromise based on minimum protection stemming from the asymmetry of the parties. Most of the provisions of CA3 are strictly limited to fundamental humanitarian protections, such as prohibition of murder or ill-treatment. The fulfilment of these provisions by belligerent parties requires no legal personality. Yet one provision of CA3 directly impacts on the domain traditionally reserved to that of the state: the administration of criminal justice. Art. 3(1)(d), protecting persons not or no longer taking part in hostilities, prohibits the ‘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’. This prohibition in fact contains two components. The first is the legal basis of a ‘regularly constituted’ court, while the second is the judicial guarantees which must be maintained by these ‘regularly constituted’ courts. As we shall see, both of these components may require the capacity to legislate. For a state, the capacity to legislate is not contested. It derives its sovereign legislative authority independent of international law. Yet armed opposition group, as sub-state entities subject to the domestic law of the state, may lack the capacity to meet both components of the International Humanitarian Law (IHL) fair trial provision.

Two possible conclusions can be drawn from the wording of CA3(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, Art. 3(1)(d) would effectively prohibit armed opposition groups from passing sentences or carrying out executions (except 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. Alternatively, armed opposition groups would have the legal capacity to establish courts and meet the judicial guarantees, 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. CA3 has been supplemented by Additional Protocol II to the Geneva Conventions (APII) covering situations of NIAC. Applying only to high threshold conflicts, it loosens the legal basis requirement while enumerating the essential guarantees of CA3.

Originally, the dilemma could be pursued within the contained legal regime of 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 inter-active, in 1949, there were no binding international norms of international human rights law or international criminal law relating to NIAC. With respect to human rights law, Zegveld, an expert on the law of NIAC, points out the general problem: ‘Human rights treaties presume the state to be the only authority within the state territory, and under this law the state, represented by a government, is the only authority entitled to arrest and detain persons on such grounds and in accordance with the law.’³ This principle would also be relevant to the ‘established by law’ and ‘*nullum crimen sine lege*’ criteria with respect to passing of sentences, as will be seen *infra*. As international criminal law incorporates human rights standards to interpret CA3 (1)(d), the provisions of the three international law regimes become cross-referential.

A further layer of complexity is added by the fact that it is not just conflicting norms that may prove problematic. The personal scope of coverage of the legal regimes is also asymmetrical: IHL creates obligations on states and armed opposition groups, 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 the state and arguably armed opposition group level). Moreover, any hierarchy in the relationship of the legal regimes must be considered. All of these factors, as well as the parallel formation of customary law, may result in the lack of coherency amongst the regimes.

The principle of equality of belligerents is especially sensitive in NIAC 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 IAC, this would pose no conceptual problems.⁴ Yet NIAC is a different story. If only state authorities, due to their 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.⁵ The issue impacts directly on the incentive for armed opposition groups to respect IHL. The only conventional incentive which exists is listed in Article 6(5) of AP II, wherein the authority in power at the end of hostilities will endeavour to grant amnesties to combatants

³ Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), p. 66.

⁴ Of course it is not at issue in IAC as combatant immunity exists under Geneva Convention III.

⁵ 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, Canada, 13-15 November 2003, p. 12.

who have not committed international crimes.⁶ This amounts to a ‘soft’ international obligation. Yet the principle of complementarity of the International Criminal Court (ICC) puts the prime responsibility on states to prosecute violations of CA3, and some claim that it is in fact an obligation.⁷ Art. 3(1)(d) could provide a dangerous loophole for states in that in the name of complementarity, they may deny the granting of amnesties to individuals associated with insurgent courts, even when armed opposition groups generally respect IHL. International criminal law could create further problems related to the command responsibility obligation to punish perpetrators of international crimes, to the extent armed opposition group superiors have such a *prima facie* obligation, but may not be granted the authority to do so. In an age where states are generally complicit in the over-exaggerated threat of terror, such an outcome would be detrimental to the protection of ‘civilians’, as it is of utmost importance that armed opposition groups willing to consider respect for IHL have the ability to distinguish themselves from those who do not.

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 at international law. This would compensate for the anomalous relationship of the parties, wherein the armed opposition group is a sub-state entity subject to the authority of the state; the vertical relationship would be avoided as far as the scope of the IHL provisions are concerned. Therefore, 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 factual capability to meet the requirements of the law of NIAC 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 essential guarantee requirements which is

⁶ See Rule 159, Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, Vol. 1 (Geneva and Cambridge: ICRC and Cambridge University Press, 2005), p. 611, concluding that this ‘soft’ obligation is part of customary law.

⁷ See Article 1 of the Rome Statute of the International Criminal Court, A/CONF./183/9, 17 July 1998; for a view that an obligation exists, see *infra*, Henckaerts in sec IV.

sensitive to the asymmetrical relationship between states and armed opposition groups, without reducing the *de facto* level of protection.

In the context of the fair trial provisions of the IHL of NIAC, this paper will explore the compatibility of the equality of belligerents principle with the convergence of IHL, international human rights law and international criminal law. It will look at the obligations and corresponding rights of armed opposition groups with respect to passing of sentences in two different contexts: 1) commission of international crimes attracting criminal responsibility; and 2) violations of ‘domestic’ penal provisions (their own or the state’s) for mere participation in hostilities or complicity therein. Section I will first examine the extent to which the equality of belligerents principle has been transposed from IAC. It will then go on to the problem of how armed opposition groups are bound by IHL, followed by an analysis of international legal personality, keeping in mind how these issues affect equality. A definition of equality of belligerents specific to NIAC will be offered. Section II will then look to the convergence of the three international law regimes and whether there exists a hierarchy of application. Section III will scrutinize the two separate requirements (legal basis and essential guarantees) of the passing of sentences provisions of CA3 and APII by looking at the definitions and drafting history. Special focus will be on the term ‘regularly constituted court’ and its relationship to the ‘established by law’ requirement of human rights law. This will be followed by an analysis of the limited reported practice in the area of insurgent courts. Section IV will look at obligations and rights with respect to prosecutions in the separate contexts of international crimes and participation in hostilities. It will then consolidate and deconstruct the obstacles to armed opposition group prosecutions based on an approach wherein rights flow from obligations.

For the sake of brevity, when passing of sentence is mentioned, it also assumes the carrying out of executions, except when the distinction is made. Prosecution for the mere participation in hostilities will also include the notion of complicity/collaboration. ‘Fair trial guarantees’ will be used to refer to the overall prohibition on passing of sentences, while ‘legal basis’ and ‘judicial guarantees’ respectively will be used to refer to the two separate components.

Throughout the analysis, it is understood that the subject matter of CA3 only deals with prosecutions related to an armed conflict. Therefore aspects of insurgent courts dealing with other civil and criminal matters are not relevant to the discussion, although they certainly have human rights implications. The same can be said about insurgent courts operating in situations that don’t amount to armed conflict. Both of these issues deserve further attention,

as the discussion on practice will reveal, although they remain outside the scope of the current study. Finally, only traditional civil war-type conflicts between an armed opposition group and a state will be addressed. Even though CA3 envisions conflicts between armed opposition groups (while APII does not) these conflicts remain outside of the scope of the analysis as they do not confront the principle of equality. Trans-national conflicts, to the extent they may be covered by the law of NIAC, will not be addressed.

Section I: Equality of Belligerents in Non-International Armed Conflict

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 determined an aggressor or during wars of national liberation. He concludes:

L'égalité des belligerents 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.⁸

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.⁹

Yet while the principle is undoubtedly established in the law of IAC, there is good reason to question its status in the law of NIAC. 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.’¹⁰ 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. This axiomatic difference renders any analogous extension of the equality principle to internal

⁸ Henri Meyrowitz, *Le Principe de L'égalité des Belligerents Devant Le Droit de La Guerre* (Paris: Editions A. Pedone, 1970), p. 400.

⁹ 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, p. 19, stating, ‘The principle of the equality of the belligerents underlies the law of armed conflict’; 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* (Geneva: ICRC, 2005), p. 106; Nathaniel Berman, ‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’, *Columbia Journal of Transnational Law*, Vol. 43, 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 NIACs’, in T. McCormick, ed., *Yearbook of International Humanitarian Law*, Vol. 6 (The Hague: T.M.C. Asser Press, 2003), p. 174, stating, ‘This principle dominates the entire body of the laws and customs of war.’

¹⁰ Emerich de Vattel, *Law of Nations*, Preliminaries, para. 18, available at http://www.constitution.org/vattel/vattel_pre.htm

conflict difficult. Based on the asymmetrical quality of the parties, only a deliberate intention of states or a paradigmatic shift in the nature of international law could account for an extension of the principle. One may therefore expect that the principle of equality of belligerents has not experienced a smooth transition into the law of NIAC.

The Inter-American Commission on Human Rights, the only treaty body to have pronounced on the issue, has explicitly transplanted only the obligation aspect of the principle to NIAC in both the *Tablada* decision and the 3rd Report on Columbia.¹¹ It is interesting to note that neither report makes mention of corresponding rights. There is not a great deal of scholarly writing on the equality of belligerents in NIAC. Meyrowitz does not mention it outside of the specific context of wars of national liberation.¹² The ICRC study on Customary IHL (ICRC Study) does not broach the topic at all. Moir notes that while equality of belligerents is part of the law of NIAC, the identical provisions as applied as human rights law only bind the state party.¹³ Sassòli and Bouvier highlight the important distinction that while the principle applies at international law, IHL can not expect the same of domestic law.¹⁴ In a separate analysis, Sassòli has specifically raised the issue of equality when it comes to insurgent courts and insurgent legislation, based on problems which arise due to the above distinction.¹⁵ Bugnion has made the most comprehensive analysis of the subject. He sets out the essential problem by noting that states will claim a dual inequality when faced with insurrection. First, they will apply domestic criminal law to insurgents, and second, they will point to the domestic vertical hierarchy in order to reject a relationship based on equality.¹⁶ In other words, states will want to deny the autonomy of *jus ad bellum* and *jus in bello* when it comes to internal armed conflict. Bugnion highlights the difficulties caused by the above during the negotiations of CA3. Nevertheless, he concludes that at least when it comes to the minimum applicable rules, ‘as far as the obligations it imposes are concerned’,¹⁷ CA3 binds

¹¹ Inter-American Commission of Human Rights, Report No. 55/97, Case No. 11.137, para. 174: ‘CA3’s mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government and dissident forces.’; 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, par 13: ‘...humanitarian 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.’

¹² Under Article 1(4) of Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of IACs, 8 June 1977, 1125 UNTS 3 – 434), National Liberation wars are now covered by the law of IAC. However, *Le Principe de L’Égalité des Belligérents Devant le Droit de la Guerre* was published in 1970, well before API came into effect.

¹³ Lindsay Moir, *Legal Protection of Civilians During Internal Armed Conflict* (Cambridge: Cambridge University Press, 2001), pp. 44-45.

¹⁴ Sassòli and Bouvier, *How Does Law Protect...*, p. 108.

¹⁵ Sassòli, “Possible Legal Mechanisms...”, p. 12.

¹⁶ Bugnion, “Jus ad Bellum...” p. 176.

¹⁷ *Id.*, p. 176.

each Party to the conflict. This was a formidable achievement for the ICRC, even though the wording from an earlier draft declaring that ‘the Convention shall be *equally* applied by each of the adverse Parties’ [emphasis added] was abandoned early in the process,¹⁸ and even though the fundamental combatant immunity principle was dealt a similar fate.

The ICRC Commentary to Article 3 (Geneva Commentary) proclaims that the words “each party” mark a step forward in international law.¹⁹ 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.’²⁰ Draft Art. 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.²¹

The Commentary to the Draft Protocol reveals that the intention of the drafters was to follow the technique of CA3.²² However, when it became clear that APII 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.’²³ 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 equal footing.’²⁴ 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:

¹⁸ Resolution XIV of the 16th International Red Cross Conference, London, 1938.

¹⁹ Jean S. Pictet, International Committee of the Red Cross, *Commentary IV, Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (Geneva: ICRC, 1958), p. 37.

²⁰ Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts* (The Hague: Martinus Nijhoff Publishers, 1982), p. 604.

²¹ ICRC, *Commentary to the Draft Additional Protocols to the Geneva Conventions of August 12, 1949* (Geneva, 1973), p. 135.

²² *Id.*, p. 135.

²³ Bothe et al, *New Rules...*, p. 606.

²⁴ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (CDDH), Geneva, 1974-1977 (Bern: Federal Political Dept., 1978) SR.56, para. 126.

several 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.²⁵

One may therefore question the assertion of the Commentary to APII, which alleges that the Protocol grants ‘the same rights and impose the same duties on both the established government and the insurgent party...’²⁶ In fact, the above analysis reveals that it is necessary to separate the concepts of rights and duties in evaluating the principle of equality of belligerents in NIAC: while the question of obligations remains somewhat controversial, the question of rights has barely been addressed. As a panel of experts has declared, ‘[t]he basic issue is that in the current situation there is a tendency to deal with irregular groups as actors that have obligations only.’²⁷ A further inquiry into the binding nature of NIAC norms and the legal personality of armed opposition groups will reveal how the question of rights affects our evaluation of the equality principle and the capacity to pass sentence.

2. How are Armed Opposition Groups Bound?

The question 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 CA3, the Geneva Commentary suggests that armed opposition groups are bound due to a principle of ‘effective sovereignty’ over territory.²⁸ 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.²⁹

²⁵ Zegveld, *Accountability...*, p.10 at fn. 1, citing ICRC, International Conference of the Red Cross and Red Crescent, 31 October – 6 November 1999, Annex II (1999). Note that the scope of this statement also reflects the opinion of these States with respect to CA3.

²⁶ Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Dordrecht: ICRC, Martinus Nijhoff Publishers, 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 APII ‘develops and supplements’ CA3, in order to conclude that ‘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 Sassoli & Bouvier, *How Does Law...*, p. 964. Sudan stated that APII is ‘simply a concession on the part of States.’ CDDH/SR.56, para. 37.

²⁷ See J-M Henckaerts, M. Veuthey, L. Zegveld, “Panel Discussion on Ways to Bind Non-State Actors to IHL,” chaired by Roy Gutman, in *Proceedings of the Bruges Colloquium: Relevance of International Humanitarian Law to Non-State Actors*, 25-26 October 2002, 27 *Colligium* (Spring 2003), p. 171.

²⁸ Pictet, *Commentary IV...*, p. 37.

²⁹ *Id.*, p. 37. However, effective sovereignty should not depend on intention but on fact.

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 CA3 (as distinct from the customary status of CA3 itself). The Special Court for Sierra Leon has pronounced:

...there is now no doubt that [CA3] 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 CA3 which is aimed at the protection of humanity.³⁰

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

Noortmann points out that there is nothing inherent in international law which prevents the practice of non-state entities from consideration in the determination of customary law.³¹

Article 38 of the Statute of the International Court of Justice lists the sources of international law:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
- ...

