

TRIALS AND PENAL SANCTIONS BY NON- STATE ARMED GROUPS



DPhil Thesis

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Abstract

This thesis sets out the international legal framework applicable to the passing of penal sentences by armed groups during non-international armed conflicts and assesses the practical and normative challenges that it entails. It explains that international law neither explicitly prohibits nor explicitly permits the passing of penal sentences by armed groups and, therefore, that such groups enjoy a limited legal capacity to pass penal sentences. However, armed groups remain subject to exacting fair trial guarantees, most notably the requirement of a regularly constituted court providing all the necessary judicial guarantees recognised as indispensable. While not categorically outlawing the operation of courts and passing of penal sentences, these guarantees will often overstrain the factual capacities of armed groups in practice. Nevertheless, the thesis demonstrates that a downgrading of these guarantees is doctrinally problematic and normatively undesirable. Moreover, the thesis explains that international law, at present, does not place an obligation upon armed groups to use penal sanctions in order to enforce compliance with IHL. Neither the organisational threshold requirement under IHL, nor substantive customary law obligations or the doctrine of command responsibility can be interpreted to place such duty upon armed groups. Nevertheless, recent State practice indicates an increasing demand for accountability measures carried out by armed groups. While penal sanctions can play a role in meeting these demands in cases where the armed group in question operates a capable judicial system, alternative measures exist that allow for the implementation of accountability in situations where a fair trial cannot be provided.

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Table of Abbreviations

ACHR	American Convention on Human Rights
AfChHPR	African Charter on Human and People's Rights
AfCommHPR	African Commission for Human and People's Rights
AJIL	American Journal of International Law
AJLS	African Journal of Legal Studies
AANES	Autonomous Administration of North and East Syria (also referred to as <i>Rojava</i>)
ANSA	Armed Non-State Actor
API	Additional Protocol I to the 1949 Geneva Conventions
AP II	Additional Protocol II to the 1949 Geneva Conventions
AQIM	Al-Qaeda in the Islamic Maghreb
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ASIL	American Society of International Law
BerkeleyJIntlL	Berkeley Journal of International Law
CA 3	Article 3 common to the 1949 Geneva Conventions
CAR	Central African Republic
CaseWResJIntlL	Case Western Reserve Journal of International Law
CAT	Committee Against Torture
CEDAW	Committee on the Elimination of All Discrimination Against Women
ChinJIntlL	Chinese Journal of International Law
CLP	Current Legal Problems
CoI	Commission of Inquiry
ColumJTransnatlL	Columbia Journal of Transnational Law
CPN-M	Communist Party of Nepal-Maoist
CUP	Cambridge University Press
DPR	Donetsk People's Republic
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
ELN	National Liberation Army (<i>Ejército de Liberación Nacional</i>)
FARC	Revolutionary Armed Forces of Colombia (<i>Fuerzas Armadas Revolucionarias de Colombia</i>)
FMNLF	Farabundo Martí National Liberation Front
FAFN	Armed Forces of the Forces Nouvelles
GaJIntl & CompL	Georgia Journal of International & Comparative Law
GC(s)	1949 Geneva Convention(s)
GAM	Free Aceh Movement (<i>Gerakan Aceh Merdeka</i>)
GoJIL	Goettingen Journal of International Law
HarvIntlLJ	Harvard International Law Journal
HRC	Human Rights Committee
IAC	International Armed Conflict
IACCommHR	Inter-American Commission on Human Rights

IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCSst	Rome Statute of the International Criminal Court
ICL	International Criminal Law
ICLR	International Criminal Law Review
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IHLS	Journal of International Humanitarian Legal Studies
IJHR	International Journal of Human Rights
ILC	International Law Commission
ILS	International Law Studies
IMT	International Military Tribunal at Nuremberg
IndJGlobLegalStud	Indiana Journal of Global Legal Studies
ICJ	International Court of Justice
IRA	Irish Republican Army
IRRC	International Review of the Red Cross
IsLR	Israel Law Review
JC&SL	Journal of Conflict & Security Law
JICJ	Journal of International Criminal Justice
JIHLS	Journal of International Humanitarian Legal Studies
KLA	Kosovo Liberation Army
KNU	Karen National Union
MONUC	United Nations Stabilization Mission in the Democratic Republic of the Congo
LJIL	Leiden Journal of International Law
LPICT	Law & Practice of International Courts and Tribunals
LPR	Lugansk People's Republic
LRTWC	Law Reports of the Trials of War Criminals
LTTE	Liberation Tigers of Tamil Eelam
MLNA	National Movement for the Liberation of Azawad (<i>Mouvement national de libération de l'Azawad</i>)
MILF	Moro Islamic Liberation Front
MLC	Movement for the Liberation of the Congo (<i>Mouvement de Libération du Congo</i>)
MLT	Moldovan Republic of Transnistria
NDFP	National Democratic Front of the Philippines
NIAC	Non-international Armed Conflict
NILR	Netherlands International Law Review
NRA	National Resistance Army
NSAG	Non-State Armed Group
OAG	Organized Armed Group
OHCHR	Office of the High Commissioner for Human Rights
OJLS	Oxford Journal of Legal Studies
ONUCI	United Nations Operation in Côte d'Ivoire

ONUSAL	United Nations Observer Mission in El Salvador
OSCE	Organization for Security and Cooperation in Europe
OTP	Office of the Prosecutor
OUP	Oxford University Press
PLO	Palestine Liberation Organization
PYD	Democratic Union Party (<i>Partiya Yekîtiya Demokrat</i>)
RcD	<i>Recueil des cours</i> /Collected Courses of The Hague Academy of International Law
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SPLM	Sudan People's Liberation Movement
TRNC	Turkish Republic of Northern Cyprus
TWC	Trials of War Criminals before the Nuremberg Military Tribunals under Control Council law no. 10
UDHR	Universal Declaration of Human Rights
UNAMA	United Nations Assistance Mission in Afghanistan
UNCHR	United Nations Commission on Human Rights
UNGA	United Nations General Assembly
UNMISS	UNMISS
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNWCC	United Nations War Crimes Commission
VandJTransnatlL	Vanderbilt Journal of Transnational Law
YILC	Yearbook of the International Law Commission
YIntlHL	Yearbook of International Humanitarian Law

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1. Introduction

The vast majority of armed conflicts fought today are not of an international character. In 2018, for example, non-international armed conflicts (NIACs) outnumbered international armed conflicts (IACs) by three to one.¹ One of the most important features that distinguish NIACs from IACs is the type of the actors that take part in them. In a NIAC at least one of the warring parties will be a non-State armed group (NSAG), sometimes referred to as an armed non-State actor (ANSA), organized armed group (OAG), or simply as an ‘armed group’. For most of its modern existence, international law was neither concerned with the behaviour of States nor that of armed groups in such conflicts, as they were perceived to be purely internal matters that did not warrant any outside interference.² This changed abruptly when the drafters of the four 1949 Geneva Conventions adopted the first ever treaty text directly regulating certain conduct in NIACs: Common Article 3 (CA 3).

The scope of this new legal framework quickly expanded through the development of customary international law and the adoption of the 1977 Additional Protocols, most importantly Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), which supplemented the rudimentary protection offered by CA 3.³ Shortly after its adoption, commentators

¹ Annyssa Bellal, *The War Report: Armed Conflicts in 2018* (Geneva Academy 2019) 31-34. If only situations of active hostilities were taken into account the ratio would increase to six to one as more than half of the IACs recorded that year were situations of ongoing occupation.

² Yoram Dinstein, *Non-International Armed Conflicts in International Law* (2nd ed, CUP 2021) 2-3.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II).

made clear that its provisions were equally binding on non-State parties to the conflict, that is, armed groups.⁴ Yet, until today, the scope of obligations imposed onto armed groups remains underdeveloped in law and practice.⁵ One field where this underdevelopment has become increasingly evident is the administration of justice by armed groups. Like established and recognized governments, insurgent movements, especially those that take and hold territory, increasingly find themselves in the need to govern.⁶ The International Committee of the Red Cross (ICRC) estimated that in 2020, no less than 66 million civilians were living under the exclusive control of armed groups.⁷ In these areas, armed groups are often called upon to resolve disputes, impose penal sanctions and implement social control, including within their own ranks. To do so, they frequently establish courts or other judicial mechanisms.⁸ This thesis aims to set out and evaluate the international legal framework governing these ‘irregular’ judicial institutions and the legal capacity of armed groups to pass penal sanctions in compliance with international law.

⁴ See e.g. Antonio Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’ (1981) 30 ICLQ 416.

⁵ Andrew Clapham, ‘Focusing on Armed Non-State Actors’ in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook on International Law in Armed Conflict* (OUP 2014) 770.

⁶ Tom Ginsburg, ‘Rebel Use of Law and Courts’ (2019) 15 Annual Review of Law and Social Science 495, 496.

⁷ ICRC, Statement to United Nations Security Council Open Debate on the Humanitarian Effects of Environmental Degradation and Peace and Security, 17 September 2020.

⁸ UNHRC, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on armed non-State actors: the protection of the right to life’ (5 June 2018) UN Doc A/HRC/38/44 [73].

1.1. Armed Group Courts in Contemporary Armed Conflicts

They have, while under the ban of the law, and exposed to its punishments, been able to construct from bottom to top a whole system of effective courts of Justice. They are daily emptying the King's Courts and filling their own. The Irish Bar looks on, part of it with consternation and part of it with secret sympathy, while the law business, in a litigious country, abandons the long established tribunals, to be discharged by makeshift courts, set up by an illegal organization, enforcing its decrees through universal intimidation.⁹

This description of the so-called Dáil courts, established by the Irish Republican Army (IRA) in the 1920s, demonstrates that the challenge to the State's monopoly on the administration of justice has always been a prominent feature of armed rebellion. This observation still holds true a century later. In the past two decades alone, a large number of armed groups have established judicial systems of various levels of sophistication. The most recent examples are the Donetsk People's Republic (DPR) and Lugansk People's Republic (LPR) in Eastern Ukraine¹⁰, the Autonomous Administration of North and East Syria (AANES or Rojava)¹¹, Jabhat al-Nusra and the Islamic State (IS/Daesh) in Syria and Iraq¹², as well as Ansar Dine, Al-Qaeda in the Islamic Maghreb (AQMI), and the National Movement for the Liberation of Azawad (MNLA) in Mali.¹³ Other examples are the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, the Farabundo Martí National Liberation Front (FMNLF) in El Salvador, Hamas in the Gaza Strip, the Taliban in Afghanistan (before their 2021 takeover of the country), the

⁹ William H. Brayden, 'Sinn Fein Courts in Operation' (1920) 6 American Bar Association Journal 8, 8.

¹⁰ OSCE, 'Thematic Report: Access to Justice and the Conflict in Ukraine', OSCE Special Monitoring Mission to Ukraine (December 2015) available at <<https://www.osce.org/files/f/documents/7/5/212311.pdf>> accessed 20 December 2022, 4.

¹¹ *ibid* 106-128.

¹² International Legal Assistance Consortium, 'ILAC Rule of Law Assessment Report 2017' (2017) available at <http://www.ilacnet.org/download/reports_documents/mission-reports_documents/Syria2017.pdf> accessed 20 December 2022, 82-105.

¹³ *Al-Hassan* (Rectificatif à la Décision relative à la confirmation des charges) ICC-01/12-01/18 (13 November 2019) [75].

Communist Party of Nepal-Maoist (CPN-M), the Revolutionary United Front (RUF) in Sierra Leone, the National Democratic Front (NDFP) and Moro Islamic Liberation Front (MILF) in the Philippines; the Armed Forces of the Forces Nouvelles (FAFN) in Ivory Coast, the Free Aceh Movement (GAM) in Indonesia, the Sudan People's Liberation Movement (SPLM) in South Sudan, the Movement for the Liberation of the Congo (MLC) in the Democratic Republic of the Congo, the Kosovo Liberation Army (UÇK/KLA), the Naxalites in India; the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN) in Colombia, the Karen National Union (NKU) in Myanmar, and the National Resistance Army (NRA) in Uganda.¹⁴

Although quantitative data is scarce, at least two surveys confirm that the operation of judicial systems by armed groups is indeed a frequent phenomenon. In a study based on a dataset comprising 127 internal armed conflicts between 1950 and 2006, for example, Huang found that 28% of the armed groups monitored had established their own courts.¹⁵ Many of the groups listed above used or are using judicial bodies for various purposes and strategic aims such as maintaining discipline within their ranks, securing public order in territories under their control, demonstrating their capacity to govern, or providing dispute resolution fora to the civilian population in the absence or rejection of the judicial institutions operated by the State.¹⁶ Using a different dataset of 2,205 so-called 'during-conflict justice' processes occurring in 204 NIACs between 1946 and 2011, Loyle and Binningsbø found that 10.3% of these

¹⁴ Most of these examples can be found in Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 549-555. The list is, however, by no means exhaustive.

¹⁵ Reyko Huang, *The Wartime Origins of Democratization: Civil War, Rebel Governance and Political Regimes* (CUP 2016) 72.

¹⁶ See *infra* section 1.2.

processes were conducted by rebel groups.¹⁷ These processes – defined as ‘judicial or quasi-judicial processes initiated during an armed conflict that attempt to address wrongdoings that have taken or are taking place as part of that conflict’ – demonstrate that some armed groups are willing to provide for accountability, including within their own ranks, through judicial processes.¹⁸ While a more comprehensive empirical analysis of these processes is certainly warranted, the two datasets support the conclusion that the use of courts and judicial processes by armed groups is not an isolated and sporadic occurrence but rather a common practice during NIACs.

1.2. Symbolic Power and Rebel Governance: Why Armed Groups Establish Courts

It is possible to identify several motives behind the creation of courts, holding of trials and passing of penal sentences by armed groups. The establishment of courts may be intended to impose military discipline among its members through the imposition of penal sanctions.¹⁹ However, it may also form an aspect of what is often referred to as ‘rebel governance’. Rebel governance can be defined as ‘the set of actions insurgents engage in to regulate the social, political, and economic life of non-combatants during war’.²⁰ Actions of rebel governance go beyond acts of coercion and may also be aimed at influencing behaviour through symbolic processes.²¹ Indeed, courts are a well-

¹⁷ Cyanne E. Loyle and Helga M. Binningsbø, ‘Justice during Armed Conflict: A New Dataset on Government and Rebel Strategies’ (2018) 62 *Journal of Conflict Resolution* 442, 446.

¹⁸ *ibid.* Trials – defined as ‘the formal examination of alleged wrongdoing through judicial proceedings within a (quasi-) legal structure’ – were found to be the most frequent justice process used by rebel groups.

¹⁹ Heike Krieger, ‘International Law and Governance by Armed Groups: Caught in the Legitimacy Trap?’ (2018) 12 *Journal of Intervention and Statebuilding* 563, 571.

²⁰ Ana Arjona, Nelson Kasfir and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (CUP 2015) 3.

²¹ Zachariah Mampilly, ‘Performing the Nation-State: Rebel Governance and Symbolic Processes’ in Arjona, Kasfir and Mampilly (n 20) 76.

known symbol of sovereign power and their establishment can be part of a strategy to bolster an armed group's legitimacy.

Moreover, the conduct of trials can be a tool to send signals to domestic and international audiences.²² Trials can demonstrate the organisational strength of an insurgent group by revealing its capacity to identify individuals and hold them accountable for certain behaviours.²³ Many groups, especially those seeking international legitimacy, are willing to comply with international norms. However, individual members of such groups may nonetheless breach international law in violation of the policies put in place by the group's leadership.²⁴ In these situations the group will frequently set up sanctioning mechanisms, which may include the establishment of courts.²⁵ Secessionist movements are particularly dependent on international recognition – especially when transforming from a *de-facto* regime to a member of the international community – which will be more difficult to obtain if the group is known for its systematic disregard of international law.²⁶ In addition, the symbolic aspect of establishing a court system might help such groups to demonstrate effective governance, which is recognized as a fundamental criterion for statehood.²⁷

²² Ginsburg (n 6) 497.

²³ Cyanne E. Loyle, 'Transitional Justice During Armed Conflict', Oxford Research Encyclopaedia (March 2017) available at <<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-218#acrefore-9780190228637-e-218-bibItem-0032>> accessed 20 December 2022.

²⁴ Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (CUP 2015) 39-40.

²⁵ Krieger (n 19) 571.

²⁶ Jo (n 24) 96. Whereas the relevance of international recognition as a legal criterion for statehood remains the subject of debates, it is undeniable that recognition by other States is politically crucial for a secessionist movement to succeed.

²⁷ James Crawford, *Brownlie's Principles of International Law* (9th ed, OUP 2019) 119; see also Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 1(c).

Armed groups that aim to overthrow an established government often attempt to take over the existing courts in areas they control to benefit from the legitimacy enjoyed by this established institutional framework.²⁸ On the other hand, however, insurgent movements with a strong (religious or political) ideological competent frequently decide to establish their own courts if the pre-existing judicial system is perceived to be built on values incompatible with those of their own (e.g. ‘Western’, ‘fascist’, ‘capitalist’ etc.).²⁹ The Communist Party of Nepal-Maoist (CPN-N) in Nepal, for example, established ‘People’s Courts’³⁰, whereas many of the rebel factions in Syria (such as ISIS or Jabhat Al-Nusra) or Mali (MNLA, AQMI, Ansar Dine) created *shari’a*-based tribunals.³¹

In some Syrian towns, the resort to *shari’a* law was a more pragmatic choice based on the lack of judges trained in civil law procedures, as well as the legitimacy it enjoyed among the local population.³² This demonstrates that efforts to achieve legitimacy on the international level might conflict with the aim of maintaining it domestically. After all, almost every armed group needs to secure some level of support from the local population and establish legitimacy within the domestic sphere to

²⁸ Krieger (n 25) 571.

²⁹ The Independent Expert on the Situation of Human Rights in Mali, for example, reported that ‘[i]n the north, the consequence of the occupation has been the systematic destruction of all State presence. State functions such as the territorial administration, security, justice, education and health care were particularly hard hit, since they were strategic targets for jihadi groups seeking to replace the judicial order by the sharia’. UNHRC, Report of the independent expert on the situation of human rights in Mali, Suliman Baldo (10 January 2014) UN Doc A/HRC/25/72 [24].

³⁰ Sandesh Sivakumaran, ‘Courts of Armed Opposition Groups: Fair Trials or Summary Justice?’ (2009) 7 JICJ 489, 492.

³¹ UNHRC, ‘Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic’, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (3 February 2016) UN Doc A/HRC/31/CRP.1 [67], [79], and [101].

³² Adam Baczeko, Gilles Dorronsoro and Arthur Quesnay, *Civil War in Syria: Mobilization and Competing Social Orders* (CUP 2017) 119-120.

survive.³³ The creation of courts and conduct of trials can therefore be as much a pragmatic, as a strategic or ideological decision.

In conclusion, the main reasons why armed groups decide to use courts are: a.) to secure popular support and legitimacy among the local population,³⁴ b.) as a strategic tool to demonstrate symbolic power by using institutions commonly associated with sovereign power, and c.) as a way to implement discipline by enforcing compliance through judicial processes. These three motives (which are certainly not exhaustive) also provide an indication as to which groups of individuals are likely to find themselves before a court or tribunal established by an armed group. Civilians might be tried for common offences such as murder or theft where the armed group in control aims to maintain public order and bolster its support among the local population. Captured enemy fighters may be tried for war crimes or other conflict-related offences in order to demonstrate symbolic power and moral superiority. Finally, the group may want to sanction its own fighters in order to maintain discipline within its ranks or to signal to an international audience that it is a responsible actor that adheres to international norms.³⁵

³³ Jo (n 24) 96. A good example is the court system established by the Taliban in Afghanistan before their 2021 takeover of the country. This system was perceived by large parts of the population to be more transparent and efficient than the State judiciary. See Ashley Jackson and Florian Weigand, 'Rebel Rule of Law: Taliban Courts in the West and North-West of Afghanistan', Overseas Development Institute Briefing Note, May 2020.

³⁴ The Special Court for Sierra Leone (SCSL), for example, noted that the Revolutionary United Front (RUF) punished violations of IHL such as rape, looting and burning of villages only where the group was dependent on local support for the success of their mission while these violations were tolerated or even actively ordered in other areas. See *Sesay et al.* (Trial Judgment) SCSL-04-15-T (2 March 2009) ('*RUF case*') [707]-[708].

³⁵ Consider, e.g., Interview with Jean-Pierre Bemba (*The New Humanitarian*, 6 February 2003) available at <<https://www.thenewhumanitarian.org/q-and/2003/02/06/interview-mlc-leader-jean-pierre-bemba>> accessed 20 December 2022.

1.3. Trials by Armed Groups as a Legal Phenomenon: The Sakhanh Case

Whereas the creation of armed group courts has long been documented as a social phenomenon, until very recently international legal actors have either turned a blind eye on such practices or have simply denied the legitimacy of their very existence. The UN Commission of Inquiry for the Syrian Arab Republic, for example, has referred to courts established by armed groups in various parts of the country as ‘unauthorized courts’³⁶ and spoke of ‘illicit trials’ that should be stopped.³⁷ What, however, is an ‘unauthorized court’ and when does a trial become ‘illicit’? Other international organisations and special mandate holders have equally struggled to measure the conduct of armed groups in relation to the administration of criminal justice against clear legal standards.³⁸ This is not surprising. The imposition of criminal sanctions is typically regarded as a core prerogative of the State and inherently linked to the concept of sovereignty.³⁹ From the perspective of the domestic law of a State on the territory of which these groups operate, every armed group court or tribunal will be illegal in the sense that it operates against the will of the established government and outside the existing constitutional framework. In addition, any act that is part of an insurgency

³⁶ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (n 31) [79], [101] and [103].

³⁷ *ibid* [67], [103] and [107].

³⁸ A high-ranking former OSCE official, for example, has told the author that the OSCE struggled in assessing courts set up in the DPR and LPR in Eastern Ukraine against international legal standards without drawing criticism from member States. This struggle is reflected in the organization’s report on access to justice in Ukraine mentioned above (n 10). See also Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (n 8) [73] describing the prosecution of crimes by armed groups simply as ‘largely illegitimate’.

³⁹ Anne-Marie La Rosa and Caroline Wuerzner, ‘Armed Groups, Sanctions and the Implementation of International Humanitarian Law’ (2008) 90 *IRRC* 327, 338; Jonathan Somer, ‘Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-international Armed Conflict’ (2007) 89 *IRRC* 655, 690.

against the government might be subject to domestic penal sanctions, often under the labels of ‘terrorism’ or ‘treason’.⁴⁰

International law, however, refrains from treating as illegal the uprising and insurgence of armed groups against the State in a national setting.⁴¹ It does not contain a *jus ad bellum internum* and is, so to say, ‘neutral’ towards rebellion.⁴² Nevertheless, international law regulates certain conduct of both armed groups and governmental authorities during a NIAC. Most notably, CA 3 contains a prohibition on the passing of sentences without a ‘regularly constituted court’ affording all the ‘judicial guarantees recognised as indispensable’. But what do these standards mean in the context of an armed group and can they even be implemented by a non-State actor in the first place? Mégret, for example, has argued that ‘the right to a fair trial is not simply a right to be tried fairly by whatever organ one happens to be tried by, but arguably a right to be tried by an independent and impartial tribunal understood as a tribunal that is an emanation of the state’.⁴³ The question is, in other words, whether international law contains standards that, either directly or indirectly, protect a State’s monopoly on the administration of justice.

⁴⁰ René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (OUP 2021) 3.

⁴¹ *ibid.*

⁴² Malcolm Shaw, ‘Self-determination and the Use of Force’ in Nazila Ghanea-Hercock and Alexandra Xanthaki (eds), *Minorities, Peoples and Self-Determination* (Brill 2004) 44. See also Olivier Corten, *La Rébellion et le Droit International: Le Principe de Neutralité en Tension* (Brill 2016) 53. Some authors, however, have questioned whether modern developments such as the right to self-determination or anti-terror legislation have undermined this principle, see Tom Ruys, ‘The Quest for an Internal Jus Ad Bellum: International Law’s Missing Link, Mere Distraction, or Pandora’s Box?’ In Claus Kreß and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (OUP 2020) 169; Claus Kreß and Frédéric Mégret ‘The regulation of non-international armed conflicts: Can a privilege of belligerency be envisioned in the law of non-international armed conflicts?’ (2015) 96 IRRC 29.

⁴³ Frédéric Mégret, ‘Are There “Inherently Sovereign Functions” in International Law?’ (2021) 115 AJIL 452, 485.

This question is inherently interlinked with broader normative considerations regarding the implementation of international law in the context of non-State actors and especially the regime of IHL. It is widely acknowledged within the internationally community that IHL compliance of armed groups remains unsatisfactory and that enhancing it would constitute a worthwhile effort.⁴⁴ In this regard, it has been argued that supporting the operation of courts could be a helpful tool in improving the compliance of armed groups with IHL and increase the sense of ownership over its obligations.⁴⁵

That these considerations are not only of academic interest but also of significant practical relevance is evidenced by the so-called *Sakhanh* case, which also inspired the initial research behind this thesis. On 11 March 2016, Swedish authorities issued an arrest warrant for Haisam Sakhanh, a Syrian national holding refugee status in Sweden, for allegedly having committed ‘aggravated crimes against international law’, including violations of CA 3 of the 1949 Geneva Conventions.⁴⁶ The prosecution produced evidence that Sakhanh had been a member of a Syrian armed opposition group and was involved in the execution of seven captured individuals belonging to the Syrian Armed Forces.⁴⁷ Sakhanh, however, denied any criminal responsibility and claimed he had merely executed a death sentence ‘imposed by a legitimate court’ on charges of murder and rape of civilians following a ‘procedure that met the basic

⁴⁴ The the UN Secretary General has identified the need to press for the compliance of armed groups with IHL as a core challenge on countless occasions. See e.g. Report of the Secretary-General on the protection of civilians in armed conflict (7 May 2019) UN Doc S/2019/373, [66]; Report of the Secretary-General on the protection of civilians in armed conflict (18 June 2015) UN Doc S/2015/453, [7].

⁴⁵ Somer (n 39) 690; La Rosa and Wuerzner (n 39) 338; Sivakumaran (n 30) 512.

⁴⁶ *Prosecutor v Haisam Sakhanh*, Stockholm Tingsrätt, Judgment, B 3787-16, 16 February 2017, translated and reproduced in ‘On the Establishment of Courts in Non-International Armed Conflict by Non-State Actors: Stockholm District Court Judgment of 16 February 2017’ (2018) 16 JICJ 403, 405.

⁴⁷ *ibid* 406.

requirements for a fair trial as required by international humanitarian law'.⁴⁸ The Stockholm District Court accepted the idea that insurgents could set up their own courts but also held that the tribunal in question could not be regarded as independent and impartial and that the fair trial guarantees required under IHL had not been met.⁴⁹ Sakhanh was sentenced to life imprisonment and his conviction confirmed by the Svea Court of Appeal.⁵⁰

This case is not an isolated event but can be seen as part of a broader trend of engagement with the judicial systems of non-State actors. Ahead of its 33rd International Conference, the International Committee of the Red Cross (ICRC) noted that implementing the IHL rules on fair trials in the difficult context armed groups operate in poses a 'complex and unresolved legal challenge'.⁵¹ In addition, armed group courts have featured prominently in recent discussions of the concept of command responsibility at the International Criminal Court (ICC)⁵² and at the time of writing, a major armed group leader is being charged with war crimes due to his involvement in the creation of a makeshift Islamic court in Mali.⁵³ Several other instances of penal sentences imposed by armed groups are currently subject of investigations by the ICC

⁴⁸ *ibid* 406-8.

⁴⁹ *ibid* 422 [64].

⁵⁰ *Prosecutor v. Haisam Sakhanh*, Svea hovrätt (Svea Court of Appeal) B 2259-17, Judgment of 31 May 2017.

⁵¹ ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th anniversary of the Geneva Conventions' (2019) 33IC/19/9.7, 45.

⁵² *Bemba* (Trial Judgment) ICC-01/05-01/08 (21 March 2016) [403], [597-600] and (Appeals Judgment) ICC-01/05-01/08 (8 June 2018) [147].

⁵³ *Al-Hassan* (n 13).

Prosecutor, including in relation to the situations in Palestine⁵⁴ and Ukraine⁵⁵. Moreover, there has been a fresh wave of scholarly commentary on this so far neglected and understudied issue.⁵⁶ Yet, a comprehensive treatment of the status of armed group courts and the international legal framework applicable to them, is still missing. This thesis aims to fill that gap.

1.4. Research Questions

The thesis aims to provide a comprehensive analysis of the international legal framework regulating the operation of courts and passing of penal sentences by armed groups during NIAC. It is, therefore, not concerned with the administration of justice in relation to civil proceedings. The reason for this limitation is threefold. First, criminal proceedings conducted by armed groups pose a stronger challenge to the authority and judicial monopoly of the State.⁵⁷ Second, criminal proceedings and

⁵⁴ See *Situation in Palestine* (Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine) ICC-01/18 (20 December 2019) [94], which noted that 'there is a reasonable basis to believe that Palestinian armed groups have been wilfully depriving protected persons of the rights of fair and regular trial under Article 8(2)(a)(vi) or 8(2)(c)(iv)) of the Rome Statute'.

⁵⁵ In its 2018 report, the OTP noted that it is examining whether alleged conduct in Eastern Ukraine would amount to a war crime under Article 8(2)(c)(vi). See OTP, Report on Preliminary Examination Activities, 5 December 2018 [91]. However, no reference to Article 8(2)(c)(vi) has been made in subsequent reports on the situation in Ukraine.

⁵⁶ See e.g. Provost (n 40); Mark Klamberg, 'The Legality of Rebel Courts during Non-International Armed Conflicts' (2018) 16 JICJ 235; René Provost, 'Accountability for International Crimes with Insurgent Groups', in Morten Bergsmo and Song Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (TOAEP 2018); Jan Willms, 'Courts of Armed Groups – A Tool for Inducing Higher Compliance with International Humanitarian Law?' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015); Jonathan Somer, 'Opening the Floodgates, Controlling the Flow: Swedish Court Rules on the Legal Capacity of Armed Groups to Establish Courts' (*EJIL:Talk!*, 10 March 2017) <<https://www.ejiltalk.org/opening-the-floodgates-controlling-the-flow-swedish-court-rules-on-the-legal-capacity-of-armed-groups-to-establish-courts/>> accessed 20 December 2022; Ezequiel Heffes, 'The Establishment of Courts by Armed Groups: What is the Legal Basis?' (*Humanitarian Law & Policy*, 11 October 2016) <<http://blogs.icrc.org/law-and-policy/2016/10/11/courts-armed-groups-legal-basis/>> accessed 20 December 2022.

⁵⁷ Indeed, many jurisdictions allow for civil disputes to be handled exclusively by non-State actors, for example through arbitration or religious courts.

sanctions have a greater potential to interfere with the rights of an individual. And third, criminal proceedings and penal sanctions are subject to detailed protection and specific safeguards under multiple regimes of international law, in particular IHL. The thesis will examine the legal framework for the passing of penal sanctions upon the groups own members ('internal' administration of justice), as well as upon enemy fighters⁵⁸ and civilians ('external' administration of justice as part of 'rebel governance'). Based on the importance of a clear legal framework on the administration of criminal justice by armed groups outlined above, the thesis is centered around two core research questions:

a.) To what extent do armed groups have the legal capacity under international law to conduct trials and pass penal sentences?

In other words, the first research question aims to answer whether international law protects the judicial monopoly of the State by outlawing, directly or indirectly, the operation of courts and passing of penal sentences by armed groups as non-State actors. The thesis will demonstrate that armed groups *do* enjoy a limited legal capacity to operate judicial institutions and pass penal sentences, even though this capacity will often be restricted in practice by the need to comply with exacting fair trial standards that were originally crafted in relation the judicial systems of States. It will also point out that this legal capacity is best described as a 'weak permission', meaning that

⁵⁸ This thesis will refer to armed group members that take part in hostilities as 'fighters'. As noted by the ICRC, persons taking part in hostilities during NIACs are sometimes labelled 'combatants'. However, this designation should be understood in its generic meaning and indicates that these persons do not enjoy the protection against attack accorded to civilians. As formal combatant status does not exist in the law of NIAC, the term will be avoided in order to avoid potential conflation. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law, Volume I: Rules* (ICRC/CUP 2005) ('ICRC Customary IHL Study') 12.

international law does neither prohibit nor explicitly authorise such conduct. It will explain that, accordingly, international law does not attach any normative legitimacy to the passing of penal sentences by armed groups and that individuals involved in such conduct cannot derive any form of immunity from such limited permission.

The second research question builds upon this conclusion by asking:

b.) Does international law require armed groups to conduct trials and pass penal sentences?

The second research question thus aims to answer whether certain legal obligations applicable to armed groups implicitly require the use of penal sanctions by such groups. It has been pointed out, for example, that if armed groups had no possibility to impose penal sanctions through courts, perpetrators of serious violations of IHL might go unpunished in areas where the State is unable to enforce the law.⁵⁹ In this regard, it is often argued that armed groups are required to ‘ensure respect’ for IHL and their military and civilian leaders will need to use penal measures in order to comply with the doctrine of command responsibility.⁶⁰ However, if such penal sanctions are not administrated in compliance with international law themselves, this would compromise any positive effect they might have on the enforcement and implementation of IHL.⁶¹ The thesis will make the case that the use of penal sanctions is a lawful tool for armed groups to enforce discipline, compliance with IHL, and public order in cases where the group disposes over institutions capable of administering such sanctions in line with

⁵⁹ La Rosa und Wuerzner (n 39) 338.

⁶⁰ See e.g. Willms (n 56) 159-60 and Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart 2016) 221.

⁶¹ Willms (n 56) 151.

the necessary judicial guarantees. However, it will also argue that this conclusion neither translates into an *obligation* to employ penal sanctions for that purpose, nor into a duty to establish such judicial institutions.

1.5. Thesis Outline

Following this Chapter, **Chapter 2** introduces the substantive part of the thesis by addressing some vital preliminary legal issues, including the status of armed groups as international legal persons and the binding force of international law on such actors. The Chapter will argue that the concept of international legal personhood is best understood as a descriptive term rather than a prerequisite for entities to incur international legal obligations. It will further explain that IHL, international human rights law (IHRL) and international criminal law (ICL) contain relevant obligations governing the conduct of trials and passing of penal sentences during NIAC. It will demonstrate that whereas the direct application of IHL to armed groups as distinct collective entities is today widely accepted, the direct application of IHRL – despite strong normative arguments in favour – remains disputed and underdeveloped. Finally, this Chapter aims to define entities referred to as ‘armed groups’, and clarifies who exactly is bound by the obligations applicable to them.

Chapter 3 subsequently outlines the types of trial situations and penal sentences that are covered by the protective scope of the relevant IHL norms, in particular in relation to the nexus requirement – which requires a link between the conduct in question and the armed conflict – and the extension of IHL to intra-party conduct. The Chapter then proceeds to flesh out the meaning of the core IHL provision applicable to penal proceedings, namely CA 3 and its requirement of a ‘regularly constituted court’. It will argue that this phrase is best understood as incorporating the

requirement that a court be ‘established by law’ and that the term ‘law’ in this context is not limited to ‘State law’. Finally, the Chapter will explain that international law neither explicitly prohibits nor explicitly permits the passing of penal sentences by armed groups and, therefore, armed groups enjoy the legal capacity to pass sentences in the form of a so-called ‘weak permission’. This conclusion entails that individuals participating in the passing of penal sentences on behalf of armed groups may be lawfully prosecuted for their actions under domestic law.

Chapter 4 builds on the findings of Chapter 3 by analysing the remaining requirements for the passing of penal sentences, including institutional requirements such as independence and impartiality, as well as more specific due process guarantees prescribed by CA 3, AP II and customary law. This Chapter will argue that despite the contested direct application of IHRL to non-State actors, IHL incorporates customary human rights law principles and standards of due process developed for States and indirectly provides for their application to armed groups. It will explain that while these standards might not have the same potential to ‘outlaw’ armed group trials as the requirement of ‘regular constitution’, they are nevertheless difficult to meet by non-State actors in practice. This conclusion notwithstanding, Chapter 4 will also argue that proposals to downgrade the fair trial standards expected from armed groups should be rejected as they might equally water down fair trial guarantees expected from States and undermine the principle of belligerent equality.