Noticeably, 38(1)(b) does not make any reference to ‘state’ or ‘civilized nation’ in the determination of custom. Sassòli, who advocates an ‘ownership’ approach to the promotion of respect for IHL by armed opposition groups, claims these non-state actors already participate in the formation of customary IHL and human rights law:

A first step for creating a sense of ownership among armed groups is to involve them into the development and reaffirmation of the law. In my view, as far as customary IHL of NIACs and customary Human Rights norms applicable to armed groups are concerned, this already is the case. Customary law is based on the behaviour of the subjects of a rule, in the form of acts and omissions or (whether qualified as practice *lato sensu* or evidence for *opinio juris*) in the form of statements, mutual accusations and justifications for their own behaviour. The subjects of the rules relevant to non-State actors are also those actors.³²

³⁰ *Kallon, Kamara, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, SCSL-04-15-PT-060, 13 March 2004, paras. 45&47.

³¹ Math Noortmann, “Globalisation, Global Governance and Non-State Actors: Researching beyond the State”, Work in Progress, *International Law FORUM du droit international*, Vol. 4, No. 1 (Jan 2002), no page number in online version, available at <http://www.ingentaconnect.com/content/mnp/inla>.

³² Marco Sassòli, “Possible Legal Mechanisms...”, 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.

The view that ‘rebel practice’ and opinion helps form the customary law of IHL is supported by the International Criminal Tribunal for the former Yugoslavia (ICTY) *Tadic* Jurisdiction decision and the Report of the UN Commission of Enquiry on Darfur (Darfur Commission).³³ In reviewing *opinio juris* of states on the content of IHL applicable in NIAC, the *Tadic* Appeals Chamber also cited a statement made by the Frente Farabundo Martí para la Liberación Nacional (FMLN), a Salvadorian rebel group, regarding its commitment to comply with CA3 and APII.³⁴ The Court then made clear that it considered the FMLN statement to be evidence of customary law: ‘[i]n addition to the behaviour of belligerent States, Governments and *insurgents*, other factors have been instrumental in bringing about the formation of the customary rules at issue.’³⁵ Although the Darfur Commission did not point to any rebel practice in enumerating the customary rules on internal armed conflict relevant to the particular conflict, it maintained that the Sudan is bound by the customary rules relating to internal armed conflict ‘which have evolved as a result of State practice...as well as pronouncements by States, international organizations and armed groups’.³⁶ 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.³⁷ 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.

The ICRC Study, conversely, does not take rebel practice into consideration, instead declaring that, ‘[t]he practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law and other statements, does not constitute State practice as such,’ and consequently lists it under a distinct category of ‘Other Practice’, based on the justification that ‘its legal significance is unclear.’³⁸ Henckaerts, a co-editor of the ICRC Study, has unequivocally stated: ‘Under

³³ Antonio Cassese was both the President of the 1995 ICTY Appeals Chamber and the Chairman of the 2005 Darfur Commission.

³⁴ *Prosecutor v Dusko Tadic*, ICTY, IT-94-1-AR72 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), para. 107.

³⁵ *Id.*, para. 108.

³⁶ *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 (hereinafter Darfur Report).

³⁷ 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. This practice would be contrary to the ICRC Study Rule 148 which prohibits belligerent reprisals against civilians. See Henckaerts and Doswald-Beck, *Customary International Law*... Vol. 1, p. 526.

³⁸ Henckaerts and Doswald-Beck, *Customary International Law*..., p. xxxvi.

current international law, only State practice can create customary international law.’³⁹

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.⁴⁰ At any rate, the notion that armed opposition groups are bound by the customary nature of their CA3 obligations makes one question the meaning of ‘equality’ if they have been unable to participate in its formation.

The binding nature of APII, which is not fully considered as customary law, is even more problematic. Sivakumaran contends that the only way that 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.⁴¹ From a perspective of international duties, such an approach removes armed opposition groups from being the addressees of AP II. As Cassese correctly points out, it is not the status of rebels at domestic law, but at international law, that is at issue.⁴² He further states, ‘[t]o acknowledge that rebels are able to invoke international rules implies that they are outside both the physical and legal control of the national authorities.’⁴³ From a perspective of equality in its broad meaning, there is of course a fundamental difference between an armed opposition group being simply bound by IHL through the implementation of APII into the domestic law of its state adversary on the one hand, and from gaining the same equal rights and obligations independent of the state on the other. In the case of fair trial guarantees, it is in fact 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.⁴⁴ While this conclusion would be consistent with any definition of the principle of equality, the result would be similar to the theory of the CA3 Commentary, as it would leave many armed opposition groups outside of the scope of coverage of APII.

³⁹ 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.

⁴⁰ Although the concept with respect to armed opposition groups as *lex ferenda* is supported by both Sivakumaran (see *infra* n. 41) and Henckaerts, “*Binding...*” p.128. Further questions, such as the weight which should be given to rebel practice, remain outside of the scope of the current study.

⁴¹ Sandesh Sivakumaran, “Binding Armed Opposition Groups”, *International Comparative Law Quarterly*, Vol. 55, (April 2006), p. 371.

⁴² Antonio Cassese, “The Status of Rebels Under the 1977 Geneva Protocol on NIACs”, *International Comparative Law Quarterly*, Vol. 30 (April, 1981), p. 429.

⁴³ *Id.*, p. 417.

⁴⁴ *Ibid.*, p. 428-30.

3. 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 only states who agree to be bound, and when it comes to treaty law, who have the capacity to become unbound, as well as the ability to alter the conditions under which they are bound. Can a spouse purport to be on equal terms with her partner if only he can change the locks? It is clear that the principle of equality of belligerents cannot be transposed from IAC 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 from the equation. Second, ‘international law’ is not limited to IHL itself, but encompasses all international norms which have bearing on the rights and obligations flowing from CA3, APII, and the customary law of NIAC. These additional norms include international human rights law, international criminal law, and anti-terrorism conventions.

For example, domestic legislation which denies unemployment benefits to the wives of all rebel fighters may result in disparity (as rebels may need to take on a day job to support their families), yet equality is maintained to the extent that the law of NIAC does not regulate the subject-matter—even though it may well be a human rights violation in its own right. On the other hand, the creation of an international norm applying a strict definition of torture contained in the Torture Convention to the prohibition of torture contained in CA3(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’.⁴⁵ In fact, the *Celebici* decision of the ICTY re-interpreted the Torture Convention in order to extend the concept of ‘official capacity’ to armed opposition groups, in line with the equality principle.⁴⁶

⁴⁵ Article 1 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 June 1987, 1465 UNTS 85.

⁴⁶ *Prosecutor v. Zejnir Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, ICTY, IT-96-21-T, 16 November 1998, para. 473.

For the sake of semantics, 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. On the one hand, 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. On the other hand, disparity may result in capability advantages for states, but equality should ensure that rights and obligations stemming from the subject-matter of the law of NIAC remain the same. To help clarify the second case by analogy, in the IHL of IAC regulating conduct of hostilities, there is a legal requirement for the parties to a conflict to apply precautionary measures in attacking military targets to verify that the target has been correctly identified.⁴⁷ One state may have a capability advantage if, possessing unique satellite technology, it is able to fulfil the requirement using high altitude bombing. Nevertheless, the legal rights of the states remain the same.

Even if one accepts that such an interpretation may suffice to bring most issues which arise in NIAC under the principle of equality,⁴⁸ a further issue arises where functions that are normally within the exclusive jurisdiction of the state are essential to the specific subject-matter covered by the law of NIAC. When it comes to murder, cruel treatment, taking of hostages, or even conduct of hostilities, the legal personality of the parties is not relevant. These are pure prohibitions with no corresponding rights. Yet as soon as the capacity to pass sentences related to the conflict enters the equation, the nature of the parties must be considered. A state derives its authority to legislate and administer justice independent of international law, and can therefore meet its obligations *per se*. There is no higher authority. An armed opposition group, however, is subject to the authority of the state (including its monopoly on the administration of justice as per state law) as well as international obligations deriving from IHL. If international law did not impose obligations on armed opposition groups, it would generally not be concerned with their actions, such as constituting courts. It would be a matter of pure domestic concern. Meron argues that CA3 ‘should be construed as imposing direct obligations on the forces fighting the government.’⁴⁹ The reverse should also apply, especially when those rights do not otherwise exist domestically, such as the right to

⁴⁷ Additional Protocol I Art. 57(2)(a)(i).

⁴⁸ There are other potential inequalities which remain outside of the scope of this paper. See Art. 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 Art. 2 of the Draft Comprehensive Terror Convention, A/57/37, available at <http://hei.unige.ch/~clapham/hrdoc/docs/a-57-37.pdf>.

⁴⁹ Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius, 1987), p. 39.

establish a ‘regularly constituted’ court.⁵⁰ We shall examine in Section IV to what extent this may be problematic when other regimes of international law come into play.

4. Legal Personality

A separate but related issue is international legal personality. Equal legal personality from the perspective of international law may not be required for our definition of equality, but armed opposition groups would nevertheless require at least limited legal personality in order to assert rights on the international plane. This would include entering agreements at the international level with other states and/or with the state itself, and invoking the international responsibility of the state party for breaches of the law of NIAC, just as it can incur responsibility itself.⁵¹ In considering legal personality, we are confronted with the fact that the broad concept of parity can not always be detached from the narrow context of equality. Until the middle of the twentieth century, the legacy of the Westphalian order left International law as little more than an exclusive ‘old boys network’ wherein membership was based on fulfilling the requirements of statehood, and non-state actors were considered *persona non grata*.⁵² The question of legal personality was directly tied to the question of order in the international community. Clapham links the reluctance to expand the notion of legal personality beyond the state to the implications of our discussion on customary law above: ‘[i]t seems assumed that increasing the category of international legal persons recognized under international law will lead to an expansion of the possible authors of international law.’⁵³ This ‘too many cooks in the kitchen’ approach may have a strong appeal in terms of maintaining international order, but it does not necessarily address the current reality wherein non-state actors have specific obligations at international law.

It is of significance to note that CA3 was the first explicit international law provision which attempted to regulate the conduct of non-state actors *qua* groups, although as noted above, it explicitly refrains from granting any legal status to armed opposition groups. In 1949, the same year as the Geneva Conference, the International Court of Justice rendered an Advisory

⁵⁰ Problems could exist importing this model to APII, as per the arguments *supra*, wherein some States and commentators do not necessarily accept that APII applies equally between the parties, but rather applies to armed opposition groups as a matter of domestic law

⁵¹ For the responsibility of the armed opposition group, see *Draft Articles Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Text adopted by the International Law Commission at its fifty-third session, in 2001, para. 16 of Art. 10, p. 118, available at <http://www.un.org/law/ilc/>.

⁵² See Eric Allen Engle, “The Transformation of the International Legal System: The Post-Westphalian Legal Order,” *QLR*, Vol. 23 (2004), p.25; on the 4 criteria of Statehood, see Ian Brownlie, *Principles of Public International Law* 6th ed. (Oxford: Oxford University Press, 2003), pp. 70-71.

⁵³ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), p. 59.

Opinion in the *Reparations* Case granting limited legal personality to a non-state entity—albeit the United Nations—an international organization created by states. The Court determined that rights emanate from duties: ‘[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being *essential to the performance of its duties*.’⁵⁴ While it is tempting to apply the principle to armed opposition groups by analogy, such a conclusion would ignore the emphasis the ICJ put on the constitutive character of the UN. The Court pointed out that the UN is ‘...the supreme type of international organization...’ whose ‘...Members...have clothed it with the competence required to enable those functions to be effectively discharged’,⁵⁵ while reiterating that ‘...the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality.’⁵⁶

The issue of whether a non-international organization could be deemed to have functional international legal personality was addressed by the ICTY in a 1999 decision regarding witness immunity of a former member of the ICRC.⁵⁷ This decision is of specific relevance as it involves personality derived from the Geneva Conventions. The Trial Chamber noted it is ‘generally acknowledged’ that the ICRC has an international legal personality even though it is a private organization established under Swiss law,⁵⁸ and that the Geneva Conventions ‘must be interpreted as giving to the ICRC the powers and the means necessary to discharge its mandate effectively.’⁵⁹ One of these powers was ruled to be ‘the right’ to insist on non-disclosure *vis à vis* parties to the Geneva Conventions and the Protocols.⁶⁰ Essentially, the Court ruled that a sub-state entity which has been empowered by the Geneva Conventions can exercise non-enumerated rights deemed necessary to fulfil its mandate.

In 2005, the Darfur Commission stated that armed opposition groups possess international legal personality when they ‘have reached a certain threshold of organization, stability and effective control of territory.’⁶¹ The Report, however, did not make reference to the origin of

⁵⁴ *Reparations For Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 at p. 182. (Italics added)

⁵⁵ *Id.*, p. 179.

⁵⁶ *Ibid.*, p. 185.

⁵⁷ *Prosecutor v. Simić et al.*, *Decision on the Prosecution Motion Under Rule 73 For a Ruling Concerning the Testimony of a Witness*, ICTY, IT-95-9, 27 July 1999, Trial Chamber.

⁵⁸ *Id.*, at footnote 9 of para. 46.

⁵⁹ *Ibid.*, para. 72.

⁶⁰ *Ibid.*, para. 73.

⁶¹ *Darfur Report*, para. 172.

such criteria, although one can assume it is the long standing principles of belligerency and insurgency, where depending on the definition, armed opposition groups have historically been granted international personality.⁶² Previous jurisprudence as well as the Commentary to the Geneva Conventions suggests that such a threshold is higher than that needed to invoke CA3.⁶³

Based on the above findings of the ICJ and the ICTY, one may point to a general rule wherein non-state actors gain personality on the international plane for the purpose of fulfilling a mandate prescribed by states, either express or implied. Such a rule would cover situations in which IHL imposes positive obligations on armed opposition groups (if, for example there were a responsibility to prosecute perpetrators of war crimes) but not necessarily situations wherein armed opposition groups are prohibited from taking certain action (such as passing of sentences without a ‘regularly constituted’ court). The Darfur Commission opens the door for a more general acceptance of legal personality of insurgents, but the threshold remains high and the rights associated with such personality remain undefined.

As much as states involved in a NIAC are apt to quote the disclaimer of the final paragraph of CA3,⁶⁴ the prophetic appeal of the Burmese delegate to the 1949 Diplomatic Conference rings out like the cry of a ghost destined to walk the earth for eternity: ‘Whether or not you safeguard the legal status of the *de jure* government, the mere inclusion of this Article in an international convention will automatically give the insurgents a status as high as the legal status which is denied to them.’⁶⁵ The cry has not evaded the ears of legal commentators. Sassòli notes, ‘IHL implicitly confers upon parties to NIACs, no matter their successes, the functional international legal personality necessary to have the rights and obligations foreseen by it.’⁶⁶ Moreover, the reasoning of the *Reparations* Opinion is consistent with such a conclusion:

⁶² See Eibe H. Riedel, “Recognition of Belligerency” (pp. 47-50) and “Recognition of Insurgency”, (pp. 54-56) in *Encyclopedia of public international law*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Rudolf Bernhardt, 4, Use of force ; War and neutrality ; Peace treaties : (N-Z).