Chapter 5 complements Chapters 3 and 4 by analysing how the standards identified in those Chapters translate into the framework of ICL. It explains that while the passing of sentences without providing for necessary fair trial standards can amount to a war crime (and, potentially, a crime against humanity if sufficiently widespread and systematic) not every violation of the judicial guarantees required by IHL entails

individual criminal responsibility. The Chapter argues that this nuanced approach maintains incentives for armed group members to comply with fundamental fair trial guarantees without being unduly penalized for not meeting standards considered unrealistic in the context of a non-State entity engaged in armed conflict. However, it will also explain how a discriminatory interpretation of the nexus requirement, as applied by international criminal tribunals and advocated for by institutions such as the ICRC, might render criminal certain acts of rebel governance, in particular the punishment of common crimes in territory under armed group control, while the same acts may be carried out with impunity by State authorities.

Finally, **Chapter 6** addresses the second research question. It first analyses whether the capacity to impose discipline as an organisational requirement for the status of party to an armed conflict implicitly presupposes the capacity to impose penal sanctions over members of the armed group. Moreover, it discusses to what extent an obligation to punish conduct with penal sanctions can be derived from the doctrine of command responsibility under ICL and whether the customary law duty to prosecute and punish war crimes, as applicable to States, can be extended to armed groups. The Chapter argues that while courts and penal sanctions administered by armed groups might be a legitimate way to ensure respect for IHL and to avoid individual criminal responsibility on the basis of command responsibility, this conclusion does not translate into a positive *obligation* of armed groups as a collective to employ penal sanctions, let alone to set up judicial institutions. This conclusion notwithstanding, the Chapter will point out that there is increasing State practice requiring armed groups to ensure accountability within their ranks.

1.6. Current State of Research and Added Value of the Present Thesis

At the beginning of this research project, almost no (legal) literature on the administration of justice by armed group existed, the main exception being two journal articles written by Jonathan Somer and Sandesh Sivakumaran in 2007 and 2009, respectively.⁶² More recently, a new book-length analysis has been published by René Provost.⁶³ This book is an interdisciplinary work that includes detailed descriptions of various judicial systems operated by armed groups, as well as perspectives from other disciplines within the social sciences. Its legal analysis covers some of the problems outlined above but stops short of the necessary in-depth treatment, in particular in relation to the second research question. While the approaches of Provost's study and this thesis are similar in relation to the legal capacity of armed groups to pass penal sentences and the judicial guarantees applicable, Provost's conclusions as to the perceived necessity for armed groups to pass penal sanctions in relation to the organisation requirement and the obligation to ensure respect for IHL have been criticized by commentators and differ from the conclusions made by this thesis.⁶⁴ Other aspects of disagreement are the permitted scope of criminal legislation by armed groups, as well as the normative assessment of Article 8(2)(c)(iv) of the Rome Statute and the related Elements of Crimes.

Moreover, the focus and added value of Provost's work is undeniably his interdisciplinary analysis and the practical insights gathered from meticulous fieldwork, as well as the transposition of the doctrinal conclusion already reached by Somer and Sivakumaran onto the daily reality of armed groups. This thesis, on the other

⁶² Somer (n 39); Sivakumaran (n 30).

⁶³ Provost (n 40)

⁶⁴ Alessandra Spadaro, 'From Outlaws to Judges: Armed Groups and the Administration of Justice', Review of René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (2022) 13 IHLS 362, 375.

hand, mainly aims to fill some of the doctrinal gaps left open in his and the above-mentioned works, in particular with regard to the general nature of IHL, the extension of IHL to intra-party protection, the relationship between CA 3 and AP II, the transposal of CA 3 into ICL, the interpretation of the nexus criterion in relation to rebel governance, as well as normative considerations relating to belligerent equality and the inadequacy of IHL in occupation-like situations of prolonged control of territory by armed groups. Therefore, both works retain their distinct focal points.

2. International Legal Framework Regulating Non-State Armed Groups

Before exploring the legal questions implicated by the establishment of judicial systems and the passing of penal sentences by armed groups, it is vital to address several preliminary questions. In particular, it is necessary to analyse the contemporary position of armed groups in the international legal system and their capacity to be the direct holder of rights and obligations under international law. Therefore, section 1 of this Chapter will begin with an analysis of the concept of international legal personality and its application to non-State actors. It will argue that legal personality is best understood as a descriptive term applying to entities that have been endowed with rights and obligations under international law rather than a prerequisite (*a priori*) threshold that needs to be met in order for international legal norms to apply.

Section 2 will then explain the theoretical background behind the binding force of international law in relation to armed groups, most notably the application of IHL, IHRL and ICL. All three regimes contain norms relevant to the establishment of courts, conduct of trials and passing of penal sentences. However, this section will demonstrate that even though IHRL can and should bind armed groups, the scope of obligations under this regime remain minimal. In this regard, it will also be explained that States continue to occupy a predominant position in the creation and interpretation of the applicable rules, notwithstanding the limited practice recognising the potential of armed groups' participation in the law-making process.

Finally, section 3 of this Chapter will analyse who exactly is bound by the normative regimes identified in the previous sections. It will thus try to define the

entities referred to as ‘armed groups’, under IHL and beyond, arguing that a conceptual distinction has to be made between the ‘armed wing’ of a non-State actor, and supportive segments of the civilian population such as administrative and political wings. Moreover, this section will look at problems specific to the implementation and enforcement of these normative regimes in relation to armed groups, and explain how these problems interact with the operation of courts and the passing of penal sentences. It will argue that the legal framework enforcing the international responsibility of the group as a collective remains underdeveloped and that related efforts have so far focussed on enforcing norms via the individual.

2.1. The International Legal Personality of Armed Groups

Traditionally, States were seen as the exclusive subjects of the ‘law of nations’.⁶⁵ Today, however, it is well recognized that international legal personality, which is often understood as the prerequisite to become a bearer of rights and obligations under international law, is no longer confined to States.⁶⁶ In order to explain how international law binds armed groups it is necessary to shed some light onto the often misperceived concept of international legal personality. This section will explain that legal personality should be understood as a descriptive term that provides no added value to the analysis of the relevant norms and obligations that govern the conduct of armed groups, including those relating to trials and penal sanctions.

⁶⁵ Lassa Oppenheim, *International Law* (Longmans 1905) 341.

⁶⁶ See *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178-79.

2.1.1. *Theories of International Legal Personality*

International legal personality is often understood as a *conditio sine qua non* for an entity to act or be held responsible under international law.⁶⁷ Yet, international law lacks a clear mechanism or rule capable of determining which entities enjoy international legal personality.⁶⁸ This has led to the emergence of a variety of conceptual frameworks for evaluating the existence of such personality. In his comprehensive study on the subject, Portmann has identified five dominant theories: ‘States-only’, ‘recognition’, ‘individualistic’, ‘formal’, and ‘actor’.⁶⁹ The ‘State only’ theory, as implied by its name, makes international legal personality conditional upon statehood.⁷⁰ The ‘recognition’ theory equally views States as the only primary legal persons in international law but allows for ‘secondary’ or ‘derivative’ legal persons through their explicit or implicit recognition by States.⁷¹

In contrast to these two State-centric and positivist theories, the ‘individualistic’ theory relies on natural law principles and endorses a presumption in favour of the individual human being as an international legal person that exists *a priori* and does not depend on the will of States.⁷² It draws mainly on Hersch Lauterpacht’s doctrine of the individual as the ultimate unit of international law, who is endowed with the ‘inalienable rights of man’.⁷³ The ‘formal’ conception, on the other hand, does not attach any consequences to being an international legal person, every entity that is

⁶⁷ Jan Klabbers, ‘The Concept of Legal Personality’ (2005) 11 *Jus Gentium* 35, 37; see also ILC, ‘First Report on Responsibility of International Organizations’ (26 March 2003) UN Doc A/CN.4/532 [15].

⁶⁸ Murray (n 60) 29.

⁶⁹ Roland Portmann, *Legal Personality in International Law* (CUP 2010) 13-14.

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.* 126.

⁷³ Hersch Lauterpacht, *International Law and Human Rights* (Stevens and Sons 1950) 69.

directly addressed by international legal norms automatically holds such personality.⁷⁴ Its intellectual origins can be traced back to Hans Kelsen's 'Pure Theory of Law'.⁷⁵ Finally, the 'actor' theory, which is closely linked to the 'New Haven School', rejects the concept of international legal personhood altogether and stipulates that international law is essentially a decision-making process with a variety of participants (States, international organisations, individuals, private groups) that make claims across State lines in order to maximize certain values.⁷⁶

Each of these theories have been subject to criticism and to dwell on their advantages and shortcomings would go beyond the scope of this thesis.⁷⁷ What is important, however, is that apart from the now irrelevant 'States-only' theory, each of the remaining four alternatives provide arguments as to why armed groups should, in principle, enjoy international legal personality. In the field of IHL, for example, the group might be 'recognized' as a belligerent by States.⁷⁸ Under the 'formal' theory, legal personality is conferred upon armed groups when they are directly addressed by a normative framework, such as CA 3 or AP II. Under the individualistic conception, armed groups derive their legal personality from the fact that they are, like States, comprised of individuals as the primary legal persons in international law. Finally, the

⁷⁴ Portmann (n 69) 13-14.

⁷⁵ Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 172-73. See also Hans Kelsen, 'Théorie Générale du Droit International Public' (1932) 42 RdC 121, 141.

⁷⁶ See e.g. Rosalyn Higgins, 'Conceptual Thinking about the Individual in International Law' (1978) 4 *British Journal of International Studies* 1.

⁷⁷ For a critique of Portmann's 'individualistic' theory consider for example Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016) 434.

⁷⁸ Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (OUP 2017) 97-98. While historically important, recognition of belligerency plays almost no role in contemporary international practice. The last recognition of belligerency arguably occurred in 1979. See Alonso Gurmendi, 'The Last Recognition of Belligerency (and Some Thoughts on Why You May Not Have Heard of It) (*EJIL:Talk!*, 10 December 2019) available at <<http://opiniojuris.org/2019/12/10/the-last-recognition-of-belligerency-and-some-thoughts-on-why-you-may-not-have-heard-of-it/>> accessed 20 December 2022.

‘actor’ conception, relying on the idea that the international system is composed of ‘participants’, emphasises the factual involvement of armed groups in international affairs and the rule-making process.⁷⁹ However, none of these theories acknowledge the existence and influence of each other, nor do they fully reflect the reality of the contemporary international legal order.⁸⁰

2.1.2. International Legal Personality as an ‘a posteriori’ Conception

Irrespective of the theories explained above, the probably most authoritative statement on the requirements for becoming an international legal person is the International Court of Justice’s (ICJ) advisory opinion in *Reparations for Injuries*. This case is often summarised as the Court stating that the UN’s legal personality is based on a.) the organization’s capacity to possess rights and obligations under international law and b.) its capacity to bring international claims.⁸¹

With regard to the first element, it is indeed frequently asserted that international legal personality requires the *capacity* to possess rights and obligations under international law.⁸² However, said capacity is not necessarily some sort of independent requirement but usually depends on the primary legal norm in question. As the next subsection will demonstrate, in the field of IHL for example, CA 3 and AP II contain capacity-related criteria identifying those entities that will become the bearer of rights and obligations in the form of ‘armed groups’. It thus seems that the essential

⁷⁹ It is necessary to point out that in the understanding of the New Haven School, the rule-making process is not confined to the orthodox sources of international law as enshrined in, for example, art 38 of the ICJ Statute. See e.g. William M. Reisman, ‘The View from the New Haven School of International Law’ (1992) 86 *ASIL Proceedings* 118, 120.

⁸⁰ Murray (n 60) 34.

⁸¹ Crawford (n 27) 105; *Reparations for Injuries* (n 66) 179.

⁸² See e.g. Crawford (n 27) 105; Christian Walter, ‘Subjects of International Law’, Max Planck Encyclopaedia of Public International Law [MPEPIL], May 2007 [21].

test is not about the *capacity* to enjoy rights and obligations but the *actual possession* of such rights and obligations. Indeed, the ICJ noted in *Reparations for Injuries* that it must first enquire whether the UN ‘possesses, in regard to its Members, rights which it is entitled to ask them to respect’.⁸³ Therefore, as the Court later observed in *Western Sahara*, the possession of rights ‘expresses the essential test where a group, whether composed of States, of tribes or of individuals, is claimed to be a legal entity distinct from its members’.⁸⁴ However, if said rights and obligations are the very reason why an entity holds legal personality in the first place, then legal personality cannot logically be the prerequisite to such rights and obligations. In other words, the argument becomes circular.⁸⁵

With regard to the second element, the capacity to bring international claims, a closer look at the *Reparations* Judgment reveals that the Court treated such capacity as a *consequence* of the UN’s legal personality rather than a prerequisite.⁸⁶ It has therefore been recognised that legal personality exists on a spectrum and that entities not capable of enforcing rights through international claims may nevertheless enjoy legal personality of a restricted kind.⁸⁷

⁸³ *Reparations for Injuries* (n 66) 178.

⁸⁴ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 [148]. See also Dapo Akande, ‘International Organizations’ in Malcom Evans (ed), *International Law* (5th ed, OUP 2018) 251, noting that ‘to say that an entity has international legal personality is to say that the entity is a bearer of rights and duties under international law’.

⁸⁵ See e.g. Jan Kleffner, ‘The Applicability of International Humanitarian Law to Organized Armed Groups’ (2011) 93 IRRC 443, 456.

⁸⁶ *Reparations for Injuries* (n 66) 178; Andrew Clapham, *Human Rights Obligations of Non-State Armed Groups* (OUP 2006) 65.

⁸⁷ Crawford (n 27) 105; Fortin (n 78) 98. Moreover, there are instances in which armed groups and national liberation movements have been granted standing before international courts, see Case T-512/12, *Frente Polisario v. Council of the European Union*, EU:T:2015:953, 10 December 2015.

In conclusion, the term ‘international legal person’ carries little substantive value.⁸⁸ It is best understood as a descriptive term for entities that are addressed by international legal norms rather than an *a priori* threshold that needs to be met before an armed group can enjoy rights or obligations under international law.⁸⁹ This approach has been described as the ‘*a posteriori*’ conception of legal personality and will inform the analysis of the applicable law in the following subsections.⁹⁰ As explained by Pedersen, ‘if interpretation of an international norm leads to the conclusion that the norm governs an entity, it follows that this entity possesses international legal personality’.⁹¹ In conclusion, armed groups enjoy legal personality *because* they have been made subject of certain rights and obligations and not the other way around.⁹² The very concept of international legal personality has therefore rightly been criticised as an ‘intellectual prison of our own choosing’.⁹³

2.2. How International Law Binds Armed Groups

Having established that international legal personality is best understood as a mere auxiliary term and ‘*a posteriori*’ concept dependent on the actual possession of rights and obligations under international law, it is necessary to determine the sources of these rights and obligations and to explain their binding force on armed groups.

⁸⁸ Cedric Ryngaert, ‘Non-State Actors: Carving out a Space in a State-Centred International Legal System’ (2016) 63 NILR 183, 187.

⁸⁹ Portmann (n 69) 174.

⁹⁰ Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (OUP 2018) 14.

⁹¹ *ibid* 26.

⁹² Ryngaert (n 88) 178. Yet, some authorities have denied that directly imposing international legal obligations onto armed groups implies that they hold international legal personality. See *Kallon and Kamara* (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72 (13 March 2004) [45].

⁹³ Rosalyn Higgins, *Problems & Processes: International Law and How We Use It* (Clarendon Press 1994) 49.

There are three significant bodies of international law that are relevant to the establishment and operation of judicial systems and passing of penal sentences by armed groups: IHL, IHRL and ICL. Whereas ICL is concerned only with the responsibility of individual group members, IHL and IHRL may bind the armed group as a collective.⁹⁴ In the relevant literature on the subject, five main theories can be identified that claim to explain the binding force of international law on armed groups: third party consent (*pacta tertiis*), prescriptive jurisdiction, *de facto* control, customary law and general principles.⁹⁵ These theories will be examined in turn. However, it is important to point out that they are not mutually exclusive and may work in parallel to each other.⁹⁶

The third-party consent (*pacta tertiis*) theory stipulates that armed groups can be bound by international treaty law if the drafters intended to bind these groups and the armed group itself consent to be bound.⁹⁷ It derives its name from the well-known roman law doctrine *pacta tertiis nec nocent nec prosunt*, meaning that treaties cannot create obligations for third parties without their consent.⁹⁸ That armed groups may accept rights and obligations enshrined in such a treaty is today well-established.⁹⁹ Cassese, for example, relied on the *pacta tertiis* theory in order to explain how

⁹⁴ See section 2.2.3.

⁹⁵ Fortin (n 78) 178; Murray (n 60) 83; Kleffner (n 85); Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 369. Sometimes, the idea of 'binding force via the individual member' is invoked as a distinct theory but will be treated under the prescriptive jurisdiction section here.

⁹⁶ Fortin (n 78) 178.

⁹⁷ Murray (n 60) 91.

⁹⁸ See e.g. Crawford (n 27) 370. In relation to third party States, the doctrine is enshrined in arts 34-36 of the Vienna Convention on the Law of Treaties (VCLT). It is also widely considered to form part of customary international law and as such, may equally apply to treaties that intend to bind non-State actors. Ultimately, however, the doctrine is based on the principle of sovereign equality, which cannot simply be transposed to the relations between States and non-State actors. See also Murray (n 60) 104.

⁹⁹ Dinstein (n 2) 91 [248].

insurgents are bound by AP II.¹⁰⁰ However, while logically coherent, the *pacta tertiis* theory enjoys only limited relevance in practice. Although expressions of consent to specific treaty norms do sometimes occur in the form of ad-hoc agreements or unilateral declarations by armed groups, they remain the exception rather than the rule.¹⁰¹

The doctrine of prescriptive (or legislative) jurisdiction, on the other hand, negates the requirement of the armed group's consent and has been adopted, for example, by the ICRC in its early commentaries on the 1949 Geneva Conventions.¹⁰² It stipulates that a State's capacity to apply its laws to its nationals and individuals acting on its territory entails the right to impose upon them obligations that originate in international law, 'even if those individuals take up arms to fight that state or (an)other organized armed group(s) within it'.¹⁰³ This may be done through the transformation of a treaty provisions into domestic legislation, which then binds everyone within the relevant jurisdiction.¹⁰⁴

However, in a dualist system, armed groups would not incur any obligations in case the territorial state fails to implement the legislation necessary in order to give domestic effect to the treaty in question.¹⁰⁵ This is the reason why scholars such as

¹⁰⁰ Cassese (n 4) 423.

¹⁰¹ The FMLN, for example, stated that it will 'ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II', see FMLN, 'La legitimidad de nuestros metodos de lucha', Secretaria de promocion y proteccion de los Derechos Humanos del FMLN (10 October 1989). More recently, the Free Syrian Army proclaimed that it 'will uphold international humanitarian laws, including treating prisoners humanely', see The Free Syrian Army's Proclamation of Principles published with the establishment of the FSA in 2012, available at <<https://fsaplatform.org/fsa-principles>> accessed 20 December 2022.

¹⁰² See Jean S. Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 2: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (ICRC 1960) 34.

¹⁰³ Kleffner (n 85) 445. Sivakumaran (n 95) 381.

¹⁰⁴ Dinstein (n 2) 70, [221].

¹⁰⁵ Kleffner (n 85) 447.

Cassese and Dinstein have been highly critical of the prescriptive jurisdiction theory, noting that its dependence on the domestic legal order makes it difficult to generate compliance as many armed groups reject pre-existing domestic legislation and declare it null and void in territories they control.¹⁰⁶

However, it is necessary to make a conceptual distinction between the introduction of legislation by a State in the implementation of a treaty – which then bind the armed group and its members via domestic law – and the direct imposition of rights and obligations through international law. The critique levelled by Cassese and Dinstein fails to acknowledge the contemporary acceptance of the notion that international law is able to directly impose rights and obligations onto individuals or collective non-State entities.¹⁰⁷ In the field of human rights law, for example, it has become well-accepted that international law can confer rights directly, irrespective of any domestic legislative act.¹⁰⁸ With regard to IHL, its direct binding force on individuals has also been aptly confirmed by international criminal jurisprudence.¹⁰⁹ Therefore, the non-transformation of a rule enshrined in a treaty may have the consequence of forestalling its domestic application but does not preclude individual members of armed groups from becoming bearer of rights and obligations in the sphere of international law.¹¹⁰

¹⁰⁶ Cassese (n 100) 429-30; Dinstein (n 2) 70 [221].

¹⁰⁷ See *Jurisdiction of the Courts of Danzig* (Advisory Opinion) [1928] PCIJ, Series B, No. 15, 18; *Case of the Major War Criminals*, International Military Tribunal at Nuremberg, Judgment, 1 October 1946, 223; *LaGrand* (Germany v United States of America) [2001] ICJ Rep 466 [77]. In his later writings, Cassese seemed to accept that States might impose obligations under international law directly onto individuals. See Antonio Cassese, *International Law* (2nd ed, OUP 2005) 144.

¹⁰⁸ See Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (eds), *International Human Rights Law* (3rd ed, OUP 2018) 89.

¹⁰⁹ See e.g. *Ohlendorf et al.*, 10 April 1948 (1949) 4 TWC 411, 460 (*Einsatzgruppen Trial*); See also *Akayesu* (Trial Judgment) ICTR-96-4-T (1 June 2001) [437]-[445].

¹¹⁰ Kleffner (n 85) 447.

Some rules of IHL, most notably those relating to judicial guarantees and detention operations,¹¹¹ are clearly addressed to and can only be implemented by the group as a collective rather than by an individual member.¹¹² Based on the formal conception of legal personality advanced in the previous section, there is no reason why States, if they so wish, cannot exercise their prescriptive jurisdiction over collective entities operating on its territory and endow them with the same or different international legal obligations than the individuals constituting such entities.¹¹³ Indeed, as will be shown in the next section, there is ample evidence in the language and drafting history of IHL treaties to demonstrate that the intention of their drafters was to directly bind individuals and armed groups alike.¹¹⁴ The prescriptive jurisdiction theory, can, therefore coherently explain the binding force of international treaty law on both type of actors and enjoys significant support among commentators.¹¹⁵

Another approach towards the binding force of international law is based on the control of territory by armed groups, sometimes referred to as the ‘*de facto* control theory’. In his early commentary on the 1949 Conventions, for example, Pictet argued that if an insurgent authority exercises ‘effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country’.¹¹⁶ The principle of effectiveness, which will also be touched upon in **Chapter 3**, stipulates that in order to

¹¹¹ E.g. CA 3 and arts 5-6 AP II.

¹¹² Kleffner (n 85) 447.

¹¹³ See Fortin (n 78) 198, arguing that there is no plausible reason why the principle originally established in the *Jurisdiction of the Courts of Danzig* case should only extend to individuals and not to all non-State actors.

¹¹⁴ See section 2.2.1.

¹¹⁵ In particular Sivakumaran (n 95) 393 and Fortin (n 78) 206-7.

¹¹⁶ Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Vol. I: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and in Armed Forces in the Field* (Geneva: ICRC 1952) 51.

be valid, a legal order must be efficacious.¹¹⁷ Where the State legal order is no longer observed in a territory because the State has lost control thereof, so the argument, any other authority that effectively exercises quasi-governmental powers in this territory must also adhere to the international legal obligations of the State.¹¹⁸ This theory is frequently invoked with regard to potential human rights obligations of armed groups¹¹⁹ but is rarely relied upon in order to explain the binding force of IHL. Indeed, since IHL explicitly differentiates between situations where armed groups control territory and situations where they do not, any concept relying on such control would fail to explain the binding force of IHL in the latter situation.¹²⁰

Another theory as to how armed groups are bound by international law draws on customary international law. That customary international law can bind subjects other than States has long been recognized in international jurisprudence.¹²¹ However, two problems arise. First, it is often argued that customary law binds armed groups because such groups hold international legal personality, which, as described above, is dependent on said group being in possession of rights and obligations.¹²² If customary law is the source of these rights and obligations, so the argument, the theory becomes circular.¹²³ However, this critique of the customary law theory is based on a problematic understanding of international legal personality as an *a priori* threshold. If

¹¹⁷ See Hiroshi Taki, 'Effectiveness', Max Planck Encyclopaedia of Public International Law [MPEPIL], February 2013.

¹¹⁸ Fortin (78) 200-201.

¹¹⁹ See section 2.2.2.

¹²⁰ See art 1(1) AP II.

¹²¹ See e.g. *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, [37]; or *Simić* (Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness) IT-95-9 (27 July 1999) [35].

¹²² Murray (n 60) 87-89.

¹²³ Fortin (n 78) 205.

States are capable of imposing direct obligations onto armed groups under their jurisdiction through treaties, there is no reason why they should not be capable of doing so via the creation of custom.¹²⁴ Indeed, why should treaty law have the privileged status of being able to address armed groups directly whereas customary law would have to ‘wait’ for applicable treaty law (that somehow endows the group with international legal personality) to enter the stage?¹²⁵ States have developed a customary international law framework that binds armed groups as soon as certain contextual and capacity-related triggers are in place.¹²⁶ In the field of IHL, for example, these triggers are the level of organisation of the group involved, a certain threshold of violence, and to some extent the control of territory.¹²⁷ In essence, this understanding of customary law mirrors the prescriptive jurisdiction theory described above.¹²⁸ The focus of any inquiry into whether armed groups incur obligations under customary law should thus be on identifying whether the relevant State practice and *opinio juris* indicate that a particular customary law norm is meant to extend to armed groups.

The latter point relates closely to the second problem of relying on customary law as a source of binding obligations incumbent upon armed groups. Some commentators view customary law as unitary system, meaning that once a rule has crystallized into custom, it binds all international legal persons.¹²⁹ In other words, once

¹²⁴ Recall the description of the ‘formal’ or ‘*a posteriori*’ conception advanced by Pedersen above in (n 90): ‘if interpretation of an international norm leads to the conclusion that the norm governs an entity, it follows that this entity possesses international legal personality’.

¹²⁵ This is indeed what Murray seems to suggest by arguing that once the group becomes the bearer of rights and obligations under the legislative jurisdiction theory through a treaty framework (and thus acquires international legal personality), it will subsequently be bound by (the entire body) of customary international law. See Murray (n 60) 130-31.

¹²⁶ Fortin (n 78) 206.

¹²⁷ See section 2.3.

¹²⁸ *ibid.*

¹²⁹ See e.g. Murray (n 60) 88; Sivakumaran (n 95) 373.

an armed group enjoys legal personality, it will be bound by the whole body of customary international law. This view is unconvincing. First, it involves once again the problem of circularity. Custom cannot be the source of international legal obligations if it presupposes international legal personality, which is again dependent on international legal obligations.

Second, as explained by Fortin, different entities or groups of entities are bound by different customary international law obligations and each obligation requires specific *opinio juris* and State practice with regard to their addressees.¹³⁰ Customary international law is, therefore, not a unitary system, which is evidenced by the existence of norms that only bind States and some that only bind other actors.¹³¹ Moreover, there is no presumption in favour of the application of ordinary custom, as applicable between States, to non-State actors.¹³² Customary law rules have different personal scopes, which can be identified through an analysis of their underlying practice and *opinio juris*.¹³³

Finally, general principles of international law are also well established as a source of international law although the dividing line to customary law is often blurred.¹³⁴ Contrary to ordinary custom, general principles can be understood as

¹³⁰ Katherine Fortin, 'How to Cope with Diversity While Preserving Unity in Customary International Law? Some Insights from International Humanitarian Law' (2018) 23 JC&SL 337-358. A difference in applicable rules exists even among similar subjects, such as States, which is evidenced by the existence of regional custom and the persistent objector doctrine. See e.g. *Asylum Case (Colombia v Peru)* Judgment [1950] ICJ Rep 266, 276.

¹³¹ Consider, for example, the prohibition on the use of force or the prohibition against piracy. See also Fortin (n 130) 345-46.

¹³² Portmann (n 69) 280. Nevertheless, Portmann argues in favour of such presumption with regard to peremptory rules of international law (*jus cogens*). However, even such limited presumption seems questionable, see section 2.2.2.

¹³³ Indeed, custom cannot be 'interpreted'. See Massimo Lando, 'Identification as the Process to Determine the Content of Customary International Law' (2022) 42 OJLS 1.

¹³⁴ See art 38(1)(c) ICJ Statute. Consider also Malgosia Fitzmaurice, 'History of Article 38 of the Statute of the ICJ' in in Jean d'Aspremont and Samantha Besson (eds), *The Oxford Handbook on Sources of International Law* (OUP 2017) 192.

binding on all subjects of international law alike as they form something akin to ‘constitutional principles’ that underlie the international legal order as a whole without having a concrete addressee.¹³⁵ However, these principles are not detailed norms but abstractions that act as a gap filler in cases where no clear rule exist.¹³⁶ They might be able to reinforce or complement norms and regimes applicable under the other theories but will otherwise play a rather limited role for the purpose of this thesis.

In conclusion, all of the above conceptions can, in theory, validly explain the binding force of international law on armed groups. However, the subsequent section will demonstrate that in practice, the obligations of armed groups are best explained via the prescriptive jurisdiction of States, either via the conclusion of treaties directly addressing such groups, or through the creation of custom to that effect.

2.2.1. The Binding Force of International Humanitarian Law

Despite broad consensus that armed groups are bound by IHL, there is no agreement on how this binding force can be explained.¹³⁷ This paradox could be resolved if one accepts that the theories described in the previous section are not mutually exclusive and operate in parallel. While some serve to explain how all armed groups are bound by certain types of IHL norms, other rationales explain the application of all norms of IHL but perhaps only to a subset of armed groups.¹³⁸

¹³⁵ Cassese (n 107) 64. See also ILC, ‘First Report on General Principles of Law’, Seventy-first Session (29 April–7 June and 8 July–9 August 2019) UN Doc A/CN.4/732, [126] and [166]; *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14 [219].

¹³⁶ Crawford (n 27) 37.

¹³⁷ See e.g. Kleffner (n 85) 443 or Dinstein (n 99) 63 [200], calling the binding force of IHL on armed groups a ‘generally accepted axiom’.

¹³⁸ Sandesh Sivakumaran ‘The Addressees of Common Article 3’ in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2016) 417.

To begin, the chapeau of CA 3 specifies that ‘each Party’ to the conflict shall be bound to apply its provisions. Although the *travaux préparatoires* reveal that such binding force on armed groups was considered a radical and controversial notion in 1949, it is generally accepted that the drafters did intend CA 3 to bind armed groups.¹³⁹ The issue resurfaced during the negotiations on AP II, when some delegates rejected the idea that the Protocol would be binding on entities other than States.¹⁴⁰ However, the final version of Article 1 of AP II stipulates that the Protocol applies where organized armed groups exercise such control over the territory to enable them to *implement this Protocol*, which is a strong indication that the drafters considered such groups to be bound.¹⁴¹ This provides support for explaining the binding nature of these rules through the prescriptive jurisdiction theory. As explained in the previous section, while armed groups occasionally express their consent to be bound by certain IHL provisions, it is quite rare for an armed group to explicitly consent to the whole range of obligations under CA 3 and AP II.¹⁴² Some armed groups have even actively denounced the application of the Geneva Conventions or its Protocols.¹⁴³ Therefore, the *pacta tertiis* theory plays a rather limited role in practice.¹⁴⁴

¹³⁹ See ICRC, *Commentary on the Third Geneva Convention* (ICRC/CUP 2021) (ICRC 2020 GC III Commentary) [539]-[540].

¹⁴⁰ Fortin (n 78) 181-82.

¹⁴¹ *ibid* 183.

¹⁴² *ibid*.

¹⁴³ The National Liberation Front of Vietnam (NLF, ‘Vietcong’), for example, informed the ICRC in October 1965 that, since it did not participate in the drafting of the Geneva Conventions, it felt not bound by them and that the Conventions contained provisions which corresponded neither with its action nor with the organization of its armed forces. See ICRC, ‘The International Committee and the Vietnam Conflict’ (1966) 65 *IRRC* 399, 400.

¹⁴⁴ Obtaining such commitments might nevertheless significantly increase the group’s actual compliance. See Richard Baxter, ‘Jus in Bello Interno: the Present and the Future’ in John N. Moore (ed), *Law in Law and Civil War in the Modern World* (John Hopkins University Press 1974) 528.

That CA 3 has morphed into a norm of customary law that exists independently from its treaty-based form has long been recognized.¹⁴⁵ That this customary law rule can bind armed groups has also been acknowledged in international jurisprudence.¹⁴⁶ This supports the ICRC's position that CA 3 is binding on armed groups, both via treaty and customary law.¹⁴⁷ This conclusion can be extended to those parts of AP II that have equally attained customary law status, which, according to the ICRC's study on customary IHL, includes the majority of the Protocol.¹⁴⁸ This is particularly relevant as AP II, in contrast to the 1949 Conventions, does not enjoy universal adherence.

Finally, it has to be noted that paragraph four of CA 3 states that 'the application of the preceding provisions shall not affect the legal status of the Parties to the conflict'. This provision was included to ensure that the application of CA3 does not interfere with the *de jure* government's lawful suppression of armed activity.¹⁴⁹ In particular, it clarifies that CA 3 does not confer belligerent status onto armed groups and that their members may be lawfully prosecuted for their involvement in hostilities through domestic law.¹⁵⁰ In other words, it does not provide them with combatant immunity, an issue that will be further discussed in **Chapters 3** and **6**. However, this does not preclude armed groups from incurring obligations under IHL.¹⁵¹

¹⁴⁵ *Case concerning Military and Paramilitary Activities in and against Nicaragua* (n 135) [218]-[219]; *Tadić* (Decision on Interlocutory Appeal Challenging Jurisdiction) IT-94-1-AR72 (2 October 1995) [98].

¹⁴⁶ *Kallon and Kamara* (n 26) [47].

¹⁴⁷ ICRC 2020 GC III Commentary [539].

¹⁴⁸ See ICRC Customary IHL Study and *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [117]. However, the precise scope of the customary law status of AP II, as well as its application to different types of NIAC, remains unclear. See **Chapter 4**, section 4.1.2.

¹⁴⁹ ICRC 2020 GC III Commentary [900].

¹⁵⁰ *ibid* [903]. On combatant immunity more generally, see **Chapter 3**, section 3.2.2.

¹⁵¹ *Dinstein* (n 99) 86 [234].

In addition, IHL is based on certain capacity-related requirements that need to be met before an entity composed of individuals can be considered an ‘armed group’ that is endowed with obligations under treaty or customary law. In particular, the existence of an armed group properly so called is dependent on organisational requirements, a certain threshold of armed violence and to some extent the control of territory. According to the authoritative definition developed by the ICTY, a conflict falling under CA 3 exists wherever there is ‘*protracted* armed violence between governmental authorities and *organized* armed groups or between such groups within a State’.¹⁵² It is generally accepted that the term ‘protracted’ refers to the intensity of a conflict as indicated by factors such as the duration and intensity of individual confrontations; the types of weapons used, or the number of casualties or extent of material destruction.¹⁵³ An armed group must, therefore, be capable of confronting State authorities or another armed group with military means of a sufficient intensity.¹⁵⁴

In addition to the intensity threshold, the level of organisation possessed by a collective of individuals is considered a central element in distinguishing armed groups participating in an armed conflict from participants in riots and other forms of unorganized large-scale violence.¹⁵⁵ The required level of organisation can be demonstrated, *inter alia*, by the existence of a command structure and disciplinary rules within the group; its ability to coordinate and carry out military operations, or its

¹⁵² *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [70] (emphasis added).

¹⁵³ *Haradinaj et al.* (Trial Judgment) IT-04-84-T (3 April 2008) [49].