⁶³ For invocation of CA3, see Pictet, *Commentary IV*..., pp. 35-6, listing criteria which may be indicative of armed conflict, but concluding that scope of application should be ‘as wide as possible’. For jurisprudence, see *Tadic* (Jurisdiction), para. 70 requiring ‘protracted’ violence, and *Tablada*, paras. 152-6, for short duration.

⁶⁴ It states: ‘The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.’

⁶⁵ 18th Plenary Meeting, *Final Record of the Diplomatic Conference of Geneva*, vol. II-B, (Berne, Federal Political Department, 1951), p. 330.

⁶⁶ Marco Sassòli, “Trans-National Armed Groups and International Humanitarian Law” (to be published through the Occasional Papers Series, Program on Humanitarian Policy and Conflict Research, Harvard University, copy on file with author).

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends of the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life...⁶⁷

In fact, the special needs required by the law of NIAC have been a catalysing force in the progressive development of international law. The principle of equality of belligerents would remain an empty construct unless it were accompanied by a safeguard to counter problems caused by the inherent lack of parity between the state and non-state party to a NIAC.

Furthermore, armed opposition group compliance is unlikely to benefit if these groups feel prejudiced by an international legal norm that subjects them to the law but does not allow them to be subjects of it.

SECTION II: Convergence of IHL, Human Rights and International Criminal Law

1. Human Right Implications

Due to a mutual dependency of provisions, an assessment of the capacity of insurgent groups to establish and operate courts which meet the legal basis and essential guarantee requirements of IHL requires an understanding of the convergence of the separate legal regimes of IHL and international human rights law. It is not necessary here to present a comprehensive analysis of the topic in general as it has been dealt with exhaustively elsewhere.⁶⁸ While it is no doubt true that the regimes have for the most part found a comfortable fit, Petrasek points out that ‘in some specific and important ways they differ radically’ and 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.’⁶⁹ 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 NIAC.⁷⁰

⁶⁷ ICJ, *Reparation for Injuries*..., para. 179.

⁶⁸ See among others: René Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002); Louise Doswald-Beck, “International Humanitarian Law and Human Rights Law,” *International Review of the Red Cross*, No. 293 (April, 1993); Asbjørn Eide, “The Laws of War and Human Rights—Differences and Convergences,” in Christian Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, (Martinus Nijhoff, 1984); G.I.A.D. Draper, “The Relationship between the Human Rights Regime and the Laws of Armed Conflict,” *Israel Yearbook on Human Rights*, Vol. 1, 1971.

⁶⁹ David Petrasek, “Moving Forward on Humanitarian Standards”, *American Journal of International Law*, Vol. 92 (1998); Noam Lubell, “Challenges of Applying Human Rights Law to Armed Conflict,” *International Review of the Red Cross*, No. 860 (December 2005), p. 738.

⁷⁰ The right of armed opposition groups to detain individuals without trial is also crucial to the general issue, but remains outside the scope of our discussion. The law of NIAC is silent on the right to detain, although it creates

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’.⁷¹ As we shall see in Section III, some interpretations of CA3(1)(d) consider that ‘regularly constituted’ incorporates the human rights law ‘prescribed by law’ criterion. Unlike IHL, human rights law only addresses states, and it does not contemplate sub-state entities as being capable of fulfilling fair trial guarantees such as ‘established by law’, even if one considers that armed opposition groups are also bound by human rights law. To the extent that the ‘regularly constituted’ requirement of IHL incorporates the ‘prescribed by law’ criterion as understood by human rights law, an armed opposition group may be barred from passing sentences. Furthermore, the essential guarantees requirement is also at issue due to possible interpretations of the *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 NIAC and human rights law) came of age, since at the end of World War II, neither regime existed at international law. In considering the historical development, Kolb states:

The end of the 1940s was when human rights law was first placed beside what was still called the law of war. The question of their mutual relationship within the body of international law can be considered only from that moment. But human rights law was still too young and undeveloped to be the subject of analyses, which require a better-established sphere of application and a more advanced stage of technical development.⁷²

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.’⁷³

In 1949, there simply were no binding human rights instruments at international law.

Therefore, in negotiating the codification of minimum humanitarian norms to regulate NIAC for the first time, it would not have been especially problematic for the Geneva Conference delegates to assume that Common Art. 3(1)(d) was a self contained system which could be

obligations to provide for those in detention. For discussion on the right to detain without trial, see Zegveld, *Accountability*..., pp. 65-67.

⁷¹ 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 (this latter treaty contains more specific requirements which will be discussed *infra*).

⁷² Robert Kolb, “The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions”, *International Review of the Red Cross*, No. 324 (September, 1998), no page number in online version, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JPG2>.

⁷³ David Elders, “The Historical Background of Common Article 3 of the Geneva Conventions”, *Case Western Reserve Journal of International Law*, vol. 11 (1979), pp. 56-57.

equally applied by state and non-state parties.⁷⁴ Compatibility with other international law obligations was not an issue in Geneva. Even if any state party had been concerned about compatibility with the Declaration, alarm bells would not necessarily have been tripped. Article 10 on fair trial guarantees does not contain the ‘established by law’ requirements, and CA3 did not enumerate the essential guarantee of *nullum crimen sine lege* contained in Art. 11(2) of the Declaration.

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 of Human Rights. A look at a commentary to the European Convention shows that the necessity of ‘established by law’ as a component of free trial is fundamental to the Convention: ‘At domstolen skal være oprettet ved lov, er et udslag af legalitetsprincippet, som generelt ligger til grund for EMRK.’⁷⁵ Yet such a foundational anchor may not hold sway over the ICCPR, as unlike the European Convention on Human Rights (ECHR), it does not make preambular reference to commitment to rule of law and democracy.

The drafting history of the ICCPR shows that the ‘established by law’ requirement was not included in a 1947 draft of the Commission on Human Rights⁷⁶, although the 1st Session of the Drafting Committee (a sub-organ of the Commission) did propose a negative formulation more similar to CA3, wherein ‘no one shall be convicted of a crime except by judgment of a court of law, in conformity with the law’. During the 1949 5th Session of the Commission, a proposal to include the words ‘pre-established by law’ was rejected, while a proposal to include ‘established by law’ was accepted. Furthermore, the Commission voted at its 8th session in 1952 to insert the word ‘competent’ before ‘independent and impartial’.⁷⁷

Discussions of the Third Committee in 1959 pointed out that while the word ‘competent’ could refer to professional qualifications, the authors had in mind the legal notions of ‘*ratione materiae*, *ratione personae* and *ratione loci*’.⁷⁸ In his Commentary to the ICCPR, however,

⁷⁴ Not any non-state party would be able to meet the organisational challenges, but the important factor is that it remained a possibility.

⁷⁵ ‘that the court shall be established by law is a result of the principle of legality, which generally underlies the ECHR.’ [author’s translation] Per Lorenzen, Lars Adam Rehof, Tyge Trier, Nina Host-Christensen, Jens Vedsted-Hansen *Den Europæiske Menneskeretskonvention*, 2. Udgave, Kommenteret af (art.1-10), (København: Jurist og Økonomforbundets Forlag, 2003), p. 298.

⁷⁶ E/CN.4/37

⁷⁷ E/CN.4/SR.323

⁷⁸ A/4299, §52

Nowak states that the word competent ‘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.⁷⁹

The case law of the treaty bodies to the human rights conventions shows a difference in approach consistent with the minimal distinction noted above. 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” (see *Zand v. Austria*, application no. 7360/76, Commission's report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80).’⁸⁰ The emphasis on the legitimacy of the legislative basis of the judiciary is directly connected to the notion of democratic society. On the other hand, in the *Fals Borda* Communication, the Human Rights Committee (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...’⁸¹ Yet this Communication has been the subject of scrutiny:

The *Fals Borda* decision may be fairly criticized as the HRC appears to deny the relevance of issues relating to the constitutionality of the military courts at issue. Article 14(1) stipulates that persons must be tried before tribunals ‘established by law’. Therefore, the constitutionality or legality of a tribunal’s existence is an issue with which the HRC should be concerned.⁸²

One can at least make a credible argument that the political underpinnings (or lack thereof) of the respective human rights conventions have an effect on the extent to which the ‘established by law’ requirement will be regarded as a substantive obligation in its own right, independent of the other due process guarantees. However, Articles 14, 21 and 22 of the ICCPR do in fact make reference to a democratic society, and the ICCPR Commentary makes reference to parliamentary or common law origins, suggesting that these provisions must derive from a state. At any rate, the case law of both treaty bodies is consistent with an IHL interpretation which divides the legal basis and the essential guarantees into two separate requirements.

⁷⁹ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel, 1993), p 245.

⁸⁰ *Coeme et al. v Belgium*, European Court of Human Rights, 22 June 2000.

⁸¹ *Fals Borda et al v Columbia*, Human Rights Committee, 46/79, 27 July 1982.

⁸² Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary*, 2nd ed., (Oxford: Oxford University Press, 2004), p. 407.

1.2 Addressees of the Law

A related and important issue in our analysis of the convergence of IHL and human rights law is the asymmetry of the addressees of the obligations imposed. The imposition of IHL of NIAC obligations directly on both the state and non-state parties to a conflict is seen as a step forward 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 Columbia, the Inter-American Commission of Human Rights stated:

humanitarian 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.⁸³

The Commission also determined that ‘[i]nternational humanitarian law provides the only legal standard for analyzing the activities of armed dissident groups.’⁸⁴ In line with this approach in applying human rights law, the Office of the High Commissioner for Refugees (OHCHR) in Nepal differentiated between ‘obligations’ of states and ‘commitments’ of armed opposition groups, noting, ‘[j]ust as our Office continues to call on State authorities to ensure compliance with their human rights obligations, it is essential that the CPN-Maoist fulfil its human rights commitments’.⁸⁵ Neither Zegveld (generally) nor Moir (with respect to captured soldiers), two of the most noted contemporary experts in the law of NIAC, recognize the extension of human rights obligations to armed opposition groups.⁸⁶ Clapham, a strong advocate for extending human rights obligations to non-state actors in general, suggests that even though the Human Rights Committee 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.⁸⁷ Regarding Darfur, the Human Rights Commission has stated that ‘[t]he rebel forces also appear to violate human rights and humanitarian law.’⁸⁸

⁸³ Inter-American Commission of Human Rights, *3rd Report Columbia...*, Ch. 4, para. 13.

⁸⁴ *Id.*, Ch. 4, para. 14.

⁸⁵ 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/resources/Documents/English/pressreleases/SEP2006/2006_09_12_HCR_PressRelease_E.pdf.

⁸⁶ See Moir, *Legal Protection...*, p. 194; Zegveld, *Accountability...*, p. 53.

⁸⁷ Clapham, *Human Rights Obligations...*, pp. 328-29. 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 phrasing is ‘careful’, one can assume that he is referring to ‘as such’.

⁸⁸ E/CN.4/2005/3, CHR, 61st Session, Item 4, *Situation of Human Rights in the Darfur Region of the Sudan*.

Further examples of international bodies seeming to hold armed opposition groups accountable for human rights violations are quite numerous,⁸⁹ and may have prompted the Institute of International Law to declare in its Berlin Resolution of 1999:

II. All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status, as well as the United Nations, and competent regional and other international organizations have the obligation to respect international humanitarian law as well as fundamental human rights. The application of such principles and rules does not affect the legal status of the parties to the conflict and is not dependent on their recognition as belligerents or insurgents.⁹⁰

It must be concluded that the jury is still out on the human rights law obligations of armed opposition groups, although one further consequence that deserves mention is the problem of holding armed opposition groups accountable only during armed conflict, but not before or after.⁹¹ At any rate, when it comes to the final sentence of the Berlin Resolution, the denial that such an extension affects the status of the parties is a bit too much like having your cake and eating it too. It highlights the problems that arise in trying to transfer a principle of the law of NIAC, drafted with the specific anomaly of asymmetry between states and non-state actors in mind, to human rights law. While CA3 contains a similar savings clause regarding the legal status of armed opposition groups, it applies to a minimum set of obligations. Extending such a savings clause to human rights obligations of armed opposition groups is untenable, considering that armed opposition groups would have to have a much more developed legal capacity in order to be capable of fulfilling human rights obligations directed towards states. The San José Agreement between the FMLN rebels and the El Salvador government, under the auspices of the UN, seemed to have taken a different, yet subtle approach, expressly acknowledging that the armed opposition group had the ‘capacity...to respect the inherent attributes of the human person’.⁹²

Tomuschat agrees that in the special case where armed opposition groups control elements of government authority, they are subject to human rights obligations, but he also recognizes that duties imply rights: ‘The international community has set up a general framework of rights and duties which every actor seeking to legitimize himself as a suitable player at the inter-State level must respect.’⁹³ The emphasis on the control of territory would mean that

⁸⁹ For examples and discussion, see Clapham, “*Human Rights Obligations...*”, pp. 281-85.

⁹⁰ Institute of International Law, *Berlin Resolution*, Article II, available at http://www.idi-iiil.org/idiE/navig_chon1993.html.

⁹¹ See *infra* III:4.2. on Nepal.

⁹² A/44/971, S/21541

⁹³ 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: Festschrift für Dieter Fleck* (Berlin: Berliner Wissenschafts-Verlag, 2004), pp. 586-587.

human rights obligations would not extend to armed opposition groups which do not control territory during a NIAC.

1.3. Derogation Regime

A major difference between IHL of NIAC and human rights law is that the former is absolute while the latter 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.⁹⁴ For our purposes, such derogation must be strictly required and consistent with other obligations of international law, *e.g.* IHL.⁹⁵ 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. While in most cases the non-derogable nature of the IHL commitments will prevent any derogations based on the human rights requirement to comply with international law obligations, a problem may be posed by the subject matter of CA3(1)(d). The issue is especially relevant to the passing of sentence in situations of NIAC, since the ‘regularly constituted court’ requirement of CA3 has been defined by some in terms of arguably derogable human rights obligations,⁹⁶ and the *nullum crimen sine lege* criterion is expressly non-derogable.

2. International Criminal Law: Completing the Circle

Up until the 1995 ICTY *Tadic* (Jurisdiction) decision, the same ‘incredulous looks’ attached to a suggestion that human rights instruments imposed obligations in 1949 would have been the majority reaction to a similar suggestion that breaches of CA3 attract international individual criminal responsibility.⁹⁷ The Appeals Chamber, using a very thin retrospective of state practice and *opinio juris*, came to the conclusion that customary law creates individual

⁹⁴ ICCPR Art. 4; ECHR Art. 15; I-ACHR Art. 27

⁹⁵ *Id.*

⁹⁶ See *infra*, IV: 2.2.2.

⁹⁷ See Theodor Meron, “International Criminalization of Internal Atrocities”, *American Journal of International Law*, Vol. 89, No. 3 (July, 1995), pp.559-563, where he notes that even the ICRC did not recognize such liability. Meron argues, however, that criminalization has been confused with jurisdiction, which in his view accounts for the conservative view towards the individual responsibility of CA3 violations. The Security Council, however, had already, and for the first time, criminalized violations of CA3 in the ICTR Statute, and Meron points to some sources in the early 1990s (all Western) which had advocated for the criminalization of CA3.

criminal liability for CA3 breaches.⁹⁸ Certainly the ruling was a catalyst for self-fulfilling prophecy, as today, just over 10 years later, the notion is established as a treaty obligation on the 102 state parties to the ICC.⁹⁹

The imposition of criminal responsibility for breaches of CA3(1)(d) under Art. 8(2)(c)(iv) of the ICC Statute greatly complicates the puzzle with respect to equality of belligerents. First, it adds a further personal scope of coverage to the subject-matter of CA3, 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. Zegveld in fact questions whether CA3(1)(d) should have been included in the ICC statute at all, claiming that the crime involves a range of acts in which many actors participate and that it is not suitable for individual criminal responsibility.¹⁰⁰

Second, Art. 21(3) of the ICC statute declares that the application and interpretation of the relevant law ‘must be consistent with internationally recognized human rights.’¹⁰¹ In effect, this creates what Pellet 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.¹⁰²

Pellet calls this subparagraph ‘certainly the most perplexing aspect of the rules laid down by the Statute with respect to applicable law’, noting that the norms which grant ‘super-legality’ status are not restricted to the peremptory, and therefore non-derogable, norms of fundamental human rights, but extend to all ‘internationally recognized human rights’.¹⁰³

Ultimately, the inability of armed opposition groups to meet the human rights ‘prescribed by law’ standard, regardless of whether it is contained in the ‘regularly constituted’ court requirement, could result in culpability for individuals associated with insurgent courts.

Third, the ICC statute introduces the notion of complementarity, meaning that the ICC will only have jurisdiction if a national government is ‘unwilling or unable’ to prosecute the crimes listed in the statute.¹⁰⁴ Much of the effect of the Statute, therefore, will be realized within domestic jurisdictions controlled by courts of the state party, outside of the scrutiny of international mechanisms. It is conceivable that a state acting in less than good faith may prosecute (or threaten the prosecution of) individuals associated with insurgent courts for the

⁹⁸ ICTY, *Tadic* (Jurisdiction), paras. 128-134.

⁹⁹ ICC Statute Art. 8(2)(c). It was easier for the ICC treaty drafters to include emerging law, or create new law, as ICC jurisdiction is not retro-active, whereas the ICTY jurisdiction applies retroactively.

¹⁰⁰ Zegveld, *Accountability...*, p. 221.

¹⁰¹ ICC Statute, Art. 21(3).

¹⁰² 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: Oxford University Press, 2002) p. 1079.

¹⁰³ *Id.*, pp. 1079, 1081.

¹⁰⁴ ICC Statute Art. 17.

sake of political leverage, even when the armed opposition group in general, and these individuals specifically, respected IHL. All of these elements may cause problems for the equality of belligerents when it comes to the passing of sentences.

International criminal liability closes a potential cross-referential circle between the three international law regimes impacting on the passing of sentences in NIAC. The references, moreover, switch between individual and international responsibility. Therefore the result could be a skewed feedback cycle of interpretation wherein the ‘prescribed by law’ criteria of human rights law affects the ‘regularly constituted’ court requirement of IHL, which is criminalized by the ICC statute, which creates a ‘super-legality’ in favour of human rights law, thereby impacting on the equality of belligerents of IHL.¹⁰⁵

Section III: The Passing of Sentences Under International Humanitarian Law

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

The text of CA3(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 rule out the possibility 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.’¹⁰⁶ This highlights the anomalous nature of CA3 in regulating conduct of asymmetrical actors, in that only the capacity of the armed opposition group, and not the corresponding government, is at issue. The capacity of the government, of course, is clearly established in domestic law.

APII, which ‘develops and supplements [CA3] without modifying its existing conditions of application’,¹⁰⁷ also divides the prohibition into two parts. The *chapeau* of Art. 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 CA3, the first requirement drops the ‘regularly constituted’ qualifying provision of what type of court is

¹⁰⁵ See IV:2.1 for further discussion on the potential problems of the cross-references.

¹⁰⁶ Zegveld, *Accountability...*, p. 69.

¹⁰⁷ Article 1(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of NIACs (APII).

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, APII 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’, Art. 6 does nothing to ‘develop or supplement’ the CA3 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 CA3. Yet the reason for the deletion is clear enough. The ICRC Commentary to the Draft Additional Protocols of 1973 admits, ‘...the words “regularly constituted”, qualifying the word “court” in CA3, 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.’¹⁰⁸ One may therefore be justified in questioning, in the specific case of the legal basis for the passing of sentences, whether this Protocol which purports to develop CA3, doesn’t 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 APII often does not apply to situations of NIAC. Second, the threshold gap means that a conflict may trigger the application of CA3 but not APII.¹⁰⁹ In either case, it is difficult to imagine how the provisions of CA3 can be ‘developed and supplemented’ by further provisions of APII 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.* CA3) is actually narrower in terms of the conditions under which it will allow the passing of sentences (*i.e.* requirement of ‘regularly constituted court’).¹¹⁰ In fact, this specific anomaly relevant to the passing of sentences actually contradicts the Commentary to PII on the general relationship between PII and CA3:

¹⁰⁸ ICRC, *Commentary to Draft Additional Protocols...*, p. 142.

¹⁰⁹ See *supra* I:4. For a comprehensive analysis of the threshold gap, see Zegveld, *Accountability*, pp. 134-46 and Sandoz et al., *Commentary on the Additional Protocols...*, paras. 4446-4479. For a cautionary note on whether the gap does in fact exist, see Françoise Hampson, “Human Rights and Humanitarian Law in Internal Armed Conflict”, in Michael Meyer, ed., *Armed Conflict and the New Law*, Vol. 1 (London, British Institute of International and Comparative Law, 1989), p. 67.

¹¹⁰ On ‘regularly constituted court’ as a more difficult prerequisite than APII, see Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006). See also *infra* IV:4.1. on ONUSAL.

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 CA3 will apply simultaneously, as the Protocol's field of application is included in the broader one of CA3.¹¹¹

There is no problem with simultaneous application when the higher threshold encompasses a narrower scope. However, when the field of application of CA3 is actually narrower, as is the case in the legal basis requirement, simultaneous application results in a contradiction that becomes difficult to reconcile: the continued application of the 'regularly constituted court' requirement would mean that the APII legal basis standard would become superfluous, obviously an absurd result.

It is important to note that the provisions of APII Art. 6(2) were adopted after states had already agreed to a high threshold of application, including control of territory and the ability to carry out sustained and concerted military operations. There is a strong indication that the high threshold was a critical issue for states to accept the provisions of the Protocol.¹¹² Therefore, this factor should be kept in mind before applying a *lex posterior* or interpretation by subsequent rule approach to the 'regularly constituted' court legal basis of CA3. The high threshold represents a substantial difference in application, one which may account for states' willingness to loosen the legal basis for insurgent courts under the strict conditions of APII, where insurgents are well established. However, 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.

2. Capacity of Armed Opposition Groups to Pass Sentence

The legal basis requirements for armed opposition groups to pass sentences in connection to the conflict should be analyzed separately under CA3 and APII Art. 6(2). Under CA3, the first step is to look into what is meant by the term 'regularly constituted'. To the extent that it requires a court to be established by law, either as a pure *renvoi* to human rights law, or as a requirement analogous to human rights law, armed opposition groups could pass sentence if a) they are considered to have the capacity to legislate for the purposes covered by CA3, or alternatively; b) if in territory under their control, they operate courts which have previously

¹¹¹ Sandoz et al., *Commentary on the Additional Protocols*, para. 4457.

¹¹² See *infra*, III:2.3.

been established by the authorities of the state. If an ‘established by law’ criterion is somehow not part of the ‘regularly constituted’ requirement, there should be no legal basis problem from the perspective of equality. Under APII, sentences must still be passed by a court, but there are no separate qualifying requirement, and therefore no legal basis issue from the perspective of IHL (unless the term ‘court’ implicitly requires a legal basis). In both cases, it is also necessary to look into the second prohibition, *i.e.*, judicial guarantees enumerated in APII Art. 6(2), to determine if any of these provisions require legal capacity. Specifically at issue is the *nullum crimen sine lege* condition of Art. 6(2)(c), which prohibits convictions unless based on ‘law’ at the time of commission.

2.1. The First Prohibition: Towards a Definition of ‘Regularly Constituted Court’

One aspect of the term ‘regularly constituted court’ on which many authorities tend to agree is that the definition is difficult to pin down. Zegveld states that both requirements of CA3(1)(d) are ‘ambiguous’.¹¹³ The United States Supreme Court, in its recent landmark *Hamdan* decision, notes that the term is ‘not specifically defined in either CA3 or its accompanying commentary.’¹¹⁴ In order to help clarify the term, the *Hamdan* majority looked to the Commentary on Art. 66 of Geneva Convention IV, which discusses the ‘properly (or regularly) constituted courts’ of an occupying power. This Article declares that an occupying power may establish courts in the territory it occupies for the purposes of adjudicating breaches of the laws it establishes under the authority of Art. 64. The Civilian Convention, however, 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 to establish courts. In fact, the Commentary on Art. 66 associates ‘regularly constituted’ with the ‘ordinary military courts of the Occupying Power’.¹¹⁵ In the case of *Hamdan*, the Supreme Court was only concerned with the courts established by the state party, and did not touch upon issues that could be prejudicial to the rights of armed opposition groups. Yet the dissenting opinion of Justice Alito is not so innocuous. He states, ‘a “regularly constituted court” is a court that has been appointed, set up, or established in accordance with the domestic law of the appointing country.’¹¹⁶ This clearly links the legal basis to the state. Yet the opinion gives no indication that Justice Alito considered the implications of this definition on the rights of an armed opposition group. This illustrates that

¹¹³ Zegveld, *Accountability...*, p. 69.

¹¹⁴ *Hamdan v. Rumsfeld*, USSC, 548U.S.__(2006), p. 69.

¹¹⁵ Pictet, *Commentary IV...*, p. 340.

¹¹⁶ Alito (dissenting opinion), *Hamdan v. Rumsfeld*, USSC, 548U.S.__(2006), p. 2.

for the purposes of NIAC, 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 IAC.

The ICRC Study concludes that in both IAC and NIAC, the customary standard for passing sentence is a ‘fair trial offering all the essential guarantees’.¹¹⁷ Unfortunately, the analysis does not distinguish between the two types of conflicts on this specific Rule, even though it does distinguish, for example, with respect to the Rule on detention. One may wonder whether an opportunity to provide for some nuance with respect to the anomaly of disparity in NIAC was therefore lost. Even though the Rule itself does not make reference to the CA3 standard, the accompanying discussion nevertheless makes a determinative finding on the requirements of ‘regularly constituted court’ in the context of both CA3 regulating NIAC and Additional Protocol I Art. 75 regulating IAC. 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 Customary 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’.¹¹⁸ This is not quite as definitive as the Alito definition with respect to state monopoly, but the implication is strong due to the preceding human rights references. These references can be linked to the Introduction of the Study, which 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 crime other than by a “regularly constituted court...”’¹¹⁹ Yet as has been shown in Section II, *supra*, human rights obligations did not exist at the time when CA3 was drafted.

One possibility is that the Customary 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*.¹²⁰ Yet in the case of passing of sentences related to an armed conflict, a *lex specialis* favouring the human rights obligations would be tenable, as the provisions of the ICCPR, ECHR, and Inter-American Court of Human Rights (I-ACHR) are all more detailed

¹¹⁷ See Rule 100 in Henckaerts and Doswald Beck, *Customary International Law*, Vol. 1, p. 353.

¹¹⁸ *Id.*, p. 355.

¹¹⁹ *Ibid.*, p. xxxi.

¹²⁰ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion, 8 July 1996, para. 25; *Legal Consequences of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004, para. 106.

than CA3 when it comes to procedural due process.¹²¹ Another possibility is that the Customary Study applies a *lex posterior* approach, wherein the development of new and overarching legal norms affects the interpretation of existing norms.¹²² Still, both of these approaches require more attention when it comes to the regulation of NIAC; 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 CA3(1)(d), ‘incorporates customary human rights to due process by reference, and thus, all of the provisions of Article 14 of the International Covenant on Civil and Political Rights.’¹²³

In a pre-APII discussion on the meaning of CA3(1)(d), James Bond advocated a functional approach to the requirements, noting that, ‘[g]uerrillas, after all, are not apt to carry black robes and white wigs in their backpacks’.¹²⁴ His cocktail of criteria was based on appropriateness: ‘whether the appropriate authorities, operating under appropriate powers, created the court under appropriate standards’.¹²⁵ 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 standards that are problematic, as they relate to the legal basis requirement, while the third standard relates to the essential guarantees requirement. The first two standards, however, do nothing to clarify who the appropriate authorities may be, and whether the purported powers of an armed opposition group, *i.e.* their legal basis, would be considered appropriate.

¹²¹ 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).

¹²² Further evidence suggesting an adoption of the *lex posterior* approach is found in the ICRC Study 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 HR treaties’, see Louise Doswald-Beck, “Human Rights and Humanitarian Law: Are there Some Individuals Bereft of all Legal Protection?”, *ASIL Proceedings* 2004, p. 356.

¹²³ 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.

¹²⁴ 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.

¹²⁵ *Id.*, p. 372.

2.1.1. Impact of Additional Protocol II Article 6(2) on Definition of ‘Regularly Constituted Court’

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 to 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.¹²⁶ There were no legal precedents to work from, as individual responsibility for NIAC did not generally exist at international law prior to the ICTY *Tadic* (Jurisdiction) decision of 1995, and none of the subsequent trials from either *ad hoc* tribunal was faced with the issue of insurgent courts.¹²⁷ Of course the Elements were drafted in the specific context of the criminal responsibility of the individual, but as the wording of ICC Art. 8(2)(c) is functionally identical to that of CA3, the Elements are a useful tool of interpretation.¹²⁸ 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.¹²⁹

Element 4 of Art. 8(2)(c)(iv) surprisingly borrows from APII Art. 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. [author’s italics]

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 refer to the 2nd requirement of judicial guarantees as separate from the legal basis itself. Such an interpretation, however, confuses the definition

¹²⁶ For discussion on the extent to which *nullum crimen sine lege* forms a general principle of international criminal law, see Antonio Cassese, *International Criminal Law*, (Oxford: Oxford University Press, 2003), pp. 139-56.