¹⁵⁴ *ibid* [60]. The ICC equally held that the group needs to ‘have a sufficient degree of organisation, in order to carry out protracted armed violence’. See *Lubanga* (Trial Judgment) ICC-01/04-01/06 (14 March 2012) [536].

¹⁵⁵ Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC 2019) 69.

capacity to speak with one voice.¹⁵⁶ While it is not necessary for an armed group to meet every one of these organizational elements, it is often argued that the group must have at least obtained the material ability to ensure discipline and respect for fundamental humanitarian norms in order to qualify as a party to the conflict.¹⁵⁷ To what extent this ability truly is an indispensable constitutive element of every armed group will be analysed in more detail in **Chapter 6**. When the necessary organisational requirements are met, a collective of individuals transforms into an organized armed group and will be treated as a distinct legal entity for the purpose of IHL.

2.2.2. Are Armed Groups Bound by Human Rights Law?

2.2.2.1. The Rationale of IHRL and its Application to Armed Groups

Today, it is firmly established that IHRL continues to apply in situations of armed conflict.¹⁵⁸ Yet, contrary to IHL, it remains disputed whether it also binds armed groups.¹⁵⁹ Human rights law has been traditionally conceived – perhaps more than any other regime of international law¹⁶⁰ – as State-centric and exclusive of other international actors.¹⁶¹ However, as explained by Clapham, States and armed groups

¹⁵⁶ Haradinaj (n 153) [60].

¹⁵⁷ Dinstein (n 99) at 44, [138]; Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (OUP 2018) 87.

¹⁵⁸ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 [106]; *Armed Activities on the Territory of the Congo (DRC v Uganda) (Merits)* [2005] ICJ Rep 168 [126].

¹⁵⁹ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) 212.

¹⁶⁰ After all, human rights can be seen as the historical response to the rise of the modern nation State. See Nigel S. Rodley, ‘Can Armed Opposition Groups Violate Human Rights Standards?’ in Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff 1993) 299.

¹⁶¹ Agnès Callamard, ‘Towards International Human Rights Law Applied to Armed Groups’ (2019) 37 *Netherlands Quarterly of Human Rights* 85, 90.

both embody the paradox that their capacity to violate human rights also demonstrates their potential to protect such rights.¹⁶² As **Chapter 3** will demonstrate, armed groups engage in a range of acts that are not governed by IHL, either because these acts are unrelated to the conflict or are simply not regulated by IHL at all.¹⁶³ Nevertheless, these acts can have a significant impact on the civil, political and economic rights of the civilian population in the areas they operate.¹⁶⁴ The vertical power relationship between an armed group and civilians under its control thus incorporates the same rationale as human rights law in the context of States.¹⁶⁵

This understanding is increasingly reflected in domestic and international case law. The UN Committee Against Torture, for example, has accepted that armed groups – in the absence of State authority – constitute a vertical authority capable of falling under the scope of ‘public officials or other persons acting in an official capacity’ under the Convention Against Torture (CAT).¹⁶⁶ The UK Supreme Court has recently confirmed this position and held that the Convention covers ‘conduct by rebels, outside the authority of the State, exercising governmental functions over the civilian population of territory under its control’.¹⁶⁷ While these decisions stop short of endowing armed groups with substantive IHRL obligations in their own right, they

¹⁶² Andrew Clapham, ‘Non-state actors’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (4th ed, OUP 2022) 584.

¹⁶³ See **Chapter 3**, section 3.1.2. on the so-called ‘nexus requirement’.

¹⁶⁴ E.g. the provision of security, food or health care. See Jean-Marie Henckaerts and Cornelius Wiesener, ‘Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice’ in in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (Asser Press 2020) 203.

¹⁶⁵ See Annyssa Bellal and Stuart Casey-Maslen, ‘Rules of Engagement - Protecting Civilians through Dialogue with Armed Non-State Actors’ (Geneva Academy 2011) 25.

¹⁶⁶ CAT, *Sadiq Shek Elmi v Australia*, Comm no 120/1998, UN Doc CAT/C/22/D/120/1998 (14 May 1999) [6.5].

¹⁶⁷ *R v Reeves Taylor* [2019] UKSC 51 [36].

recognise the potential of armed groups to violate – and implicitly also to protect – human rights.

These decisions also demonstrate the normative appeal of applying human rights law to such actors. When the State has lost control over a given area to an armed group, the scope of its human rights obligations with regard to the territory in question becomes limited.¹⁶⁸ In these situations, complementary IHRL obligations for armed groups can help prevent a significant protection gap. A number of human rights bodies and experts, including the OHCHR¹⁶⁹, special procedures mandate holders¹⁷⁰, as well as UN fact-finding missions and commissions of inquiry (COIs)¹⁷¹ have therefore advocated for the direct application of human rights obligations to armed groups in situations where they hold territory and exercise quasi-governmental functions.

¹⁶⁸ See *Ilașcu and Others v Moldova and Russia*, App no 48787/9 (ECtHR, 8 July 2004) (Grand Chamber) [333]; and more generally Tatiana Eatwell, ‘State Responsibility for Human Rights Violations Committed in the State’s Territory Controlled by Armed Non-State Actors’, Geneva Academy Briefing No. 13, December 2018.

¹⁶⁹ ‘The application of human rights standards to non-State actors is particularly relevant in situations where they exercise some degree of control over a given territory and population. [...] Indeed, the assumption of international human rights responsibilities by non-State actors is seen as a pragmatic recognition of the realities of a conflict, without which rights holders would lose out on any practicable claim to their human rights’, OHCHR, *International Legal Protection of Human Rights in Armed Conflict*, 2011, 25.

¹⁷⁰ See e.g. OHCHR, *Joint Statement by independent United Nations human rights experts on human rights responsibilities of armed non-State actors*, 25 February 2021, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E#_ftn1> accessed 20 December 2022; UNHCR, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life* (5 June 2018) A/HRC/38/44 [46]-[47].

¹⁷¹ See e.g. UNHRC, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (25 September 2009) UN Doc A/HRC/12/48 [365]; *Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya* (12 January 2012) UN Doc A/HRC/17/44 [62]; *Report of the Commission on Human Rights in South Sudan* (23 February 2018) A/HRC/37/CRP.2 [120]; UNSC, *Final Report of the International Commission of Inquiry on the Central African Republic* (22 December 2014) UN Doc S/2014/928 [41] and [107]; *Final Report of the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140* (26 January 2016) UN Doc S/2018/192 [143]-[144].

2.2.2.2. *Sources and Scope of IHRL Obligations for Armed Groups*

From a positivist view, there is no reason why the doctrinal explanation for the binding force of human rights law on armed groups should be any different than for the application of IHL.¹⁷² Armed groups may be bound by human rights law norms if they are directly addressed in a treaty framework or if States have confirmed, through State practice and *opinio juris*, that a rule of customary human rights law also binds such groups.¹⁷³ The practical difference, however, is that IHL can rely upon a well-established body of treaty-based obligations in the form of CA 3 and AP II that directly address armed groups. In contrast and with very few exceptions, human rights treaties do not address armed groups at all.¹⁷⁴

Some commentators have therefore argued that, following the default of governmental authorities, treaty-based human rights rules could be extended to armed groups in areas where they exercise effective territorial control.¹⁷⁵ Tomuschat, for example, notes that '[t]o the extent that elements of governmental authority have fallen into the hands of a rebel movement, that movement cannot escape its responsibilities under the CCPR and other human rights instruments'.¹⁷⁶ The Committee on the Elimination of All Discrimination Against Women (CEDAW) took a similar approach when it held that where State institutions are weakened in conflict situations, there may

¹⁷² Clapham (n 162) 572.

¹⁷³ See *supra* section 2.2.

¹⁷⁴ Exceptions include the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227 (CRC-OPAC) art 4; and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2020) 3013 UNTS 1 (Kampala Convention) art 2(e).

¹⁷⁵ Murray (n 60) 137; David Matas, 'Armed Opposition Groups' (1997) 3 Manitoba Law Journal 621, 632. See also Fortin (n 78) 240.

¹⁷⁶ Christian Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements' in Horst Fischer et al. (eds), *Krisensicherung Und Humanitärer Schutz— Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (Berliner Wissenschaftsverlag 2004) 573.

be ‘simultaneous and complementary sets of obligations under the Convention for armed groups’.¹⁷⁷

In essence, these approaches are based on the principle of effectiveness, as discussed above in relation to the binding nature of IHL.¹⁷⁸ It is sometimes claimed that the application of human rights treaties automatically devolves with territory and that the rights enshrined therein are owned by the populations inhabiting that territory.¹⁷⁹ It has been suggested that this principle could also explain the binding nature of IHRL treaty obligations on armed groups.¹⁸⁰ However, even in the case of newly independent States, the automatic devolution of IHRL treaties has been criticized as not universally recognized and insufficiently grounded in *opinio juris*.¹⁸¹ *A fortiori*, applying this concept to an armed group that has not yet succeeded in either overthrowing the current government or seceding from the original territorial State remains an argument that is difficult to sustain as a matter of positive law. It might be possible, however, that some groups achieve such a high level of effective governance that the criteria for Statehood are met.¹⁸² In such a case, depending on whether one adopts a declaratory or constitutive approach to recognition, this new *de-facto* State will cease to qualify as an

¹⁷⁷ CEDAW, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations (18 October 2013) UN Doc. CEDAW/C/GC/30 [13] and [15].

¹⁷⁸ See also Fortin (n 78) 200-203.

¹⁷⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, Separate Opinion of Judge Weeramantry, 641-53; HRC, ‘General Comment No. 26, (Continuity of Obligations)’ (12 August 1997) UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1 [4].

¹⁸⁰ See e.g. OHCHR, Joint Statement by independent United Nations human rights experts (n 170) highlighting ‘the idea that human rights protection devolves with territory’. See also HRC, General Comment 26 (n 179) [4]; Murray (n 60) 135; and Fortin (n 78) 275-76.

¹⁸¹ See e.g. Crawford (n 27) 425-426, arguing that [s]uccessor states will often accept human rights agreements [...] of their predecessors, although this is arguably contingent on the successor’s consent rather than any rule of automatic succession’. See also Akbar Rasulov, ‘Revisiting State Succession to Humanitarian Treaties: Is there a Case for Automaticity?’ (2003) 14 EJIL 141 and Fortin (n 78) 275-76.

¹⁸² See e.g. Michael Shoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'* (Brill 2004) 216-217.

armed group under IHL and incur all accepted human rights law obligations incumbent on States under customary law.¹⁸³

Even for armed groups that have not attained this status, the most likely source of IHRL obligations for armed groups is customary international law.¹⁸⁴ It is sometimes argued that all armed groups are bound by human rights norms that form part of *jus cogens* because peremptory norms allegedly bind all subjects of international law alike.¹⁸⁵ This approach seems to have been taken, for example, by the UN Commission of Inquiry on Syria and the United Nations Mission in the Republic of South Sudan (UNMISS).¹⁸⁶ However, as Fortin has correctly pointed out in her work, just as the fact that a norm is customary in character does not allow for concluding that it is binding on an every subject of international law, the fact that a norm forms part of *jus cogens* – as a specific subset of customary international law¹⁸⁷ – equally does not imply that it automatically binds every subject of international law.¹⁸⁸ Indeed, some peremptory norms apply only to States (e.g. the prohibition against the use of force¹⁸⁹), whereas others (e.g. the prohibition of piracy¹⁹⁰) only bind non-State actors.¹⁹¹ Even the

¹⁸³ *ibid.*

¹⁸⁴ Fortin (n 78) 323.

¹⁸⁵ See e.g. Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649 [226].

¹⁸⁶ UNHRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (22 February 2012) UN Doc A/HRC/19/69 [106]; UNMISS, Conflict in South Sudan: A Human Rights Report (8 May 2014) [18].

¹⁸⁷ ILC, Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*), Report of the International Law Commission on the work of the seventy-first session (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 142-3, draft conclusions 4(a) and 5(1).

¹⁸⁸ Fortin (n 78) 346-47.

¹⁸⁹ Oliver Dörr, 'Prohibition of the Use of Force', Max Planck Encyclopaedia of Public International Law [MPEIL], August 2019 [29].

¹⁹⁰ Piracy, by its very nature and definition, must always be committed for private ends and cannot be carried out in the name of a State. See Crawford (n 27) 287. For the *jus cogens* nature of the prohibition of piracy consider ILC, Draft Articles on the Law of Treaties with Commentaries, YILC 1966 (4 May–19 July 1966) Vol II, UN Doc A/CN.4/SER.A/1966/Add.1, 248 [3].

¹⁹¹ Fortin (n 78) 346-47.

application of a peremptory norm of international law to armed groups must, therefore, be grounded in specific practice and *opinio juris*.

In this regard, there is a growing amount of practice, for example within the UN Human Rights Council, that indicates that armed groups are bound to respect many of those fundamental IHRL obligations considered to be peremptory norms, irrespective of whether they control territory or exercise governmental functions.¹⁹² This development is to some extent corroborated by the application of certain well-established IHRL norms to armed groups by the Security Council.¹⁹³ Among those obligations frequently invoked in relation to armed groups are the prohibitions against torture and ill-treatment, the recruitment of child soldiers, summary executions and extrajudicial killings, sexual violence against women and children, enforced disappearances and arbitrary detention.¹⁹⁴

At this point, it has to be noted that both the UNHRC and the UNSC still try to painstakingly maintain a semantic distinction between ‘human rights violations’ by States and ‘human rights abuses’ by non-State actors. This distinction was originally suggested in order not to relativize or excuse human rights violations of States.¹⁹⁵

¹⁹² Geneva Academy, ‘Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council’ (December 2016) Academy In-Brief No. 7, 36.

¹⁹³ Jessica S. Burniske, Naz K. Modirzadeh and Dustin A. Lewis, ‘Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly (2017) Harvard Law School Program on International Law & Armed Conflict, 12 and 27.

¹⁹⁴ See e.g. UNSC Resolution 2109 (11 July 2013) UN Doc S/Res/2109; UNSC Resolution 2127 (5 December 2013) UN Doc S/Res 2127; UNSC Resolution 2149 (10 April 2014) UN Doc S/Res/2149, UNSC Resolution 2191 (17 December 2014) UN Doc S/Res/2191; UNSC Resolution 2196 (22 January 2015) UN Doc S/Res/2196; UNSC Resolution 2217 (28 April 2015) UN Doc S/Res/2217; UNSC Resolution 2248 (12 November 2015) UN Doc S/Res/2248.

¹⁹⁵ UNCHR, Report of the Meeting of Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Service Programme (30 September 1996) UN Doc E/CN.4/1997/3, [44] and [76].

However, its contemporary legal significance is doubtful.¹⁹⁶ First, the distinction has never been consistently maintained, with some resolutions referring to human rights ‘abuses’¹⁹⁷, some to ‘violations’¹⁹⁸ and some to both ‘abuses’ and ‘violations’¹⁹⁹ by armed groups. In addition, with regard to the practice of UN CoIs, more than half of their reports now refer to human rights ‘violations’ of armed groups.²⁰⁰ Second, no State or international body maintains the position that the term ‘human rights abuses’ denotes that these abuses are in fact ‘legal’ under international law.²⁰¹ Third, several resolutions refer to the need to ‘hold accountable’ or even ‘bring to justice’ those responsible for human rights abuses.²⁰² It is difficult to perceive how someone can be ‘brought to justice’ for an ‘abuse’, which inevitably implies some form of judicial process, without that ‘abuse’ effectively being a violation of a legally binding

¹⁹⁶ See Andrew Clapham, ‘Human Rights Obligations for Non-State Actors: Where are We Now?’ in Fannie Lafontaine and François Larocque (eds), *Essays in International Law and International Relations in Honour of Louise Arbour* (Intersentia 2019) 6. See also Gilles Giacca, *Human Rights Obligations of Armed Non-State Actors, in Economic, Social, and Cultural Rights in Armed Conflict* (OUP 2016) 250, who argues that this is a purely semantic distinction that does not affect the Security Council’s recognition of armed groups formally assuming international human rights obligations.

¹⁹⁷ e.g. UNSC Resolution 2139 (22 February 2014) UN Doc S/Res 2139, condemning ‘the human rights abuses and violations of international humanitarian law by armed groups’.

¹⁹⁸ e.g. UNSC Resolution 2109 (11 July 2013) UN Doc S/Res/2109, expressing ‘Expressing grave concern at the continuing human rights violations, including inter alia arbitrary arrests and detentions, torture, and incidences of extrajudicial killings, as well as looting of property, by armed groups and by national security institutions’. Or UNHRC Resolution 20/17 (12 July 2012) UN Doc A/HRC/Res/20/17, condemning ‘the human rights violations and acts of violence committed in northern Mali, in particular by the rebels’.

¹⁹⁹ e.g. UNSC Resolution 2340 (8 February 2017), emphasizing ‘the imperative for all armed actors to refrain from all acts of violence against civilians, in particular members of vulnerable groups such as women and children, and to end all violations and abuses of human rights’.

²⁰⁰ Ginevra Le Moli, ‘From “Is” to “Ought”: The Development of Normative Powers of UN Investigative Mechanisms’ (2021) 19 *ChinJIntL* 625, 647.

²⁰¹ Clapham (n 196) 18.

²⁰² e.g. UNSC Resolution 2514 (12 March 2020) UN Doc S/Res/2514, reiterating ‘the urgent need to end impunity in South Sudan and to bring to justice all those responsible for violations of international humanitarian law and violations and abuses of human rights’; or UNSC Resolution 1592 (30 March 2005) UN Doc S/Res/1592, welcoming ‘the first steps taken to date to bring them [militia members] to justice, in particular the arrests of militia leaders suspected of bearing responsibility for human rights abuses’.

obligation. It could be argued that these statements refer to the individual criminal responsibility of armed group members under domestic criminal law or for crimes against humanity that constitute the underlying acts behind these ‘abuses’ but which do not violate international human rights law as such.²⁰³ However, the UNSC and the international community more broadly do not normally concern themselves with the punishment of purely domestic offences, which makes this alternative explanation unconvincing.