¹²⁷ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court : Sources and Commentary* (Cambridge: Cambridge University Press, 2002), p. 409.

¹²⁸ The relevant section of ICC Art. 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 revision (in author’s italics above) indicates a recognition of the dated terminology of CA3 but does not represent a substantive effect.

¹²⁹ According to ICC Art. 9, the Elements of Crime are not definitive but ‘assist the Court in the interpretation and application of articles 6, 7 and 8’.

of the legal basis of CA3 with that of the essential guarantees of APII. It tries to define the legal basis requirement of CA3(1)(d) by importing part of the essential guarantee requirement of APII Art. 6(2), namely ‘independence and impartiality’. The adopted Element can be compared to an earlier draft proposal by Belgium which correctly separated the elements into legal basis and essential guarantees. It listed three distinct situations where the passing of sentence would amount to a war crime: ‘either no previous judgement 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.’¹³⁰

The uneasy relationship between APII Art. 6(2) and CA3(1)(d) has already been discussed *supra*, 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 APII 6(2) standard (and the wrong one, at that) to define ‘regularly constituted court’ when the drafters of the actual ICC Statute maintained the CA3(1)(d) wording. As the discussion on equality of belligerents has revealed, APII 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 APII.¹³¹ There is no indication that in accepting AP II 6(2), states intended to apply its terminology to CA3 conflicts. It is of further interest to note that the threshold for the application of Art. 8(2)(c)(iv) has been set objectively lower than that of APII, as the former requires neither territorial control nor ability to implement the provisions of the Article.¹³² The gap therefore becomes actual rather than theoretical, at least in terms of individual responsibility. Rather than being formalistic, these differences point to the possibility that states were less concerned about the legal basis for insurgent courts when armed opposition groups controlled territory and exercised governmental functions than when they didn’t. Therefore one may question whether the drafters of the Rome Statute, knowing that the first

¹³⁰ PCNICC/1999/WGEC/DP.13, reproduced in Eva LaHaye, ‘Violations of CA3’, in Roy S. Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedure & Evidence* (Ardsley, NY: Transnational Publishers, 2001), p. 212.

¹³¹ See for example CDDH/SR.49/ANNEX, explanation of vote on Material Field of Application, statement of Ghana.

¹³² 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.’

means of statutory interpretation is the ordinary meaning of the words, wouldn't have used the terminology of APII Art. 6(2) if that is what they intended.

The Elements of Crime at any rate takes the view that with respect to the legal basis, the IHL of APII becomes the *lex specialis* for any NIAC. The lack of any qualification to the word 'court' in APII Art. 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.¹³³ Nevertheless, this point of view is based on an illogical connection, wherein the explicit requirement of CA3 is unjustifiably abandoned in an erroneous cross-referential definition of 'regularly constituted court'.

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 CA3 and APII. If human rights law is considered the *lex specialis*, there may be differences of obligations in states bound by the ECHR, which tends to require legislative basis due to democratic requirements, and those only bound by the ICCPR, which may be more lax in considering the 'prescribed by law' requirement.¹³⁴ The impact of APII Art. 6(2) has been to highlight the problem of CA3(1)(d), but even if APII 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—except in the context of the Elements of Crime definition, where it effectively overwrites 'regularly constituted'. CA3 therefore seems to remain relevant regardless of its perceived inconvenience.

2.2 The Second Prohibition: Judicial Guarantees

In looking to any potential problems of inequality with respect to the ability of armed opposition groups to offer the essential guarantees, the problem of differing standards between CA3 and APII does not arise due to the consistency of the two regimes. As already noted, when it comes to judicial guarantees, APII clarifies CA3 without expanding it. Therefore the APII standards can be applied universally with respect to the second prohibition. Most of the guarantees listed in Art. 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,

¹³³ To the extent that 'prescribed by law' may be considered non-derogable, this reasoning would be problematic. See *infra*, IV:2.2.2.

¹³⁴ See *supra*, II:1.1.

e.g., the requirement to provide education to children under Art. 4(3)(a). It is only the first sentence of Art. 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.’ Zegveld asserts that since the final wording seems to have come from Art. 15 of the ICCPR, the provision ‘must therefore be understood as referring to state law’.¹³⁵ 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”’.¹³⁶ 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, e.g., trying government soldiers for murder. The Sandoz Commentary points out the difficulty caused by disparity, or the ‘special context of NIAC’, explaining that, ‘[t]he 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’.¹³⁷ Nevertheless, it then does seem to advocate for the broader view, concluding, ‘the interests of the accused and good faith require that this should be interpreted in the light of the initial ICRC proposal, i.e., that no one can be convicted for an act, or for failing to act contrary to a duty to act, when such an act or omission was not an offence at the time when it was committed.’¹³⁸

However, the fact that the *nullum crimen sine lege* provisions are non-derogable in all of the human rights conventions presents a potential conflict between the IHL and the human rights understanding of the meaning of ‘law’. In his ICCPR Commentary, Nowak notes that the meaning of law is the same under both the ‘established by law’ criteria of Art. 14 and Article 15,¹³⁹ suggesting that the non-derogable latter provision only contemplates state law.

Moreover, to the extent that the principle is considered a general principle of international

¹³⁵ Zegveld, *Accountability...*, p. 187.

¹³⁶ Bothe *et al.*, *New Rules...*, p. 652.

¹³⁷ Sandoz *et al.*, *Commentary on the Additional Protocols...*, paras. 4604-4605.

¹³⁸ *Id.*, para. 4606.

¹³⁹ Nowak, *CCPR Commentary...*, p. 245.

criminal law with respect to individual responsibility, it would have to be determined whether the broad or narrow scope applies.

2.3. The Diplomatic Conferences

A review of the relevant discussions at the Geneva Conference and the CDDH can help to shed some light on these remaining problems with respect to both the legal basis and the judicial guarantee prohibitions. It is easy to imagine the objections that states, especially those engaged in NIAC, would have in recognizing a right of armed opposition groups to establish courts. Unfortunately, the intention of the drafters of CA3 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 NIAC, 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 CA3.¹⁴⁰ The Official Records give no indication of how the passing of sentences prohibition ended up in the enumerated list, and contains no discussion on the meaning of regularly constituted court. With respect to judicial guarantees, there was some agreement that either reference should be made to those of the Conventions in general, or a list should be proposed, but nothing came of the discussion.¹⁴¹

For the purposes of our discussion, one important difference between the negotiations in 1949 and those in 1977 is that in the latter instance, states were aware of their human rights obligations, and hence the ‘prescribed 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 APII draft Art. 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...¹⁴²

The ICRC delegate began the discussion by emphasizing that draft Art.10 should be considered in light of the fact that Art. 1 on the high threshold of application, including territorial control, had already been passed by the drafting Committee.¹⁴³ The intention of such a comment was most likely to ensure that states recognized that the adoption of a provision with a wider scope of application than CA3 would only be applicable to high

¹⁴⁰ See 28th Meeting of the Special Committee, *Official Records*, II-B, , p. 83.

¹⁴¹ See views of US and Italian and French delegates, *Id.*, pp. 83-84.

¹⁴² CDDH/1

¹⁴³ CDDH/I/SR.33, para. 24.

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.’¹⁴⁴ The ICRC was therefore in favour of the right for armed opposition groups to establish courts, at least in conflicts wherein the armed opposition group asserts territorial control and meets the other APII 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.¹⁴⁵

Many state delegates, recognizing the difficulties in reconciling disparity and equality in terms of insurgent courts, also made reference to draft Article 5 and counselled caution in drafting the provision on due process.¹⁴⁶ 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’.¹⁴⁷ 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...’¹⁴⁸ The general warnings in connection with draft Art. 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 *supra*. Although the initial ICRC draft only contained the term ‘law’, intermediate drafts contained the expression ‘national or international law’¹⁴⁹ as imported directly from Art. 15 of the ICCPR.¹⁵⁰ This formulation was not well-received. The Argentinean delegate expressed

¹⁴⁴ *Id.*, para. 24. The French text is presented above as authoritative due to ambiguity in the English text.

¹⁴⁵ *Ibid.*, para. 24; see also *supra* I:1 on draft Article 5.

¹⁴⁶ In addition UK delegate, see Spanish delegate, CDDH/I/SR.34, para. 28, and Soviet delegate, CDDH/I/SR.34, para. 42.

¹⁴⁷ CDDH/I/SR.29, para. 45.

¹⁴⁸ CDDH/I/SR.34, para.20.

¹⁴⁹ CDDH/I; CDDH/I/GT/88

¹⁵⁰ ICCPR Art. 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

concern over the ambiguity of the term ‘national law’, questioning whether a government involved in an NIAC would ‘recognize the idea of “rebel law”’.¹⁵¹ The Mexican delegate called the meaning ‘vague’, noting that ‘no clear idea of it had emerged from the debate’.¹⁵² Some delegations threatened that they would vote to exclude the entire sub-paragraph (d) if the wording was maintained¹⁵³, and in the end, the Conference reverted to the original, unqualified ‘law’.¹⁵⁴ The seriousness of the disagreement indicates that many states were not willing to contemplate the notion of insurgent law.

3. Right to Legislate

The right to legislate becomes important to the equality of belligerents in two instances. First, it is important if it is considered that the establishment of a court needs a legal basis, either with or without the ‘regularly constituted’ requirement, in order to comply with IHL. Second, it is important in the instance where an armed opposition group purports to pass sentences based on penal provisions which go beyond the scope of either existing state legislation or the provisions of international criminal law. In all cases, the inherent disparity of the human rights law regime, both with respect to its scope of coverage and presumption of state monopoly on authority, must be taken into account.

3.1. Restrictions on the Right to Legislate

The right to legislate with respect to the armed conflict could be either an absolute or limited right. Bothe declares, ‘[t]here is no basis for the concept that the rebels are prevented from changing the legal order existing in the territory where they exercise factual power.’¹⁵⁵

Zegveld, however, looks to analogy with the law of occupation for guidance in imposing limitations. She refers to paragraph 2 of Art. 64 of Geneva Convention IV, which deals with the relationship between domestic legislation and the legislation of the Occupying Power.¹⁵⁶

While our discussion is limited to penal provisions in relation to the armed conflict, it is

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.

¹⁵¹ CDDH /I/SR.64, para. 54.

¹⁵² *Id.*, para. 78.

¹⁵³ CDDH/I/262 fn. 1.

¹⁵⁴ The actual wording adopted was proposed by the Pakistan amendment, CDDH/427.

¹⁵⁵ Bothe *et al.*, *New Rules...*, p. 651.

¹⁵⁶ Zegveld, *Accountability...*, p. 71.

nevertheless of interest to explore the analogy, as such provisions would be covered. Art. 64 states:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

According to this analogy, only in the three enumerated special circumstances would armed opposition groups be able to create their own laws. As the first paragraph makes clear, the laws of the state should generally remain in force and the existing tribunals should generally continue to function. By means of Art. 66, armed opposition groups would only be able to establish courts with jurisdiction over the penal provisions enacted under their prescribed authority. In all other cases not covered by the enumerated exceptions, the courts of the state party would have to continue to function.¹⁵⁷ Under the ‘security of the Occupying Power’ exception of the second paragraph, armed opposition groups would clearly be able to legislate penal provisions making it an offence to participate in hostilities against the armed opposition group, or to aid and abet the conduct of such hostilities, in the same way that the government could do against members of the armed opposition group. They would also be able to punish war crimes under the exception of ensuring respect for the Convention.

The theory is attractive in that it regulates the extent to which the legislative power to create penal law can be abused and it recognizes the existence of concurrent authority over the territory of the state. There are, however, both practical and teleological problems with the theory.

On the practical side, Art. 66, as applied only by analogy, would not provide a legal basis for insurgent courts. Moreover, the scope of legislative authority is in reality almost open-ended when it comes to security of the ‘occupier’ and penal legislation with respect to participation in hostilities. A further problem arises over the jurisdiction of the parallel courts. Those prosecuted for war crimes would be under the jurisdiction of the existing courts, while those prosecuted for mere participation in hostilities, or for aiding the government side, would be subject to the jurisdiction of the rebel courts. The perception at least would be that those

¹⁵⁷ As far as our discussion on equality is concerned, it is only legislation relevant to the prosecution of criminal offences related to the armed conflict that are relevant.

convicted of war crimes would be in a better position than those simply participating in hostilities. The final practical problem is that in CA3 conflicts, the armed opposition group may not control territory at all, and as such, the provisions would not be applicable—although division based on territorial control may in fact be desirable, and as we have shown, has been considered relevant by states.

For teleological reasons, it is inaccurate to make a direct analogy between the law of occupation and the law of non-international conflict pertaining to territory controlled by armed opposition groups. The law of occupation is a detailed regime created specifically to grant temporary protection to persons and property until sovereignty is once again established. The *jus in bello* favours the maintenance of the status quo. In a Declaration of 5 December 2001, the ICRC outlined that the Fourth Geneva Convention allows the civilian population of an occupied territory to ‘live as normal a life as possible, in accordance with its own laws, culture and tradition,’ adding that, ‘[b]eing only a temporary administrator of occupied territory, the Occupying Power must not interfere with its original economic and social structures, organization, legal system or demography.’¹⁵⁸ A post-World War II Burmese court, in applying the Regulations of the Hague Convention IV of 1907 (generally regarded today as an expression of customary law), held that, ‘[t]he right of an occupant in occupied territory is merely the right of an administrator.’¹⁵⁹

In the law of NIAC, there is no such favouritism granted to any particular outcome. The *jus in bello* does not indicate a preference for the return to the pre-conflict situation. In fact the application of the IHL of NIAC does not affect either the possibility of insurgents to replace the government or to create a new state.¹⁶⁰ Therefore, the analogy falls short on a fundamental point, that being the object and purpose of the law: in the case of occupation, it includes the maintenance of the pre-occupation status quo, while in the case of NIAC, it is limited to humanitarian concerns without prejudice to the future status of territory controlled by insurgents. During the 1949 Geneva Conference, the Soviet delegate emphasized the problem of analogy with the law of occupation by pointing out that the great majority of provision of the Geneva Conventions cannot apply to NIAC for purely formal reasons: ‘for instance, it is impossible to stipulate that the provisions relative to penal legislation and the continued functioning of Courts in occupied territory should be applied in exactly the same

¹⁵⁸ ICRC, *Statement by the International Committee of the Red Cross*, Geneva, 5 December 2001, reproduced in Sassòli and Bouvier, *How does Law Protect...*, Vol. II, p. 1148.

¹⁵⁹ High Court of Burma (Appellate Civil), *Ko Maung Tin v. U Gon Man*, 3 May 1947, partially reproduced in Sassòli and Bouvier, *How does Law Protect...*, Vol. II, p. 1068.

¹⁶⁰ Sassòli and Bouvier, *How does Law Protect...*, Vol. I, p. 269. However, for an alternate point of view, see Zegveld, *Accountability...*, p. 74.

fashion.’¹⁶¹ Despite the appeal of the occupation analogy, its problems must not be discounted.