Crimes against humanity, on the other hand, are based on the extension of individual criminal responsibility to the widespread and systematic violation of international human rights.²⁰⁴ It is well established today that not only State officials but also members of armed groups can commit crimes against humanity.²⁰⁵ In order to constitute crimes against humanity under the ICC Statute, an attack must be carried out in furtherance of an organizational policy of the armed group in question, an issue that will be further discussed in **Chapter 5**.²⁰⁶ This implies that armed groups are obligated not to violate the underlying norms of human rights law that the concept of crimes against humanity seek to protect. In addition, crimes against humanity embody the same form of ‘dual responsibility’ as the crime of genocide, namely individual and State responsibility.²⁰⁷ It has therefore been suggested that armed groups as a collective

²⁰³ See Rodenhäuser (n 157) 155.

²⁰⁴ Lauterpacht (n 73) 37. See also Kai Ambos, ‘Article 7’ in Kai Ambos (ed), *The Rome Statute of the International Criminal Court: A Commentary* (4th edn, C.H. Beck 2022) 155, [15].

²⁰⁵ Several armed group members have been convicted of crimes against humanity by the SCSL and the ICC, and charges of crimes against humanity have been confirmed in a large number of situations by the ICC Pre-Trial Chambers and are currently being tried in Court. See e.g. the *RUF case* (n 34) and *Ntaganda* (Trial Judgment) ICC-01/04-02/06 (8 July 2019).

²⁰⁶ Art 7(2)(a) ICC Statute. It remains controversial, however, whether the ‘policy requirement’ forms part of customary law. See Ambos (n 204204) 242, [204]. See also **Chapter 5**, section 5.3.

²⁰⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 179) [168]

entity may incur a similar form of responsibility apart from the individual criminal responsibility of its members.²⁰⁸

In conclusion, the position that armed groups are not bound by human rights law at all seems increasingly untenable today. The question is rather how far these obligations extend. Based on the observations above, it is arguable that all armed groups incur a certain minimum of human rights obligations, which could include, for example, the prohibition against torture and inhumane treatment, arbitrary killing or sexual violence. Groups that control territory and exercise quasi-governmental functions may incur additional obligations, although their exact scope remains difficult to determine. Most importantly for this thesis, a survey of relevant UNSC and UNHRC resolutions shows that there is little to no practice or *opinio juris* involving the extension of the right to a fair trial to armed groups.²⁰⁹ This is not surprising. As **Chapters 3 and 4** will explain, the right to a fair trial under human rights law entails positive obligations (obligations to *fulfil*), and applying them to armed groups would imply the legitimization of acts that are essentially a challenge to the judicial monopoly of the State.²¹⁰ Similar considerations apply to other positive IHRL obligations. Most UN resolutions referred to above thus request the armed group in question to abstain from conduct and to ‘respect’ human rights (obligations to *respect*).²¹¹ While some commentators argue for the imposition of a more extensive set of human rights obligations upon armed groups, including positive obligations, State practice and

²⁰⁸ ILC, Report of the International Law Commission on the work of the seventy-first session (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 108 [21].

²⁰⁹ None of the UNHRC and UNSC resolutions surveyed in the Geneva Academy and Harvard School Studies, respectively, mentioned the right to a fair trial or associated judicial guarantees. See (n 192) and (n 193).

²¹⁰ See also Tilman Rodenhäuser, ‘The legal protection of persons living under the control of non-State armed groups’ (2021) 102 IRRC 1, 28-29.

²¹¹ *ibid*, 27.

opinio juris are virtually non-existent in this regard.²¹² It is for this reason that the idea of IHRL obligations (including obligations to *fulfil*) increasing with the control of territory is normatively appealing but, for the time being, lacks a solid basis in positive law, at least when it is assumed that such basis must be found in customary law.²¹³

Given this significant uncertainty in relation to the scope of IHRL norms applicable to armed groups and the aim of this thesis to stay within the scope of what arguably constitutes the *lex lata*, the subsequent Chapters will take a cautious approach to the application IHRL norms. They will only consider the most basic human rights obligations, such as the prohibition of torture and cruel or inhumane treatment, whose application to armed groups can arguably draw on a minimum amount of State practice and *opinio iuris* as reflected in the resolutions mentioned above, and whose widespread and systematic violation may amount to crimes against humanity. For the purpose of this thesis, these obligations may be relied on as a safety net of protection in situations that are not governed by IHL, either because a given situation lacks a nexus to the armed conflict or because the individual to be tried fall outside IHL's personal scope of protection.²¹⁴ However, this conclusion should not be taken as a normative endorsement of the current state of the law. Indeed, **Chapters 3** and **4** will set out arguments why it would be preferable to extend the scope of IHRL rules applicable to armed groups, in particular with regard to acts of rebel governance in protracted armed conflicts in which armed groups have developed State-like administrative structures.

²¹² See Rodenhäuser (n 157) 147-48; Fortin (n 78) 164; UNHRC, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on armed non-State actors: the protection of the right to life (5 June 2018) UN Doc A/HRC/38/44 [78].

²¹³ Nevertheless, it is the position of the OHCHR that 'under certain circumstances non-State actors can also be bound by international human rights law and can assume, voluntarily or not, obligations to respect, protect *and fulfil* human rights'. See OHCHR, 'International Legal Protection of Human Rights in Armed Conflict', 2011, 21.

²¹⁴ See **Chapter 3**, section 3.1.

2.2.3. *The Relevance of International Criminal Law*

Another regime that is relevant to the passing of penal sanctions by armed groups is ICL, which operates differently than IHL or IHRL. It imposes criminal responsibility for the violation of an international legal obligation onto individuals.²¹⁵ These obligations are conceptually distinct from obligations binding the State or the armed group as the organ on behalf of which the individual may act.²¹⁶ If such an obligation arises directly out of international law, be it custom or treaty²¹⁷, it is usually referred to as an ‘international crime’:

A crime under international law is a crime defined by international law which gives rise to the individual criminal responsibility of the perpetrator under international law itself. It amounts to an obligation, negative or positive, imposed directly on individuals by international law, the breach of which results under international law in the liability of the perpetrator to punishment.²¹⁸

Although it remains distinct, ICL is inherently linked to the two regimes of IHL and IHRL. It is commonly accepted that crimes under customary international law comprise, as a minimum, war crimes, crimes against humanity, genocide, and aggression.²¹⁹ War crimes are defined as serious violations of IHL that give rise to the individual criminal responsibility of the perpetrator.²²⁰ Under customary international law, they encompass ‘violations of the laws and customs of war’ and the customary

²¹⁵ Roger O’Keefe, *International Criminal Law* (OUP 2015) 79.

²¹⁶ *ibid.*

²¹⁷ *ibid* 76-77.

²¹⁸ *ibid.*

²¹⁹ Sometimes also referred to as ‘core crimes’ although this term has been criticized as ‘juridically misconceived’, see O’Keefe (n 215) 162.

²²⁰ *ibid* 123.

law equivalents of certain violations of the 1949 Geneva Conventions and their Additional Protocols.²²¹

Crimes against humanity, on the other hand, are defined as certain acts ‘committed as part of a widespread or systematic attack directed against any civilian population’.²²² This form of international crime can also be committed in peace times and does not require a nexus to an armed conflict.²²³ As already explained in section 2.2.2., crimes against humanity impose individual criminal responsibility for severe human rights violations:

The rationale of this ‘internationalisation’ of certain crimes is the protection of fundamental human rights and underlying human dignity against serious systematic and widespread human rights violations caused, supported, or tolerated by state or certain non-state organisations.²²⁴

The connection between these three bodies of law is, therefore, inherent. ICL constitutes an enforcement mechanism for certain IHL (and potentially IHRL) obligations incumbent on armed groups via the individual criminal responsibility of their members.²²⁵ The extension of such criminal responsibility over serious violations of CA 3 and other fundamental rules in NIACs, the increasing acceptance of universal jurisdiction over international crimes, as well as the proliferation of international criminal courts and tribunals²²⁶ has made this route for enforcement appear more

²²¹ ibid 124.

²²² Rome Statute art 7(1).

²²³ O’Keefe (n 215) 143. See also **Chapter 5**.

²²⁴ Ambos (n 204) 165 [14].

²²⁵ Marco Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law’ (2010) 1 *International Humanitarian Legal Studies* 5, 8-9; Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (CUP 2002) 87-223.

²²⁶ See *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [45]; Wolfgang Kaleck and Patrick Kroker: ‘Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?’ (2018) 16 *JICJ* 165.

promising than the rather incomplete legal framework for directly invoking the international responsibility of the group under international law.²²⁷ Although the idea of imposing criminal responsibility upon legal persons (including armed groups) was initially discussed during the drafting of the Rome Statute, it was ultimately rejected.²²⁸ As **Chapter 5** will explain in more detail in relation to judicial proceedings in armed conflict, States have thus attached individual criminal responsibility to the passing of sentences without respect for fair trial guarantees, even though such guarantees must first and foremost be realized through the armed group as a collective.²²⁹

However, holding armed groups accountable via criminal proceedings against their individual members also has certain shortcomings. First of all, only a specific set of violations is punished, namely those that amount to international crimes by carrying individual criminal responsibility under customary international law.²³⁰ In this regard, **Chapter 5** will explain why not every breach of fair trial obligations under IHL will also entail the individual criminal responsibility of those involved. Second, evidentiary standards in (international) criminal proceedings are very high and go beyond what is needed to invoke the responsibility of the armed group as a collective after a violation has occurred.²³¹ Finally, criminal tribunals are only competent to order reparations for

²²⁷ Annyssa Bellal, 'What Are 'Armed Non-State Actors'?': A Legal and Semantic Approach' in Heffes, Kotlik and Ventura (n 164) 39. In recent years, however, more and more attention has been given to the direct enforcement of international rules against armed groups. See e.g. Laura I. Alvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2020).

²²⁸ Kai Ambos, 'Article 25' in Ambos (n 204) 1198 [4].

²²⁹ See art 8(2)(c)(iv) ICCSt and, more generally, **Chapter 5**.

²³⁰ Ezequiel Heffes and Brian E. Frenkel, 'The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules' (2017) 8 GoJIL 39, 56.

²³¹ Sassòli (n 225) 10.

victims that match the individual perpetrator's contribution to the injustice caused, but not for the full spectrum of collective violations committed by the armed group.²³²

2.2.4. The Role of Armed Group Practice in the Formation of Customary Law

The previous sections have identified certain legal frameworks that apply to armed groups and explained the legal theory behind their binding force. It has also been noted that it is primarily States that shape the individual norms contained in these frameworks through the adoption of treaties and the creation of customary law through practice and *opinio juris*. In this regard, it is important to mention that throughout this thesis reference will be made to a wide range of armed group practice in relation to penal proceedings, the operation of courts, and other related matters. The subsequent Chapters will also mention that armed groups regularly issue codes of conduct, pass 'laws' or vow to adhere to international standards by ad-hoc agreements or unilateral declarations. It is, therefore, necessary to clarify the legal value these actions might or might not have in relation to the formation and identification of customary international law.

It is often suggested that the development of IHL applicable to NIAC should involve all stakeholders, including armed groups.²³³ Indeed, the inclusion of armed groups in the law-making process could increase their compliance with IHL and

²³² Katharine Fortin, 'Armed Groups and Procedural Accountability' (2016) 19 *YintIHL* 157, 159. However, Fortin also recognizes that the ICC has confirmed that collective reparations are possible, even though the convicted person's liability must be proportionate to the harm caused. This was recently confirmed by the ICC Appeals Chamber, see *Lubanga* (Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable) ICC-01/04-01/06 (18 July 2019).

²³³ Sophie Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 *IRRC* 649, 652.

strengthen self-enforcement mechanisms, one of which might be the use of penal proceedings to sanction violations.²³⁴ The ICTY, for example, took into account the practice of several armed groups, namely the CPLA, FMLN, and the Royalists in Yemen in determining that a number of customary rules applied in NIACs.²³⁵ Furthermore, eleven national liberation movements participated in the negotiations of the 1977 Additional Protocols and were allowed to speak and introduce proposals.²³⁶ A few other bodies, such as the International Commission of Inquiry on Darfur, also considered armed group practice as relevant for the formation of customary law.²³⁷ Nevertheless, the ICRC's customary IHL study, although listing armed group practice, has concluded that its legal significance remains unclear.²³⁸ Indeed, apart from the few examples mentioned above, there is little authority that would suggest a departure from the acceptance of States and international organisations as the exclusive creators of custom.²³⁹

The reason behind this reluctance to include armed groups in the law-making process is not only the fear of unwanted legitimisation but also the concern that their practice might result in the downgrading of humanitarian norms.²⁴⁰ **Chapter 4** will

²³⁴ *ibid* 654.

²³⁵ *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [102]-[103], [107].

²³⁶ Yet, they were not granted actual voting rights. Of these groups, the PLO, also enjoyed observer status at the UN. See Sandesh Sivakumaran, 'Making and Shaping the Law of Armed Conflict' (2018) 71 CLP 119, 145; Michael Bothe, Karl-Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts* (2nd ed, Brill 2013) 8.

²³⁷ See International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General', 25 January 2005, [156], noting that rules relating to internal armed conflicts have evolved 'as a result of State practice and jurisprudence from international, regional and national courts, as well as pronouncements by States, international organizations and armed groups'.

²³⁸ ICRC Customary IHL Study, vol. I, xlii.

²³⁹ Zhuo Liang, 'The Practice of Non-state Armed Groups and the Formation of Customary International Humanitarian Law' in Panos Merkouris, Jörg Kammerhofer and Nora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (CUP 2022) 300.

²⁴⁰ Rondeau (n 233) 658.

consider this problem when discussing the downgrading of fair trial protections in light of the concept of belligerent equality.²⁴¹ However, some commentators, for example Roberts and Sivakumaran, have argued that it is possible to move away from the traditional statist approach to international legal sources, which denies armed groups any role in law creation, without moving to the extreme position of giving such groups complete control over their obligations or equal their law-making powers with that of States.²⁴² They suggest that armed groups could contribute to the process of developing customary law, without being able to control its outcome.²⁴³ Whether the practice of armed groups would result in any change of customary law, under this argument, would depend not just on its generality and consistency, but also on the actions and reactions of States.²⁴⁴ In addition, armed group practice must not necessarily be given equal weight to that of States. These suggestions seem to alleviate potential concerns about the dilution of protection obligations through armed group practice.

However, the ILC has decided to adopt a more cautious and restrictive approach. According to its Draft Conclusions on the Identification of Customary Law, the practice of armed groups is neither creative nor expressive of customary law, and is relevant only to the extent that States have endorsed or reacted to such practice.²⁴⁵ The following sections will, in accordance with the ILC's conclusion, mainly rely on State reactions to armed group conduct. However, some sections will also mention relevant armed group practice, especially when expressed through codes of conduct or

²⁴¹ See **Chapter 4**, section 4.4.

²⁴² Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 *YaleJIntL* 107, 152.

²⁴³ *ibid* 151.

²⁴⁴ *ibid*.

²⁴⁵ ILC, Draft conclusions on identification of customary international law with commentaries, Report of the ILC, Seventieth session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 132.

unilateral commitments in cases where they lend additional support to pre-existing State practice. In other instances, armed group practice is cited simply as an example of how a particular obligation has been implemented, without necessarily implying that such practice has independent legal value in relation to the creation of customary law.

2.3. Defining Armed Groups – Who is bound by IHL and IHRL?

The previous sections have explained how two specific legal regimes, IHL and IHRL, are applicable to the collective entities referred to as ‘armed groups’. However, unlike other international actors, there is no uniform definition of armed groups that applies throughout the whole body of international law.²⁴⁶ Some commentators have proposed working definitions, but many of these definitions entail shortcomings if used outside the specific context they have been introduced for.²⁴⁷

2.3.1. Armed Groups under IHL: Military and Political Wings

Within IHL, the definition of an armed group is interlinked with the definition of a non-State party to a NIAC. However, the terms ‘armed group’ and ‘non-State party to the conflict’ cannot simply be equated. Admittedly, the wording of Article 1(1) AP II, which refers to armed conflicts taking place between the ‘armed forces’ of a High Contracting Party and ‘dissident armed forces or other organized armed groups’, suggests that the (organized) armed group constitutes the non-State party to the conflict. However, as pointed out by Melzer, the provision fails to properly distinguish between the Parties to the conflict and the armed forces conducting the hostilities on

²⁴⁶ See e.g. Bellal (n 227) 23.

²⁴⁷ Bellal, Giacca and Casey-Maslen, for example, define non-State armed actors as ‘any *armed* group, distinct from and not operating under the control of, the state or states in which it carries out military operations, and which has political, religious, and/or military objectives’. See Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, ‘International law and armed non-state actors in Afghanistan’ (2011) 93 IRRC 47, 48 fn 4.

their behalf.²⁴⁸ It is the ‘High Contracting Party’ that constitutes the State party to a conflict. It comprises the State in its entirety and not just its armed forces.²⁴⁹ Indeed, it is ‘the State as a broader entity that assumes [IHL] legal obligations for itself’.²⁵⁰ By analogy, dissident armed forces or armed groups conduct the hostilities on behalf of their respective non-State party.²⁵¹ The better view, therefore, is that the term ‘(organized) armed group’ refers exclusively to the armed or military wing of a non-State party to a NIAC.²⁵²

Just as a State is more than its armed forces, the notion of a non-State party to the conflict is broader in the sense that it may also include supportive segments of the civilian population, often referred to as the ‘political’, ‘civilian’ or ‘administrative’ wing of the armed group.²⁵³ Hamas, for example, is a non-State party to the conflict with Israel, while only its armed wing, the Izz ad-Din al-Qassam Brigades, constitutes the armed group for the purpose of IHL. Similarly, the People’s Protection Units (YPG) are carrying out hostilities on behalf of a non-State party to the conflict in Syria, namely the Autonomous Administration of North and East Syria (AANES or Rojava).²⁵⁴

²⁴⁸ Nils Melzer, ‘The Principle of Distinction Between Civilians and Combatants’ in Clapham and Gaeta (n 5) 310-311.

²⁴⁹ *ibid.* See also Katharine Fortin, ‘Civilian wings of armed groups: included within the concept of ‘non State party’ under IHL?’ (*Armed Groups and International Law Blog*, 13 October 2020) available at <<https://www.armedgroups-internationalallaw.org/2020/10/13/civilian-wings-of-armed-groups-included-within-the-concept-of-non-state-party-under-ihl/>> accessed 20 December 2022.

²⁵⁰ Katharine Fortin, ‘Exploring the civilian and political institutions of armed groups under IHL in an age of rebel governance’ (forthcoming 2023, on file with the author).

²⁵¹ See ICRC 2020 GC III Commentary [568].

²⁵² ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) 32. See also ICRC Customary IHL Study, Rule 4.

²⁵³ *ibid.*

²⁵⁴ Bellal (n 227) 26-27.

Hamas's Governing Structure

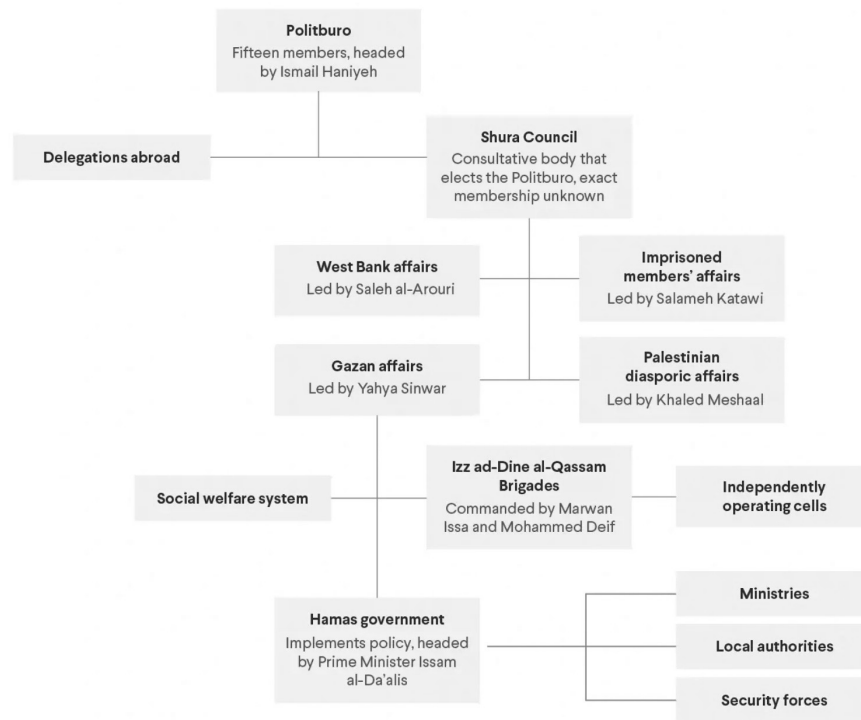


Illustration 1: The governing structure of Hamas, showing the Izz ad-Dine al-Qassam alongside various political and administrative bodies.²⁵⁵

This distinction is important, for example, in relation to the rules on targeting. Only members of the armed group properly so-called may be lawfully targeted whereas individuals belonging to an associated civilian, political or administrative wing enjoy protection from direct attack unless they directly participate in hostilities.²⁵⁶

Nevertheless, individuals belonging to these extended entities must equally comply with IHL. Indeed, since it is the non-State party to the conflict as a whole that is addressed by IHL, political and administrative branches must be considered bound

²⁵⁵ Zachary Laub and Kali Robinson, ‘What is Hamas?’, Council on Foreign Relations, 17 August 2021, available at <<https://www.cfr.org/backgrounder/what-hamas>> accessed 20 December 2022.

²⁵⁶ ibid, 26-27. See also **Chapter 3**, section 3.1, discussing the membership criteria for armed groups and the concept of a ‘continuous combat function’.

by the same obligations as the armed group properly so-called.²⁵⁷ This is particularly relevant in the case of trials and criminal proceedings, which are frequently conducted by political wings and military wings alike.²⁵⁸ This understanding also finds support in the drafting history of AP II. The ICRC's Delegate specifically noted that the provisions on humane treatment were 'designed to protect all persons who took no direct part or who had ceased to take a part in hostilities against abuse of power and inhuman and cruel treatment by the *military or civilian authorities* of the Party to the conflict in whose power they might be'.²⁵⁹ In conclusion, even though this thesis will normally refer only to 'armed groups', findings and conclusions as to the applicable law in relation to trials and penal proceedings should be understood as applying to the non-State party to a conflict as a whole and, unless stated otherwise, are not restricted to its 'military wing'.

The application of IHL to non-State parties as a whole also has consequences for the legal attribution of conduct to such entities. There exists no clear legal framework governing the attribution of individual conduct to armed groups or the non-State party to a NIAC more broadly.²⁶⁰ Therefore, it is frequently suggested to apply the existing rules governing the attribution of conduct to States by analogy.²⁶¹

²⁵⁷ Fortin (n 249).

²⁵⁸ The ICTY Appeals Chamber has noted, for example, that GC III 'invests all agents of a Detaining Power into whose custody prisoners of war have come with the obligation to protect them by reason of their position as agents of that Detaining Power'. This reasoning could be transposed to penal sanctions or detention imposed by the administrative or political wing of an armed group in NIAC. See *Mrkšić* (Appeals Judgment) IT-95-13/1-A (5 May 2009) [71]-[73]. See also more generally Fortin (n 250).

²⁵⁹ Final Record of the Diplomatic Conference, Federal Political Department, Berne, vol. VIII, CDDH/I/SR.33, 323 [3].

²⁶⁰ Katharine Fortin and Jan Kleffner, 'Responsibility of Organized Armed Groups Controlling Territory: Attributing Conduct to ISIS', in Rogier Bartels et al. (ed), *Military Operations and the Notion of Control Under International Law* (Springer 2021) 308. See also Alvarez (n 227) 207.

²⁶¹ The ICJ, for example, was open to such analogies in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 179) [420]. See also Fortin and Kleffner (n 260) 318.

Customary law, as reflected in Article 4 ARSIWA, prescribes that the conduct of any State organ shall be attributed to that State under international law. Usually, an organ of a State is identified as such by the internal law of that State, an option not always available in the context of informally organised armed groups without a system of ‘laws’ on their own.²⁶² However, Article 4 ARISWA has been interpreted as being broad enough to also encompass *de facto* organs, irrespective of their status under any internal law.²⁶³ If applied by analogy, individuals acting in a political or administrative capacity may qualify as *de-facto* organs of the non-State party to the conflict. As **Chapter 3** will explain in more detail, membership in the armed group properly so-called is usually determined through examining whether an individual holds a continuous combat function in that group.²⁶⁴ However, this conception of membership was developed exclusively for determining who benefits from protection against direct attack in a NIAC, not for the legal attribution of acts to the armed group, let alone the non-State party to a conflict. A similar membership test, albeit without the ‘combat’ element, could be used to determine *de facto* ‘organ’ status in relation to the civilian wing of the armed group.²⁶⁵

Moreover, Article 8 ARSIWA attributes to a State the conduct of individuals directed or controlled by that State, irrespective of any formal or informal position as an organ of that State. If applied by analogy, this would allow the attribution of administrative acts, including the conduct of trials and passing of penal sentences, to the non-State party to the conflict in cases where the individuals in question were under

²⁶² Article 4(2) ARSIWA.

²⁶³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 179) [392].

²⁶⁴ See **Chapter 3**, section 3.1.2.

²⁶⁵ See also Alvarez (n 227) 124, noting that the civilian role of the individual could be a relevant factor in attributing IHL violations to armed groups.

its effective control.²⁶⁶ However, the absence of further authority supporting these suggestions, the lack of a clear framework for attribution remains one of the most significant gaps in establishing and enforcing the collective responsibility of armed groups.²⁶⁷

2.3.2. *Armed Groups Outside of Active Armed Conflicts*

The vast majority of armed groups operate in situations of ongoing armed conflict and these situations will be the focal point of this thesis. After all, organised armed struggle against the State and its allies is the very reason why most armed groups exist. In these cases, even though the lines between military and administrative wings can be blurry, armed groups can be properly identified using the IHL criteria outlined above.

However, it is a well-observed fact that some armed groups, as well as their non-military wings, operate outside the scope of an active armed conflict.²⁶⁸ This leads to the question of whether these groups nevertheless form separate legal entities under international law and how they can be identified as such. As explained above, the application of IHL is dependent on the existence of an armed conflict and – with limited

²⁶⁶ *Case concerning Military and Paramilitary Activities in and against Nicaragua* (n 135) [115]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 179) [392]-[393]. The level of control necessary for attribution is still subject to debate following the ICTY's famous *Tadić* decision. However, it is arguable that the 'overall control' test applied by ICTY was never meant to govern attribution under the law of State responsibility. See *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [131].

²⁶⁷ Fortin and Kleffner (n 260) 317-318. See also Annyssa Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Humanitarian Law: Issues of Attribution' in Naomi Gal-Or et al. (eds) *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill 2015) 285.

²⁶⁸ Examples are Boko Haram in Nigeria or the various groups operating in Libya after the end of the 2011 conflict. See Murray (n 60) 132-33. Another example might be Hezbollah in Lebanon, which continued to exist between and after the various armed conflicts fought against Israel and before the current conflict in Syria where the group supported Syrian government forces.

exceptions – does not regulate the conduct of armed groups in peace time.²⁶⁹ However, if one accepts that international obligations other than IHL apply to such groups (for example IHRL) it is necessary to understand what it means to be an ‘armed’ group in a non-conflict situation as the definition of an armed group cannot simply rely on the organisational and intensity requirements used to establish a NIAC under IHL.²⁷⁰

In the context of humanitarian negotiations, the UN Office for the Coordination of Humanitarian Affairs (OCHA) defines armed groups as entities that have ‘the *potential* to employ arms in the use of force to achieve political, ideological or economic objectives’.²⁷¹ In relation to transitional processes aimed to transform armed groups into political movements, the EU has adopted a similar definition and refers to ‘groups who *retain the potential* to deploy arms for political, economic and ideological objectives’.²⁷² These approaches underline the importance of the capability of armed groups to challenge the monopoly on the use of force normally held by the State even if that capability is not being exercised in a way that would trigger the protracted violence threshold necessary for the existence of a NIAC.

Even outside armed conflict, armed groups can exercise a significant level of control over parts of the civilian population, replicating the vertical power relationship that normally exists between a State and its citizens. In the absence of IHL, the

²⁶⁹ Exceptions are, for example, the obligations related to persons deprived of their liberty for reasons related to the conflict, e.g. 2(2) AP II. See also **Chapter 3**, section 3.1.3. on the temporal scope of IHL protection.

²⁷⁰ See Tom Gal, ‘The International Legal Status of Armed Groups: Can one be Determined Outside the Scope of Armed Conflict?’ (2018) 51 ILR 321, 325.

²⁷¹ Gerard McHugh and Manuel Bessler, ‘Humanitarian Negotiations with Armed Groups: A Manual for Practitioners’, OCHA, January 2006, available at <<https://www.unocha.org/sites/unocha/files/HumanitarianNegotiationswArmedGroupsManual.pdf>> accessed 20 December 2022, 6.

²⁷² European External Action Service, ‘Mediation and Dialogue in transitional processes from non-state armed groups to political movements/political parties’, November 2012, available at <<https://ecdpm.org/wp-content/uploads/2013/11/2011-Transitional-Processes-Non-state-Armed-Groups-Political.pdf>> accessed 20 December 2022 (emphasis added).

normative argument for the direct application IHRL to armed groups therefore becomes even stronger as the civilian population concerned would otherwise suffer from a considerable protection gap.²⁷³ Indeed, unlike IHL, human rights law applies at all times and if one accepts that it binds armed groups in times of armed conflict there is no legal reason why it should not also do so in peace time.²⁷⁴

These conclusions notwithstanding, it is important to note that there is considerable debate about the precise criteria necessary for a NIAC to end and the point at which IHL rules no longer apply. IHL treaty law does not provide any guidance on when a NIAC has formally come to a conclusion. Nevertheless, two main theories have emerged in practice, namely the ‘peaceful settlement’ approach and the ‘lasting pacification’ approach.

The ‘peaceful settlement’ approach is based on the ICTY Appeals Chamber’s notion in the *Tadić* case that ‘international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved’.²⁷⁵ While this approach was later endorsed by the ICC²⁷⁶, the precise definition of a ‘peaceful settlement’ remains unclear.²⁷⁷ In particular, it is uncertain whether a ‘peaceful settlement’ can be achieved through the absence of sufficiently intense hostilities alone or to what extent some sort of formalized agreement is required.²⁷⁸

²⁷³ See Henckaerts and Wiesener (n 164) 204.

²⁷⁴ Fortin (n 78) 157-58.

²⁷⁵ *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [70].

²⁷⁶ *Bemba*, Trial Judgment (n 52) [141].

²⁷⁷ Nathan Derjeko, ‘A Forever War? Rethinking the Temporal Scope of Non-International Armed Conflict’ (2020) 26 JC&SL 347, 353.

²⁷⁸ *ibid* 353-354.

In response to these concerns, the ICRC has advanced its own theory for determining the end of a NIAC, which requires that a ‘factual and lasting pacification of the NIAC has been achieved’.²⁷⁹ According to the ICRC, this lasting pacification requires the complete cessation of all hostilities, not only temporarily but without a real risk of resumption.²⁸⁰

Yet others have proposed a more functional approach to the temporal scope of armed conflicts, suggesting that certain rules such as those relating to the conduct of hostilities may cease to apply earlier than those protecting individuals that are in the hands of an adverse Party to the conflict.²⁸¹ As **Chapter 3** will explain in more detail, the rules on judicial guarantees might fall into this latter category.

2.3.3. Descriptive Typologies of Armed Groups

Finally, it has to be mentioned that, with the exception of the heightened organisational threshold requirement of Article 1(1) AP II, international law does not generally differentiate between different types of armed groups, even though their composition and level of military and administrative capacities vary considerably. **Chapter 4**, in particular, will demonstrate the consequences of this ‘one-size fits all’ approach in relation to the judicial guarantees required from such groups. In order to better accommodate the plurality of armed groups, commentators have therefore tried to introduce certain descriptive (as opposed to legal) typologies. Heffes, for example, distinguishes between ‘non-State authorities’ exercising *de facto* authority and control

²⁷⁹ ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, Report of the 32nd International Conference of the Red Cross and Red Crescent, (8–10 December 2015) 10.

²⁸⁰ *ibid.*

²⁸¹ Derjeko (n 277) 357-376.

over territory and population in a State-like manner; ‘armed opposition groups’ with control over parts of a State’s territory, often with the aim of replacing the existing government; and ‘militias’, which frequently develop in areas of limited Statehood but which do not necessarily control territories themselves.²⁸² These typologies can sometimes be helpful to distinguish between the various practical realities that armed groups operate in. However, even though certain elements used for these typologies do influence the scope of applicable international legal norms (e.g. the control of territory, responsible command etc.) they do not, in and of themselves, constitute legal categories that are attached to a particular set of obligations. This thesis thus aims to avoid such typologies and will consistently refer to ‘armed groups’, while, where necessary, adding qualifiers such as ‘...that hold territory’, or ‘...that are under responsible command’.

2.4. Conclusions

This Chapter has demonstrated that States have long ceased to be the exclusive subjects of international law and that non-State actors may enjoy limited international legal personality. This legal personality, however, is best understood as a descriptive (*a posteriori*) term to describe entities that have been endowed with rights and obligations created by States under international law. The binding force of these legal obligations is most coherently explained through the extended prescriptive jurisdiction theory and customary law, both of which rely on the ability of international law to directly impose obligations on individual and collective entities, irrespective of any interplay by domestic law. The two theories operate in parallel to each other and together provide a

²⁸² Ezequiel Heffes, *Detention by Non-State Armed Groups under International Law* (CUP 2022) 63-67.

convincing explanation for why armed groups are bound by a significant number of IHL provisions.

In addition, the traditional view that IHRL obligations are confined to States has proven untenable. Specific instances of State practice and *opinio juris*, especially those expressed in the UNSC and UNHRC, provide increasing evidence that certain IHRL obligations may apply to armed groups via customary law. This development has been further supported by the case law of UN treaty bodies and the works of UN special mandate holders. However, despite convincing normative arguments to the contrary, customary IHRL obligations of armed groups remain minimal for the time being. This is unsurprising given the fact that these obligations continue to be created and shaped by States, with little evidence that armed group practice is accepted as a source of (customary) international law in relation to IHL, let alone IHRL. In particular, States seem reluctant to endorse obligations that could be interpreted as legitimising acts of rebel governance.

Finally, the Chapter has also aimed at taking a closer look at what constitutes an entity referred to as an ‘armed group’ under IHL, as well as beyond. It was explained that armed groups properly so-called constitute the armed faction of a non-State party to a NIAC on behalf of whom they conduct hostilities. However, it was also pointed out that civilian wings of such non-State parties are nevertheless bound by IHL and can play an important role in the operation of courts and passing of penal sentences.

3. The Legal Capacity of Armed Groups to Establish Courts and Conduct Penal Proceedings

This Chapter analyses if and to what extent armed groups possess the legal capacity to establish courts, conduct penal proceedings and pass sentences during a NIAC. In particular, it will assess whether any of the legal regimes mentioned in **Chapter 2**, in particular IHL, contain norms that prohibit the operation of courts and passing of penal sentences by armed groups *per se*, most notably the requirement of a ‘regularly constituted court’ found in CA 3. Together with **Chapter 4**, this Chapter thus also aims to answer the question of whether international law protects the monopoly of the State in dispensing criminal justice during armed conflict either by directly outlawing armed group courts or by imposing requirements that are impossible to meet for any actor other than a State. The Chapter will demonstrate that although subject to strict requirements, international law does not categorically prohibit armed groups from conducting penal proceedings, and, consequently, that these groups enjoy a certain ‘legal capacity’ to engage in such activities.

Section 1 of this Chapter begins by identifying IHL rules that govern penal proceedings during armed conflict, as well as the types of trials that are covered by their protective scope. In particular, it will argue that fair trial guarantees under IHL apply to trials over civilians, enemy fighters and arguably the groups’ own members alike, provided that the proceedings in question contains a link (nexus) to the armed conflict.