3.2. Explicit Legal Basis

One thing that remains nevertheless noteworthy about a comparison between the law of occupation and the law of NIAC is that the former provides an explicit legal basis for the establishment of tribunals, whereas the latter does not. Art. 66 of Convention IV states that ‘...the Occupying Power may hand over the accused to its properly constituted, non-political military courts...’ This creates a clear legal basis within the *jus in bello* for an Occupying Power to establish courts on the territory of a sovereign state. The drafters of CA3 and PII could have also chosen such enabling language, but they instead only resorted to prohibition. Such a difference in approach could be interpreted as an intention to withhold a legal basis altogether, or it could be an indication of an intention to leave the legal basis of rebel courts outside of the sphere of the law of NIAC altogether. Of course the law of occupation does not confront issues of disparity as it is still regulating affairs between two sovereign and equal states. Nevertheless, the difference in approach between the law of occupation and the law of NIAC reveals that the lack of explicit legal basis for the establishment of courts and right to legislate leaves insurgent courts more susceptible to human rights requirements.

4. 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.¹⁶² While the current study does not purport to present a full survey of practice, it will look at some 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.

4.1. The El Salvador Conflict

The conflict in El Salvador during the 1980-90s is one of the few in which insurgent courts have received any international attention whatsoever. Security Council Resolution 693 (1991)

¹⁶¹ 18th Plenary Meeting, *Official Records...*, II-B, p. 326.

¹⁶² ICRC archives are kept confidential for 40 years. 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.

established the United Nations 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.¹⁶³ Significantly, the El Salvador conflict was the first case of application of APII,¹⁶⁴ and therefore provides some insight into the relationship between the requirements of the two NIAC instruments. During the El Salvador conflict, the 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 PII Art. 6(2) as the legal basis for its rebel courts.¹⁶⁵ The FMLN further alleged that compliance ‘does not require the tribunal to have been set up according to government law in effect.’¹⁶⁶

In its Third Report, the ONUSAL Human Rights Division confirmed the norm of APII 6(2) to be a ‘broader precept’ than that of CA3(1)(d), and in the same paragraph, ONUSAL proclaimed that the ‘regularly constituted court’ requirement is one in 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’.¹⁶⁷ The Report goes on to consider the principles of independence and impartiality, which suggests that ONUSAL applied the APII legal basis requirement exclusively.

The FMLN sentenced individuals under its own ‘penal procedural law’ that contains precise sanctions for each of the commonly committed infractions in relation to the armed conflict’.¹⁶⁸ 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.’¹⁶⁹

¹⁶³ Tathiana Flores Acuña, *The United Nations Mission in El Salvador: A Humanitarian Law Perspective* (The Hague: Kluwer Law International, 1995), pp. 36-40.

¹⁶⁴ Michel Veuthey, Preface to *Id.*, page xiii;

¹⁶⁵ 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* (New York and Washington: Americas Watch, 1990).

¹⁶⁶ *Id.*

¹⁶⁷ A/46/876, S23580, ONUSAL Human Rights Division, *Third Report*, , para. 111. The latter statement is a reiteration of Sandoz *et al.*, *Commentary to the Additional Protocols...*, para. 4597.

¹⁶⁸ FMLN Memo at Americas Watch, *Violation of Fair Trial...*, p. 511.

¹⁶⁹ *Id.*

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.’¹⁷⁰

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’.¹⁷¹

Americas Watch expressly agreed with the FMLN interpretation that APII envisions two sets of national legislation, wherein 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,¹⁷² 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.¹⁷³

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 2 American 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 Salvadorian law. The trial apparently never took place as the FMLN decided to instead hand over the accused to the national truth and reconciliation process.¹⁷⁴ Human Rights Watch ‘expressed "disappointment" that the FMLN had not made more progress in fulfilling its obligations under international law to punish gross abusers,’¹⁷⁵ although it is not clear that such an obligation in fact existed at the time, or even does now.¹⁷⁶ ONUSAL did not report on the incident at all, most likely because it considered incidents which occurred prior to the

¹⁷⁰ *Ibid.*, at Americas Watch, *Violation of Fair Trial...*, p. 510.

¹⁷¹ Americas Watch, *Violation of Fair Trial...*, p.12, citing the FMLN Memo.

¹⁷² Americas Watch, *Violation of Fair Trial...*, 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.

¹⁷³ Zegveld, *Accountability...*, p. 70.

¹⁷⁴ Human Rights Watch, *1992 Annual Report* (El Salvador Chapter), available at <http://www.hrw.org/reports/1992/WR92/AMW-08.htm#TopOfPage>.

¹⁷⁵ *Id.*

¹⁷⁶ See *infra* IV:1.1.1. At the time of the incident, violations of CA3 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 US was allied with the El Salvadorian government. Therefore there was no international obligation to prosecute, although the situation would be different today in light of the individual responsibility in NIAC.

launching of the Human Rights Verification Mission on 23 July 1991 to be outside of its competence ‘save in exceptional circumstances’.¹⁷⁷

4.2. The Nepal Conflict

The question looms as to what would have been the outcome had the El Salvador conflict been one in which APII 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 13000 killed over a decade long conflict)¹⁷⁸ indicates that the APII threshold has most likely been met, Nepal is not a Party to the Protocol, and therefore CA3 remains the only applicable standard. A ceasefire was signed in early 2006 which seems to be holding in general at the time of writing. The CPN-M has established ‘peoples courts’, which operated during hostilities, and reportedly have further blossomed since the ceasefire. 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.¹⁷⁹ It is in fact a parallel justice system, and the introductory statement asserts that it has been issued to ‘institutionalize the new form of Rule of Law’, based on ‘Marxism-Leninism-Maoism’, including means to resolve ‘the conflict with the enemy class by authoritarian measures.’ Art. 2(9) established the legal basis of peoples courts, stipulating that prosecutions shall be carried out ‘by the People’s Prosecutor and decisions by the people’s Court.’ Art. 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 Art. 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 labor 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, 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 labor imprisonment not exceeding five years and the money and goods as collected shall be confiscated.

¹⁷⁷ ONUSAL Human Rights Division, *First Report*, A/45/1055, para. 8.

¹⁷⁸ BBC News, “Violent clashes amid Nepal curfew,” 10 April 2006, available at http://news.bbc.co.uk/2/hi/south_asia/4894474.stm.

¹⁷⁹ United Revolutionary Peoples’ Council Nepal, *Public Legal Code, 2060* (2003/2004), unofficial English translation [copy on file with the author].

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 offenses (only if the victim is a woman), illegal detention, and theft in general.¹⁸⁰ It is not the intention of the author here to analyze whether the judicial guarantees are in line with the standards of the law of NIAC. 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 it is in fact national law). Under APII, these courts would most likely be *prima facie* acceptable, while under the ‘regularly constituted’ requirement of CA3, 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.’¹⁸¹ The same report further declares that internal investigations of ‘abuses’ by CPN-M members ‘cannot substitute for prosecutions carried out in a state court’.¹⁸² There is no mention in the report 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. Yet it does note ‘the need to ensure full implementation of the CPN-M’s repeatedly stated commitment to human rights and humanitarian principles.’¹⁸³ At any rate, OHCHR seems to indicate that state courts are the only tribunals which may prosecute criminal acts.

While the question of end of application of IHL to the factual situation in Nepal makes it difficult to draw conclusions about interpretations of CA3(1)(d)¹⁸⁴, it does nevertheless raise a different question: what effect does the end of hostilities have on the legal status of insurgent courts? Surely it would be prudent to dismantle such courts as part of peace and reconciliation processes, but such processes often occur in fragmented phases where mutual confidence remains a sensitive issue; many ceasefire and peace agreements slide back into conflict. At the end of hostilities, as armed opposition groups would no longer have any international obligations or rights (according to IHL), they would be subject only to domestic

¹⁸⁰ See *Public Legal Code*, Articles 6, 7, 9, 12 & 16.

¹⁸¹ OHCHR-Nepal, *Human Rights Abuses by the CPN-M, Summary of Concerns*, September 2006, p. 4, available at <http://nepal.ohchr.org/reports.htm>.

¹⁸² *Id.*, p. 8.

¹⁸³ *Ibid.*, p. 8.

¹⁸⁴ Recurring hostilities is especially problematic in NIAC because the threshold of application is more difficult to determine than IAC, as the latter becomes applicable as soon as hostilities begin.

law. However, APII Art. 2(2) extends the application of Art. 6 until the end of deprivation of liberty of anyone detained in connection to the conflict, either during or after hostilities. One may assume that this may be applied by analogy to CA3 conflicts, meaning that armed opposition groups and their courts would remain subject to IHL fair trial provisions until all trials and or executions of such persons are completed.

In Nepal, the CPN-M leadership announced the dissolution of peoples' courts in urban areas after the ceasefire took effect. However, in rural areas, OHCHR reports that even more such courts were created, citing vacuum of justice reasons.¹⁸⁵ One can impute that most of the activities of such post-conflict courts would not be related to the conflict, and therefore outside of the scope of IHL¹⁸⁶. It is nevertheless quite foreseeable that these courts would continue to consider the prosecution of individuals for war crimes to be part of their jurisdiction, even if they ceased prosecution for mere participation related offences in the spirit of reconciliation. Consequently, it would be important for any peace process to take these issues, and their legal consequences, into consideration.

4.3. Evaluation of Practice

Unfortunately, the available practice on which to make conclusions is very limited. Both the FMLN and CPN-M armed opposition groups at least purported to draft legislation for the purposes of establishing courts and prosecuting crimes related to the conduct of hostilities. The following general observations can be made from practice related to the El Salvador conflict. It appears that the armed opposition group, the United Nations Mission and the watchdog organization all agreed that under APII and for conduct related to the conflict, an armed opposition group has a right to establish tribunals in order to pass sentences, and to establish its own penal law without restrictions. The government party, however, did not concur that the armed opposition group had the authority to establish a court for the purpose of penal prosecution. In Nepal, the CPN-M criminal code envisions the prosecution of anyone aiding the government effort in relation to the conflict, and it creates a legal basis for CPN-M courts. While the OHCHR does not seem to recognize the competency of the CPN-M courts, this could be because the OHCHR did not consider an armed conflict to be occurring at the time of its report, or that the OHCHR does not apply (or has not applied) IHL at all in Nepal.

¹⁸⁵ OHCHR-Nepal, *Human Rights Abuses...*, p. 4.

¹⁸⁶ See "Judged by the People", *The Economist*, October 7-13, 2006.

Section IV: Passing Sentence on the Right to Pass Sentence

The extent to which disparity between states and armed opposition groups is a relevant factor in determining the rights and obligations of the latter is not always fully appreciated.

Zegveld's assertion that international bodies should be cautious in holding armed opposition groups accountable for failure to uphold human rights standards, since such a responsibility would require 'the existence of a government, or at least an entity exercising government functions',¹⁸⁷ has been questioned by Clapham. He asks his readers to 'reassess whether it is really true that these questions should depend on the idea that human rights norms "presume the existence of a government"'.¹⁸⁸ In the case of the human rights law approach to the passing of sentences, both the 'prescribed by law' and the '*nullum crimen sine lege*' criteria of the various treaties seem to indicate that they in fact do.

This consideration has been central to our analysis of the convergence of IHL and human rights law. In fact it highlights the disparity problem of incorporating human rights criteria into the law of NIAC penal provisions, where obligations would be equally imposed on actors for whom the law was not contemplated. These two human rights criteria related to the passing of sentences do indeed presume the existence of a government,¹⁸⁹ whereas the law of NIAC does not. Accordingly, the direct incorporation of human rights penal provisions is not compatible with the notion that armed opposition groups should have the legal capacity to exercise the rights flowing from their IHL obligations. It would result in a situation where disparity results in inequality within the subject-matter of an IHL obligation.

Both Zegveld and a panel of IHL experts have looked critically on the purely prohibitory formulation of CA3 and most of APII, agreeing that most focus has only been on the obligation side of the coin.¹⁹⁰ Acuña also considers the rights perspective, arguing that 'the difficulty for a dissident group to meet the requirement of regularly constituted court should be overcome'.¹⁹¹

¹⁸⁷ Zegveld, *Accountability...*, p. 152.

¹⁸⁸ Clapham, *Human Rights Obligations...*, p. 281 at fn. 39.

¹⁸⁹ Except possibly in the case where armed opposition groups control territory according to the Tomuschat interpretation, *supra* II:1.2.

¹⁹⁰ Henckaerts *et al.*, "Panel Discussion..." p. 171: 'Obligations imply rights and the recognition implies for instance that they make their own rules.'; Zegveld, *Accountability* p. 92: 'When penal prosecutions conducted by armed opposition groups must be in accordance with the law, it appears that these groups must adopt such law'. There is a shared view that the tendency to equate prohibition with criminalization is an inadequate form of regulation of armed opposition groups.

¹⁹¹ Acuña, *United Nations Mission...*, p. 61.

Section IV will first determine whether this difficulty, as well as the ability to legislate for penal prosecutions, should in fact be overcome in all situations, *i.e.* both for the prosecution of international crimes and the prosecution of mere participation related offences. Our determination will be based on an interpretation of the law of NIAC which asserts that rights flow from obligations, even when those obligations are only expressed in prohibitory terms. The subsequent part of the section will then consolidate the factors causing the difficulty in meeting the CA3(1)(d) and APII Art. 6(2) requirements, before finally determining to what extent they can be overcome. Any further relevance from the practice shown in Section III will be discussed.

1. The Scenarios of Prosecution

There are 2 different situations in which an armed opposition group would consider prosecutions in relation to the armed conflict: first, for the perpetration of international crimes, either by its own members, opposing forces or civilians, and; second, for the mere participating, or aiding in the participation, in hostilities against the armed opposition group. The following analysis will determine what types of further obligations armed opposition groups and their members incur in terms of responsibility to prosecute, and how these obligations may be affected by the ‘passing of sentences’ prohibitions of CA3 and APII.

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.¹⁹² The prohibition on impunity covers all individuals, whether part of state armed forces, rebel forces or civilians (including political office holders). In certain circumstances, international law may impose obligations on either entities¹⁹³ 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 opposite 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. Since all provisions of CA3(1)

¹⁹² See for example, Philippe Sands, ed., *From Nuremberg to the Hague: The Future of International Criminal Justice* (Oxford: OUP, 2003), p. x.

¹⁹³ The term ‘entity’ is used to include both armed opposition groups and States with respect to the law of international responsibility, a broader concept than the law of state responsibility. See Zegveld, *Accountability...*, pp. 224-225 on how group and state responsibility co-exist.

entail international criminal responsibility at both conventional (ICC) and customary law, there is no issue of other forms of summary punishment, as there could be for less serious breaches of IHL in general. For CA3 conflicts, any breach of an international obligation incurred by armed opposition groups would automatically invoke its responsibility, whereas any individual obligation would inevitably invoke responsibility of armed opposition group members involved in the organization of trials. APII involves some provisions, such as the aforementioned obligation to provide education for children, a breach of which would only invoke international responsibility.

1.1.1. 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 person 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.’¹⁹⁴ The grave breach regime includes crimes that are also considered crimes in NIAC, such as wilful killing and torture, but the *Tadic* Appeals Chamber ruled that grave breaches only apply to IAC as the law currently stands.¹⁹⁵ The US argued that the grave breach regime should apply to NIAC, but it was not at issue whether armed opposition groups would have the same obligations as states. If it were so, then armed opposition groups would have the positive obligation of creating legislation and either bringing perpetrators before their own courts or handing them over to another state for trial. It is easy to imagine that the second option would often be unavailable, as the armed opposition group could very likely have a difficult time finding another state to prosecute a suspect, especially if he were from the government side. The *Tadic* Appeal chamber suggested as obiter dictum that the US position may be an initial indication of emerging custom.¹⁹⁶ The extent of the obligation of armed opposition groups must be reconsidered in the event that such custom does in fact emerge.

Meron takes the view that common Art. 1, which requires ‘respect for the Convention in all circumstances’, may provide a conventional basis for penal measures.¹⁹⁷ However, there is no consensus that common Art. 1 applies to armed opposition groups at all. The overwhelming

¹⁹⁴ Convention I Art. 50; Convention II Art. 50; Convention III Art. 129; Convention IV Art. 146.

¹⁹⁵ ICTY, *Tadic* (Jurisdiction) paras. 80-84.

¹⁹⁶ *Id.*, para. 83.

¹⁹⁷ Meron, “International Criminalization...”, p. 570.

view,¹⁹⁸ supported by *Nicaragua*¹⁹⁹, is that common Art. 1 now applies to NIAC, even though the Commentary to the Geneva Conventions expressly states that it does not.²⁰⁰ Yet these opinions only consider whether it applies to either the state party or to other states (the latter being the situation in *Nicaragua*). Zegveld considers the applicability of common Article 1 to armed opposition groups, suggesting ‘it may be inferred that it applies equally to armed opposition groups’.²⁰¹ 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 CA3 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 CA3, and can not be ‘deduced’ so easily.

The ICRC Study looks specifically to the customary obligations of armed opposition groups to conclude a parallel obligation in Rule 139: ‘each party to the conflict must respect and ensure respect for international humanitarian law’.²⁰² Yet for the ‘ensure respect’ obligation of armed opposition groups, the evidence is not convincing, as it is limited to state participants in the Yugoslav conflict (where it was unclear at the time whether the law of NIAC applied at all), two instances of the UN Security Council and practice of the ICRC. In terms of obligations, Rule 158 of the ICRC Study, applying to both IAC and NIAC, finds:

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.²⁰³

It is not clear whether the ICRC Study considered whether the obligation extends to armed opposition groups. However, Rule 158 suggests that there may be an obligation on states to prosecute war crimes in NIAC, 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 NIAC.²⁰⁴ As discussed *supra* (III: 4.4.1), Human Rights Watch considers there to be an international obligation on armed opposition groups to

¹⁹⁸ 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).

¹⁹⁹ 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.

²⁰⁰ Pictet, *Commentary IV*..., p. 16..

²⁰¹ Zegveld, *Accountability*..., p. 67.

²⁰² Rule 139, Henckaerts and Doswald-Beck, *Customary International Law*..., Vol. I, pp. 495-498

²⁰³ Rule 158, Henckaerts and Doswald-Beck, *Customary International Law*..., Vol. I, pp. 607-611.

²⁰⁴ Henckaerts, “Binding Armed Opposition Groups...”, p. 133.

prosecute ‘gross abusers’. Although the report does not clarify the obligation, one can assume 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 as per our definition of Section I, assuming that the obligation derives from IHL and not international criminal law.

1.1.2. Individual Responsibility

The obligations on members of armed opposition groups and their political structures are more defined when it comes to individual criminal responsibility, where responsibility is only attached to superior-subordinate relationships. Of course the widely held belief that war crimes did not exist in NIAC prior to the *ad hoc* tribunals indicates that the situation has also changed quite rapidly in terms of superior responsibility. The jurisprudence of the *ad hoc* tribunals²⁰⁵, the findings of the ICRC customary study,²⁰⁶ and the provisions of the ICC statute²⁰⁷ all conclude that from the individual penal responsibility perspective, the obligation to punish is the same in NIAC as it is in IAC. 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,²⁰⁸ and it can be assumed that the ‘punishment’ required for any war crime, crime against humanity or genocide would require penal prosecution, *i.e.* would not be able to be met with mere ‘summary punishment’. Articles 28(a)(ii)&(b)(iii) of the ICC Statute require superiors/commanders to take ‘all necessary and reasonable measures within his or her power to prevent or repress’ crimes. Therefore, if armed opposition groups have the legal capacity to establish courts, someone in the chain of command would be responsible if a suspect was not prosecuted. The law as such, however, does not necessarily mean that armed opposition group superiors have an obligation to bring suspected war criminals before their

²⁰⁵ ICTY Appeals Chamber, *Prosecutor v. Hadzihasanovic et al.*, 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 organised military force, it also recognizes that a commander can be penally sanctioned.’

²⁰⁶ Rule 153, Henckaerts and Doswald-Beck, *Customary International Law*, 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 NIACs.

²⁰⁷ ICC Statute Art. 28, titled *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.

²⁰⁸ The *Hadzihasanovic* decision does not include the ‘within their power’ condition.

own courts.²⁰⁹ 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.²¹⁰ In fact, Acuña claims that with respect to the El Salvador conflict, the ICRC stated, ‘in the presence of a serious violation of international humanitarian law, the rebels should have recourse to the national system of administration of justice.’²¹¹ 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 was willing?

1.1.3 Assessment of Obligations to Prosecute International Crimes

As the law stands, the conduct required to discharge any obligations related to the prosecution of perpetrators of international crimes derives mostly from specific instances of individual responsibility at international criminal law. Although superior responsibility does not imply an absolute obligation on armed opposition groups to prosecute suspected perpetrators of international crimes, it at least imposes a considerable burden on armed opposition group members that may be considered overly restrictive if armed opposition groups were deemed unable to constitute courts. The international responsibility of armed opposition groups is less clear, but a similar conclusion can be reached.

In 1990, before individual responsibility was believed to extend to NIAC, Plattner wrote: ‘On conçoit difficilement que le DIH attribue aux insurgés la compétence de poursuivre et de juger les auteurs de violations.’²¹² Such a view must be re-evaluated in terms of the requirements imposed by IHL and international criminal law today. 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, then armed opposition group superiors may find themselves in the untenable position of having to hand over prisoners to the opposing state party in 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

²⁰⁹Crimes Against Humanity and Genocide are also covered by command responsibility, raising questions of obligations of armed opposition groups outside of an armed conflict context.

²¹⁰ This could also raise legal questions with regards to extradition.

²¹¹ Acuña, *The United Nations Mission...*, fn. 247 at p. 61.

²¹² Denise Plattner, “La repression pénale des violations du droit international humanitaire applicable aux conflits armés non internationaux”, *Revue internationale de la Croix-Rouge* No. 785 (Sept.,1990), p. 450.

to be overly burdensome and prejudicial towards them, with the result that overall compliance would suffer.

The interests of justice would be best served if armed opposition groups which have the factual capacity to fulfil their international obligations are also considered by IHL to have the legal capacity to prosecute suspected perpetrators of war crimes. If the armed opposition group, in a given circumstance, is unable to establish courts which meet the essential guarantee requirements, or if it would rather not take on such responsibility, then it could pursue other options based on its own preference rather than based on a prejudicial *de jure* requirement. Again, in this particular circumstance, the *nullum crimen sine lege* problem does not arise as all crimes are proscribed at the international level.

This is clearly a situation in which the rights and obligations of the armed opposition group should be interpreted to overcome the disparity between the parties. The problems caused by such a situation are real, as the alleged attempted prosecutions by the FMLN and the peoples' courts of the CPN-M attest. The El Salvador situation shows that a government is likely to attempt to deny the right based on the disparity of domestic law. A clarification of the rule would allow for compliance efforts to focus on whether essential guarantees were being met rather than getting bogged down on the legal basis issue. Armed opposition groups unable to prosecute in accordance with the necessary standards could hand them over to another state for purposes of prosecution, hand over to the state party,²¹³ or to the extent permitted by law, detain the suspects until the end of hostilities.

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 the aiding in such participation. Both the legal basis requirement and the *nullum crimen sine lege* criterion of the essential guarantees requirement would pose potential problems for conflicts governed by CA3. APII 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 cannot rely on further international law obligations to suggest subsequently flowing rights. Any capacity to pass sentence would either flow directly from the prohibitions of

²¹³ Although still problematic, in this case, the handover would be the result of the armed opposition groups own failure to implement rather than an obligation to hand over. The ICRC or another impartial organization could possibly broker terms to ensure that a fair trial would be conducted, or even better, to postpone prosecution until the end of hostilities.

CA3(1)(d) and APII Art. 6(2), or stem from the control of pre-existing state courts. The disparity between states and armed opposition groups is most prevalent here. 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 obligation, from a human rights point of view) to prosecute rebels and rebel collaborators. Again, the *nullum crimen sine lege* criterion would be relevant in this scenario.

1.2.1. Assessment of Prosecution for Mere Participation in Hostilities

The limited practice from Section III 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 CA3 and APII governed conflicts.²¹⁴ A new trend may be emerging where armed opposition groups are showing an increasing ability to not just mimic the functions of the state, but to deliver services, including the administration of justice, more efficiently if not more effectively than the state.²¹⁵ 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 interest 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. In this study, we have chosen a model where effective equality requires that rights flow from obligations. In the anomalous situation of the NIAC penal provisions, where disparity may affect equality, these rights should flow from the express prohibitions. The capacity of armed opposition groups to administer justice would nevertheless be severely tempered in that IHL would only envision such rights in situations amounting to armed conflict, and then only for conduct related to hostilities. Human rights norms, including state monopoly on the administration of justice, would continue to govern all other prosecutions and deprivation of liberty, even in situations of internal strife short of armed conflict. If states recognized that actual rights flowed from the prohibitions of CA3 and APII, there could be a move to both legitimize and isolate insurgent courts, *i.e.*, ensure that they only operate with respect to the permitted purposes of IHL. Surely it would be a

²¹⁴ for a statement by the Maoist rebel leader indicating that informers may be tried and executed by Peoples' 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.

²¹⁵ Charles Haviland/BBC News, "Parallel Justice, Maoist Style", 14 October 2006, available at http://news.bbc.co.uk/2/hi/south_asia/6048272.stm.

trade off, but possibly one states would recognize could be in their interest, as it would maintain their exclusive jurisdiction in all cases but those covered by IHL.

2. Towards A Solution

The preferable solution is one which states have already made clear they are not willing to accept. In both the Geneva Conference of 1949 and the CDDH of 1974-77, States were not willing to consider extending prisoner of war status to NIAC. Moreover, the CDDH harshly debated a proposal to prohibit the carrying out of the death penalty until the end of hostilities, but ultimately refused to accept even this commitment.²¹⁶ Veuthey, in an excellent pre-APII historical analysis of the treatment of captured fighters in guerrilla wars of the twentieth century, shows that many insurgent groups and governments have extended at least analogous prisoner of war status, or even released prisoners for whom they could not provide basic necessities to the ICRC.²¹⁷ However, this practice is far from universal and has not translated into conventional or customary law. It is highly unlikely that any formal developments will be made towards these ends in the current political environment where states have a near *carte blanche* ability to label armed opposition groups as terrorist organizations.

A solution should aim towards evening the playing field so that both sides of an NIAC will determine it is in their best interest to refrain from carrying out the harshest measures. 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 postponement of the death penalty, especially for mere participation related offences. 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.

With these considerations in mind, a realistic solution should entail a mixture involving a loose interpretation of the legal basis, with more emphasis on the essential guarantees requirement. This would recognize that the rights implied by the prohibitions of CA3 would be granted to those groups capable of fulfilling the conditions to exercise those rights. In fact, this would shift the focus back onto 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

²¹⁶ See CDDH/SR.50.

²¹⁷ See Michel Veuthey, "La guérilla: Le problème du traitement des prisonniers", *Annales d'études Internationales* 1972, pp. 119-136. For example, in the Cuban revolutionary war of 1958, Castro unconditionally liberated 153 prisoners through the intermediary of the ICRC.

would obstruct efforts to improve compliance with essential 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, as more focus would be put on armed opposition group compliance with the administration of justice rather than the legal basis. 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.

Here, it is also important to consider that the threshold of CA3 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 NIAC 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 CA3 and APII 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 ‘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. This result would deflect the focus from the formal legal basis requirements such as ‘established by law’ in favour of practical considerations. Besides being consistent with the equality of belligerents, it also conforms to the spirit in which APII was adopted (see *supra*. III:2.3), wherein control of territory appeared to be an essential pre-condition in negotiating APII Art. 6(2). Furthermore, it would be consistent with the Tomuschat view that armed opposition groups incur human rights obligations (and may claim corresponding rights), but once again, only in situations where they control territory. Under this interpretation, in the threshold gap between the two NIAC legal regimes, only IHL obligations would be incurred; the closer an armed opposition group comes to statehood, the more obligations it assumes. Finally, as the provisions of APII do not have customary status in their entirety, and as many states involved in NIAC are not parties to the Protocol, the

proposed solution would nevertheless reduce the practical differences between the standards. Section I showed that this would also be relevant in considering the argument, *supra* I:1.2., that APII does not bind the parties equally, but only creates obligations on states, leaving armed opposition groups as subjects of domestic law.

2.1. Legal Barriers to the Solution: Tying the Gordian Knot

The solution of allowing armed opposition groups to pass sentence for conduct related to the conflict wherever IHL applies nevertheless confronts formidable legal problems, especially from a human rights perspective. Sections II and III have exposed a number of cross-referential factors, stemming from both the legal basis and essential guarantees requirements, which if applicable, would restrict the capacity of armed opposition groups to pass sentences for offences related to a NIAC. This part will consolidate these factors and demonstrate their cumulative effect, while the next part will deconstruct them in order to present options of interpretation consistent with the solution proposed above.

First, interpretations of the ‘regularly constituted’ legal basis requirement of CA3(1)(d) purport to directly incorporate the human rights standard of ‘prescribed by law’, a standard which only states may be capable of meeting under human rights law. This represents the human rights as *lex posterior* or *lex specialis* point of view. Second, even if human rights treaties do not bind armed opposition groups, they may nevertheless be bound by the general principle of law nature of the ‘established by law’ requirement. Third, even under a *lex specialis* approach wherein ‘regularly constituted’ is deemed to not refer back to the human rights standard *per se*, the alleged non-derogable nature of the ‘established by law’ requirement could maintain its relevance. Fourth, from the perspective of the essential guarantee requirement, specifically *nullum crimen sine lege*, the explicit non-derogable nature of the human rights provisions (if applicable) may bar an armed opposition group from creating penal legislation. Fifth, from the perspective of both requirements, even if the inconsistencies between IHL and human rights law can be worked out at the level of international responsibility, international criminal law (at least as governed by the ICC Statute) creates a hierarchy of norms favouring human rights with respect to individual responsibility of armed opposition group members. The cumulative result these cross-references potentially results in a gordian knot when it comes to the interplay of the passing of sentences, the equality of belligerents under IHL, human rights and international criminal law.

2.2 Solutions to the Gordian Knot

2.2.1. *Slashing the Gordian Knot: the Sword of Alexander and the Tadic Court*

In Gordium, when Alexander the Great could not solve the problem of Midas' knot, he pulled out his sword and split it in two. In the Hague, when the *Tadic* Appeal Chamber could not find a solution to the 'established by law' legal basis problem for the ICTY, it pulled out its sword as well. Reviewing its own competency, the Appeals Chamber first distinguished an international tribunal from a domestic tribunal based on the fact that there is no legislature in the international system from which to establish competency. The Chamber then simply relaxed the standard in the case of an international tribunal by ruling that it will be considered to be 'established by law' if it is established 'in accordance with the rule of law'.²¹⁸ The decision does seem to indicate that the tribunal must be set up by a 'competent organ', such as the Security Council, with the capacity 'to take binding decisions', although this is not explicitly spelled out.²¹⁹ Notably, the Chamber further insulated its decision with respect to the international/municipal distinction by declaring that the established by law requirement is 'a general principle of law' imposing an international obligation applicable 'to the administration of justice in a municipal setting'.²²⁰ The SCSL entrenched the *Tadic* decision, stating (without reference) that 'it is a norm of international law that for it to be "established by law", its establishment must accord with the rule of law.'²²¹

The reasoning of both decisions in determining an exception to the traditional 'prescribed by law' definitions should be viewed critically, as it is unlikely that a court is going to rule itself out of existence. Alvarez criticizes *Tadic*, pointing out the decision,

renders the right to a court "established by law" redundant, a result at odds with settled rules of construction. It is also not consistent with how this phrase has been interpreted at least by some human rights entities, namely as a distinct requirement separate from other guarantees for criminal defendants.²²²

It would appear, however, that the very purpose of the ruling was to make the 'established by law' requirement redundant. In doing so, it may have opened the door for an interpretation that an armed opposition group may also be subject to the same standards. Granted, *Tadic* did distinguish the international setting from the municipal as well as drawing attention to the decision making authority of the Security Council. Yet the analogy between 'decision

²¹⁸ *Tadic* (Jurisdiction), para. 45.

²¹⁹ *Id.*, par. 44-45.

²²⁰ *Id.*, par. 42.

²²¹ *Kallon, Norman, Kamara, Decision on Constitutionality and Lack of Jurisdiction*, SCSL-04-14-PT-035, March 13, 2004, para. 55.

²²² Jose E. Alvarez, "Nuremberg Revisited: The Tadic 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>.

making' and 'legislative' authority of the Security Council is contrary to the contention made by some commentators that the Security Council is in fact barred from legislating.²²³ It therefore hardly seems justified to determine that the decision making authority of the Security Council satisfies the legislative requirement. Fundamentally, the reasoning of the ICTY would seem to also apply to armed opposition groups if one considers that they do not have the capacity to comply with the human rights prescribed by law criterion.

This solution would be the most comprehensive as it would remove the 'established by law' problem altogether, *i.e.*, as part of the 'regularly constituted' definition, as part of the human rights requirement, as part of the general principle of law requirement, and as part of the international criminal law hierarchy of rights, as long as the armed opposition group had previously created a penal code. However, the *Tadic* court was strict in distinguishing the international from the domestic setting, and also put emphasis on the existence of a Security Council decision. Attempts to apply this standard by analogy to armed opposition groups would most likely meet opposition, as it was essentially a tailor-made solution for a specific international political problem. Nevertheless, it demonstrates that the 'prescribed by law' criterion is not unassailable and it opens the door for application in the armed opposition group context.

2.2.2. *Circumventing the Knot*

A general argument against the direct incorporation of the human rights 'prescribed by law' criterion into the 'regularly constituted' definition is the asymmetry of their application. As has been shown, human rights law was scripted with only 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.'²²⁴ This framework is one in which IHL must balance the protection of human values with other concerns resulting from the realities of warfare. 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 taken by Paust, *supra*, that CA3(1)(d) incorporates all of ICCPR Art. 14.

²²³ See Matthew Happold, "Security Council Resolution 1373 and the Constitution of the United Nations", *Leiden Journal of International Law*, Vol. 16 (2003), p. 596. Happold points to some authors who considered the establishment of the *ad hoc* tribunals to be legislating, and therefore *ultra vires* Security Council authority.

²²⁴ René Provost, *International Human Rights...*, p. 117.

Instead, we can revisit the Bond definition of ‘regularly constituted’ in order to derive its meaning.²²⁵ 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 CA3, while the ‘appropriate powers’ include those necessary to overcome the disparity of parties to a NIAC. To the extent that human rights law binds armed opposition groups (and accordingly contemplates the corresponding rights, *supra*, II:1.2), the ‘prescribed by law’ criterion could be incorporated, meaning that the legislation of armed opposition groups would be recognized. To the extent that human rights law does not bind armed opposition groups, the 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. However, it is important that in applying standards derived from the case law of the various 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,²²⁶ while case law requires independence from the executive.²²⁷ Focus should rather be on fairness rather than any institutional requirements.

This IHL as *lex specialis* approach would be consistent with a general notion of fairness as it would allow armed opposition groups to meet their *de jure* international obligations. Yet, to the extent that the ‘established by law’ criterion is part of a non-derogable human right, it could prevent IHL from being considered *lex specialis*. Heintze notes:

Some of the rights explicitly mentioned in the foregoing articles may not be derogated from (*inter alia* the right to life, the freedom of belief and the prohibition of torture). These human rights are called non-derogable, which means that they are to be applied in all circumstances, without exception. The traditional impermeable border between international humanitarian law, which applies during armed conflicts, and the law of peace is thereby crossed.²²⁸

None of the major human rights treaties preclude derogation from fair trial guarantees, although the I-ACHR prohibits derogation from the judicial guarantees essential for the protection of the non-derogable rights, the right to life being the only relevant one with

²²⁵ *supra*, III:2.1.

²²⁶ 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.

²²⁷ See collection of case law in Henckaerts and Doswald-Beck, *Customary International Law*, Vol. 1, p. 356.

²²⁸ Hans-Joachim Heintze, “On the Relationship Between Human Rights Protection and International Humanitarian Law”, *International Review of the Red Cross*, No. 856 (December 2004), p. 789

respect to the passing of sentences.²²⁹ Even though the drafters of the ICCPR chose not to include Art. 14 on fair trial guarantees in its list of non-derogable provisions, the Human Rights Committee nevertheless comments:

As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence.²³⁰

The logic of this argument, however, would be circular if applied to the passing of sentences under CA3. If the definition of the IHL ‘regularly constituted’ requirement contains the derogable human rights criterion of ‘established by law’, then it hardly seems reasonable to claim that ‘established by law’ is non-derogable because ‘regularly constituted’ is non-derogable. Moir acknowledges that it is ‘surprising’ that the right to a fair trial, one of the most basic human rights, was not listed as non-derogable, but nevertheless concedes that these rights are ‘thus not indispensable at all’.²³¹ ONUSAL, moreover, concluded that APII contains ‘practically all the “untouchable rights”’ contained in the ICCPR.²³² The fact that neither ‘established by law’ nor ‘regularly constituted’ are covered by APII suggests that ONUSAL did not consider ‘established by law’ to be untouchable. In fact, such an opinion would be consistent with ONUSAL’s implicit recognition of the legal basis of FMLN courts. The derogation regime was included in the human rights treaties for a purpose, that being to account for the special circumstances of emergency situations, including armed conflict, to the extent that the drafters of human rights treaties intended to extend coverage to armed conflict.²³³ In a conscious process, some notions were considered untouchable and were

²²⁹ This suggests that in member States of the I-ACHR, CA3(1)(d) may be subject to a special regime when it comes to carrying out the death penalty. The non-derogable nature of judicial guarantees surrounding the right to life would preclude a armed opposition group from executing anyone based on judgment of its own courts, resulting in inequality (unless insurgent ‘law’ is covered). From a *lex ferenda* point of view, it would be desirable to extend such a regime universally.

²³⁰ Human Rights Commission, General Comment 29, para. 16. Without further suggestion that it represents customary law or a general principle of law, this statement lacks justification as *lex lata*. Contrast with para. 13(b): ‘The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.’

²³¹ Moir, *Legal Protection...*, p. 206.

²³² ONUSAL, *First Report...*, fn. 3 at p. 25.

²³³ For view that it was not so intended, see Michael J. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict,” *American Journal of International Law* Vol. 99, No. 1, pp. 138-139, and quoting Schindler, ‘The adoption of the two 1977 Protocols additional to the Geneva Conventions is proof that a separate set of rules for armed conflict is in fact what States want’: Dietrich Schindler, “The International Committee of the Red Cross and Human Rights,” *International Review of the Red Cross*, No. 208 (Feb. 1979).

therefore intentionally excluded from the derogation regime, while others were not. The regime contains an implicit understanding that the special circumstances of emergency situations and armed conflict may require solutions not considered permissible in times of peace. It can account for specific anomalies. One such anomaly is the existence of a non-governmental authority holding power over individuals outside of the control of the state. If these non-state actors are subject to human rights standards, then one would have to presume that they too may derogate, as long as they meet the conditions, including that of complying with their IHL obligations. However, the ‘established by law’ *renvoi* would again result in a circular argument. As was pointed out in the Section II discussion on derogations, the conditions for derogation will almost by definition be met during an NIAC. Therefore it seems reasonable to conclude that the human rights conception of ‘established by law’ is not an integral criterion of ‘regularly constituted court’.

A further problem arises from *Tadic*, where the Court states that ‘established by law’ is a general principle of law in a state setting. A common law solution would be to label the statement as *obiter dictum* and thereby downplay its value. While Brownlie points out that Judge Tanaka referred to general principles of law as a basis for human rights concepts,²³⁴ he also adopts the view of Oppenheimer: ‘The intention is to authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States.’²³⁵ The final part of the sentence mitigates against applying general principles to armed opposition groups. Alternatively one could argue that armed opposition group legislation is in fact compatible with ‘established by law’ when the term is construed as a general principle, as in this context, the term would not be confined to its narrow human rights construction. Therefore, the IHL as *lex specialis* approach is the most reasonable in the specific circumstance of the legal basis requirement for passing sentence in NIAC.

The non-derogable nature of the term ‘national law’, with respect to the essential guarantee requirements in the context of the passing of sentence for mere participation or support of participation in hostilities, poses a unique problem. However, just as the *lex specialis* of IHL is used to determine the meaning of ‘arbitrary’ when it comes to the non-derogable right to life, so can it determine the meaning of the term ‘national law’ when it comes to the human rights *nullum crimen sine lege* requirement.²³⁶ Even if the non-derogable nature could not be

²³⁴ Brownlie, *Principles...*, p. 18.

²³⁵ As quoted in *Id.*, p. 16.

²³⁶ This was the approach taken by the ICJ in the *Nuclear Weapons* and *Israeli Wall* cases, *supra* II:1.3.

overcome, the principle that states are not responsible for the acts of insurgents on its territory may absolve states of international responsibility.²³⁷ At any rate, only prosecutions for participation in hostilities related offences would be at issue, and for the most part these would be covered by existing state legislation.

The final problem to be overcome may also be the most puzzling. The ICC Statute creates a hierarchy of norms wherein interpretation of CA3(1)(d) (or Art. 8(2)(c)(iv) as it appears in the Statute) ‘must be consistent with internationally recognized human rights.’²³⁸ Such a requirement does not seem to be consistent with the *lex specialis* approach, as the mere imposition of a hierarchy would tend to subvert the concept of *lex specialis* altogether.

Although one may be tempted to conclude that Art. 21(3) only refers to procedural measures, Arsanjani asserts:

[Art. 21(3)] applies a standard against which all the law applied by the court should be tested. This is sweeping language, which, as drafted, could apply to all 3 categories in Article 21. For instance, if the court decides that certain provisions of the Elements of Crimes or the Rules of Procedure and Evidence are not compatible with the standards set out in paragraph 3 of Article 21, it would not have to apply them.²³⁹

This interpretation would put the Art. 8(2)(c)(iv) Element 4, *supra*, at risk, as it requires only a court without any ‘prescribed by law’ legal basis. Furthermore, Caraccioli calls the ‘requirement for complete respect’ of human rights ‘extremely important’, and emphasises that this is ‘especially true when the Court applies customary international law and treaties existing before the protection of human rights came to be developed at an international level...’²⁴⁰ This interpretation indicates that human rights law will automatically apply as *lex posterior* with respect to the Geneva Conventions. Such a general interpretation would certainly confront the fundamental basis of IHL if it were destined to take a back seat to human rights norms in situations of armed conflict. In this specific case, the interpretation would mean that the pre-eminence of the ‘established by law’ human rights standard would impose international criminal liability on any individuals associated with insurgent courts which were in fact established by the insurgents. 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. This in itself would seem to be contrary to the interests of justice.

²³⁷ Nowak, *Commentary...*, p. 41 n.73.

²³⁸ See *supra*, Art. 21(3).

²³⁹ M. Arsanjani, “The Rome Statute of the International Criminal Court”, *American Journal of International Law*, Vol. 93 (1999), p. 29.

²⁴⁰ Ida Caracciolo, “Applicable Law”, in *Essays on the Rome Statute of the International Criminal Court*, Vol. I, Flavia Lattanzi and William A. Schabas, eds, (il Serente, 1999), p. 229.

Yet without any case law on the application of Art. 21(3), it remains to be seen how it will apply.

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 scrupulous rebels who 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 of the state.

One such principle is the equality of belligerents in NIAC. 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 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.

On this date, October 29, 2006, the London Guardian quotes 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’.²⁴¹ Right or wrong, it is doubtful that 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 peoples’ courts with respect to serious crimes, and that in many cases these courts are in fact sought out by citizens due in part to ‘lack of trust’ in the state criminal justice system.²⁴² Such courts and the particular circumstances may or may not be governed by CA3, but the OHCHR evaluation should at least deflect the prejudicial view of insurgent courts in general.

²⁴¹ Jason Burke, “Taliban Plan to Fight Through the Winter”, *Guardian*, 29 October 2006.

²⁴² OHCHR-Nepal, *Human Rights Abuses...*p. 4.

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 CA3 or APII. 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 essential 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 NIAC in general.

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