Section 2 will then focus on the interpretation of one particular requirement, namely the concept of a ‘regularly constituted court’ under CA 3, and its application to

armed groups. It will demonstrate that the requirement of a ‘regularly constituted court’, from the perspective of both positive law and normative considerations, is best understood as incorporating the ‘established by law’ standard commonly found in IHRL. The section will also explain that neither AP II nor customary law have altered the application of this requirement. It will make the case that this criterion should not be interpreted in an overly formalistic manner, and that compliance by armed groups can be assessed in light of the group’s own ‘legislation’.

Finally, section three will demonstrate how the conclusion that the requirement of ‘regular constitution’ does not preclude the passing of penal sentences by armed groups translates into a limited legal capacity in the form of a ‘weak permission’, meaning that its legality is based on the mere absence of a prohibitive rule. It will also explain that this limited capacity does not entail any form of ‘combatant immunity’ from prosecution under domestic law for individuals involved in the operation of armed group judicial institutions.

3.1. Fair Trial Rights and the Scope of Protection under IHL

The protection of fair trial rights during armed conflict can be traced back to the late 19th century. The 1863 Lieber Code noted that no individual belonging to a hostile army ‘may be slain without trial by any captor’ and also stipulated that no death sentence shall be carried out without ‘approval of the chief executive’.²⁸³ A few years later, the 1880 Oxford Manual on the Laws of War on Land required that offenders against the laws of war should be punished only ‘after a judicial hearing’ and that no person charged with espionage can be punished ‘until the judicial authority shall have

²⁸³ Instructions for the Government of Armies of the United States in the Field, 24 April 1863 (Lieber Code), arts 13 and 148.

pronounced judgment’.²⁸⁴ The latter provision was also included in the 1907 Hague Convention on the Laws and Customs of War on Land, which prescribed that a spy taken in the act shall not be punished without previous trial.²⁸⁵ The first comprehensive regulation of judicial guarantees was introduced through the 1929 Geneva Convention on Prisoners of War,²⁸⁶ which included detailed provisions on judicial proceedings over POWs, including their right to defend themselves²⁸⁷, the right not to be compelled to admit guilt²⁸⁸, the right to have access to a competent counsel and interpreter²⁸⁹ and the right to appeal a sentence in the same manner as is available to members of the detaining Power²⁹⁰.

After the Second World War, fair trial guarantees were given closer attention and substantial provisions were enshrined in the 1949 Geneva Conventions, in particular in relation to POWs and civilians in occupied territory.²⁹¹ Most importantly, however, CA 3 introduced fair trial standards for NIACs by prohibiting the ‘passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable’. Ultimately, the regime of fair trial rights was further developed by the adoption of the two Additional Protocols in 1977, in particular through Article 75(4) AP I and Article 6 AP II. It is these three provisions, CA 3, Article 75(4) AP I and

²⁸⁴ The Oxford Manual on the Laws of War on Land, 9 September 1880, arts 25 and 84.

²⁸⁵ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 12 August 1949, entered into force 26 January 1910) 187 CTS 227, art 30.

²⁸⁶ Geneva Convention of 27 July 1929 Relative to the Treatment of Prisoners of War (entered into force 19 June 1931) 118 LNTS 343.

²⁸⁷ *ibid.*, art 61.

²⁸⁸ *ibid.*

²⁸⁹ *ibid.*, art 62.

²⁹⁰ *ibid.*, art 64.

²⁹¹ See arts 82-102 GC III and arts 64-75 GC IV.

Article 6 AP II, as well as their customary law equivalents, that will be analysed in detail in this Chapter and throughout this thesis. However, before discussing their substantive content it is necessary to clarify their personal and material scope of application to trials and penal sentences administered by armed groups.

3.1.1. The Personal Scope of Protection

As outlined in **Chapter 1**, there are three different groups of individuals that might be subjected to criminal proceedings and penal sanctions by armed groups: captured enemy fighters, civilians and members of the armed group itself. Whereas it is uncontroversial that the protective scope of IHL extends to the two former categories, it remains disputed if and to what extent IHL also applies to abuses committed by armed groups against their own members. If IHL does not apply to these acts, members of the armed group would not benefit from the judicial guarantees incorporated therein, and could potentially be left without any protection at all. Clarifying the personal scope of protection is, therefore, an important preliminary question not only for the purpose of this Chapter, but also in relation to the capacity of armed groups to enforce military discipline and the duty to punish subordinates under the doctrine of command responsibility, both of which will be discussed in **Chapter 6**.

In the *RUF* case, the Trial Chamber of the Special Court for Sierra Leone (SCSL) famously noted that ‘the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces’.²⁹² Indeed, the traditional perception of IHL is that of a body of law that is applicable only to the relationship between enemy parties to an armed conflict, or between a party and

²⁹²

RUF case (n 34) [1451].

the civilian population.²⁹³ Intra-party violence – that is, violence or abuse of an individual by the same party – was meant to be dealt with purely through domestic criminal law and human rights law.²⁹⁴ Members of armed forces or armed groups were presumed to benefit from the protection of the party to which they belonged and to only require the protection of the law of armed conflict once they fell into the hands of the adversary.²⁹⁵ This view was also held by prominent scholars such as Cassese, who emphasised in the context of ICL that crimes committed by combatants of one party to the conflict against members of their own armed forces cannot constitute war crimes.

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However, this understanding of the scope and rationale of IHL merits a more nuanced analysis. Whereas it is true that IHL is usually only concerned with the protection of civilians and combatants *hors de combat*, as well as with certain limitations to the conduct of hostilities against the enemy, this is not to say that IHL is completely devoid of norms addressing intra-party conduct. Indeed, a long-standing core provision of IHL, namely the obligation that ‘the wounded and sick shall be respected and protected in all circumstances’, enshrined in Articles 13 GC I and GC II, as well as customary law²⁹⁷, applies to all members of armed forces at all times.²⁹⁸ As noted by Pictet, the provision requires that the wounded are to be ‘respected *just as*

²⁹³ Marco Longobardo, ‘The Criminalisation of Intra-party Offences in Light of Some Recent ICC Decisions on Children in Armed Conflict’ (2019) 19 ICLR 600, 607-608.

²⁹⁴ *RUF case* (n 34) [1453].

²⁹⁵ Cónan Kenny and Yvonne McDermott, ‘The Expanding Protection of Members of a Party’s Own Armed Forces Under International Criminal Law’ (2019) 68 ICLQ 943, 965.

²⁹⁶ Antonio Cassese and Paola Gaeta, *Cassese’s International Criminal Law* (3rd edn., OUP 2013) 67.

²⁹⁷ ICRC Customary IHL Study, Rule 109.

²⁹⁸ Tilman Rodenhäuser, ‘Squaring the Circle?: Prosecuting Sexual Violence against Child Soldiers by their “Own Forces”’ (2016) 14 JICJ 171, 188. See also art 12 GC I and art 13 GC II.

much when they are with their own army or in no man's land as when they have fallen into the hands of the enemy'.²⁹⁹ This universal scope was later made explicit in Article 10 AP I: '[a]ll the wounded, sick and shipwrecked, *to whichever Party they belong*, shall be respected and protected'. Similarly, the fundamental guarantees provision of Article 75 AP I affords protection to all 'persons who are in the power of a Party to the conflict' and who do not benefit from more favourable treatment under other provisions of the Convention or the Protocol.³⁰⁰ The 1987 ICRC commentary on Article 75 AP I suggests that the term 'in the power of a Party to the conflict' does not necessarily involve the 'connotation of opposition, dependence or compulsion', thereby implying that the protection of Article 75 could arguably also apply to a Party abusing its own combatants.³⁰¹

In relation to rules applicable in a NIAC, the ICRC's updated commentaries on CA 3 explicitly specify that 'the fact that the trial is undertaken or the abuse committed by their own Party *should not* be a ground to deny such persons the protection of common Article 3'.³⁰² The fact that CA 3 is now firmly recognised as a 'minimum

²⁹⁹ Pictet (n 116) 135 (emphasis added). Indeed, it was the fact that wounded soldiers on both sides were left to die on the battlefield after the battle of Solferino that inspired Henry Dunant to establish the ICRC and led to the 1864 Geneva Convention. See also Sivakumaran (n 14) 248.

³⁰⁰ See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) (ICRC 1987 AP I/II Commentary) [2913] and [2926]. Both the ICRC and some delegations understood this phrase to include the protection of individuals vis-à-vis their own State of nationality. The Finnish Government made the following, uncontested declaration when ratifying the Protocol: 'With reference to [Article 75] of the Protocol, the Finnish Government declare their understanding that under Article 72, the field of application of Article 75 shall be interpreted to include also the nationals of the Contracting Party applying the provisions of that Article, as well as the nationals of neutral or other States not Parties to the conflict [...]'.
³⁰¹ The Commentary notes that 'the expression covers not only persons who have fallen into the hands of a Party to the conflict, but also those over whom it exercises, or would be able to exercise, authority, for the sole reason that they live in territory under its control. See ICRC 1987 AP I Commentary [2912].
³⁰² ICRC 2020 GC III Commentary [581] (emphasis added). However, due to the lack of authorities corroborating this claim, this passage has been criticised as a mere policy recommendation; see Michael A. Newton, 'Contorting Common Article 3' (2017) 45 GaIntl & ComplL 513.

yardstick’ of protection that reflects ‘elementary considerations of humanity’, so the argument, makes it difficult to deny its protection to an individual simply because he or she is facing conflict-related violence or abuse by their own party.³⁰³ Acknowledging this position, the ICC Appeals Chamber has recently confirmed that ‘international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group’.³⁰⁴ Commentators have also argued that the non-discrimination clauses found in both CA 3 and Article 2 AP II provide further support against the exclusion of members of armed groups from protection against abuse by their own forces.³⁰⁵

While these examples demonstrate that IHL is not categorically precluded from addressing intra-party violence or abuse, the application of many IHL norms nevertheless remains dependent on certain status requirements that explicitly exclude individuals in the hands of their own party. The definition of POWs in GC III, for example, requires that combatants must have fallen ‘into the hands of the *enemy*’.³⁰⁶ In NIACs, however, protection is granted to persons defined negatively as those who do not or no longer take a direct part in hostilities. No other criterion restricts or extends the protection under the law of NIAC than the question of whether someone does not directly participate or no longer participates in hostilities. CA 3, for example, protects ‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds,

³⁰³ *Case concerning Military and Paramilitary Activities in and against Nicaragua* (n 135) [218].

³⁰⁴ *Ntaganda* (Judgment on the appeal of Mr Ntaganda against the ‘Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9) ICC-01/04-02/06 (15 June 2017) [63].

³⁰⁵ Jan K. Kleffner, ‘Friend or Foe? On the Protective Reach of the Law of Armed Conflict’, in Mariëlle Matthee, Birgit Toebes, and Marcel Brus (eds), *Armed Conflict and International Law, in Search of the Human Face—Liber Amicorum in Memory of Avril McDonald* (Asser Press 2013) 296.

³⁰⁶ Art 4 GC III (emphasis added).

detention, or any other cause'. Similarly, Article 4 AP II protects '[a]ll persons who do not take a direct part or who have ceased to take part in hostilities'.³⁰⁷ Neither provision, therefore, contains an explicit limitation that would suggest its protection extends only to those in the hands of an adversary.³⁰⁸ The ICC Appeals Chamber thus emphasized that:

[...] Common Article 3 provides for unqualified protection against inhumane treatment irrespective of a person's affiliation, requiring only that the persons were taking no active part in hostilities at the material time.³⁰⁹

In order to grant members of an armed group protection under CA 3 in relation to trials and penal sanctions by their own party it thus needs to be shown that they qualify as 'not taking an active part in hostilities' at the relevant time.³¹⁰ Members of an armed force or armed group are usually considered to no longer be taking an active part in hostilities if they are *hors de combat*. However, the definition of a person as *hors de combat* is restricted to the following groups of individuals: (a) anyone who is in the power of an *adverse* party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender.³¹¹

Therefore, to explain the application of CA 3 to intra-party abuse while maintaining the definition of *hors de combat*, it has been suggested that a fighter whose

³⁰⁷ The scope of application defined in art 4 AP II ('Fundamental Guarantees') applies to Part II of the Protocol as a whole, including the provision on judicial guarantees enshrined in art 6. See 1987 ICRC AP II Commentary [4520].

³⁰⁸ Kenny and McDermott (n 295) 963. However, it has been argued that the drafting history of CA 3 points against extending its protection to intra-party violence, see Newton (n 302) 523.

³⁰⁹ *Ntaganda*, Appeals Decision on Jurisdiction (n 304) [60]-[61].

³¹⁰ See also the Elements of Crimes for Article 8(2)(c)(iv) of the ICC Statute, noting that sentences in the sense of Article 8(2)(c)(iv), which is based on the relevant provision of CA 3, must be pronounced against either civilians or persons *hors de combat*.

³¹¹ ICRC Customary IHL Study, Rule 47 (emphasis added).

own armed group has turned hostile could be considered as being *de facto* in the hands of ‘an adverse party’.³¹² In the context of IACs, this approach was relied on to justify the application of IHL in the *Prlić case* at the ICTY.³¹³ In *Prlić*, the Croatian Defence Forces (HVO) had detained their own Muslim members who were deemed to have switched their allegiance to the Bosnian army.³¹⁴ The Appeals Chamber found:

[T]hat the Muslim HVO members could not be deemed POWs within the strict meaning of Geneva Convention III as they did not formally belong to the ABiH, the "armed forces of a Party other than the detaining Party." They could nevertheless be protected under Geneva Convention IV because they were *in fact in enemy hands*.³¹⁵

Prior to this case, the Appeals Chamber in the *Čelebići* case had already emphasised that the detaining or abusing authority's view of the victims' allegiance (rather than their actual allegiance) is a relevant factor in determining whether the victim benefits from the protection of IHL.³¹⁶ This approach can thus explain the protection of a fighter or combatant who is found to be an informant or is otherwise alleged to have collaborated with the enemy.³¹⁷ Such individuals might equally be considered to be ‘in fact in enemy hands’ and, therefore, *hors de combat*.³¹⁸

However, explaining the application of IHL becomes more difficult in situations where detention, trial and/or punishment are used as internal disciplinary

³¹² Kenny and McDermott (n 295) 965.

³¹³ *Prlić et al.* (IT-04-74-A) Appeals Chamber (29 November 2017).

³¹⁴ *ibid* [348].

³¹⁵ *ibid* [359].

³¹⁶ *Delalić et al.* (Appeals Judgment) IT-96-21-A (20 February 2001) (*‘Čelebići case’*) [98].

³¹⁷ See Shane Darcy, *To Serve the Enemy: Informers, Collaborators, and the Laws of Armed Conflict* (OUP 2019) 154-155.

³¹⁸ Consider also the finding of the SCSL Trial Chamber in the *RUF case*, which, despite denying the applicability of IHL to intra-party violence, found that that an AFRC fighter who had been detained and later killed by an allied group for travelling without the necessary documents, was *hors de combat*. See *RUF case* (n 34) [1453].

measures. Trying one of its own members – for example under suspicion of having committed a (war) crime – cannot automatically turn the group into an ‘enemy’ or ‘adversary’ for the purpose of IHL in cases where the allegiance of the accused is not in doubt. The accused does not somehow become aligned, or be considered to have aligned, with the opposing party simply because they are suspected of having transgressed a rule that their group considers worthy of a trial or punishment, even if the resulting judicial process violates fair trial guarantees. If the armed group member in question cannot be said to have fallen into the hands of an enemy, it needs to be shown that there are other circumstances that qualify them as ‘no longer participating in hostilities’.

According to the influential ICRC Guidance on the notion of direct participation in hostilities, two approaches can be identified in determining when an individual ceases to participate in hostilities and therefore (re)gains protection.³¹⁹ The first one is the so-called ‘revolving door’ approach, according to which (‘civilian’) protection is only temporarily suspended during each specific act amounting to direct participation in hostilities.³²⁰ This approach was relied on by the ICC Pre-Trial Chamber in *Ntaganda*, where it noted that when abuse against a fighter involves ‘elements of force/coercion or the exercise of rights of ownership’, this ‘logically preclude[s] active participation in hostilities at the same time’.³²¹ While this logic is sound, the Pre-Trial Chamber has omitted to note that the ‘revolving door’ approach is usually applied only to civilians who participate in hostilities on a spontaneous, ad-hoc basis (including individuals belonging to the political or administrative branches attached to an armed

³¹⁹ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, 70-73.

³²⁰ *ibid* 70.

³²¹ *Ntaganda* (Confirmation of Charges) ICC-01/04-02/06 (9 June 2014) [79].

group) and not to ‘permanent’ members of a groups’ armed wing.³²² Members of an armed group do not benefit from the protection reserved for individuals not directly participating in hostilities for as long as they hold a continuous combat function in that group.³²³ Only when an individual permanently ceases to assume such a function, whether openly declared or through conclusive behaviour or circumstances, do they regain ‘civilian’ status and benefit from protection accordingly.³²⁴

It is arguable that at least in cases where members of an armed group face imprisonment³²⁵, severe corporal punishment or capital punishment as a potential sentence, their continuous combat function can be understood to be implicitly revoked, as the sentence will obviously prevent them from taking part in future combat operations. As a result, they could be said to have regained their ‘civilian’ status and, therefore, fall under the category of persons eligible for protection under CA 3 or AP II. That these fighters may nevertheless maintain a political or ethnic affiliation to the group, or have even expressly declared their loyalty, does not suffice to deprive them of their protection under CA 3.³²⁶ Here, an analogy could be made to members of State armed forces who regain their civilian protection because they have been discharged from duty due to transgressing behaviour.³²⁷

It is important to note that such extensive interpretations of the protective scope of IHL have not been without criticism.³²⁸ In relation to States, the case for intra-party

³²² ICRC, Interpretive Guidance (n 319) 71-72; Kenny and McDermott (n 295) 947.

³²³ Such function involves the preparation, execution, or command of individual acts or operations amounting to direct participation in hostilities. See ICRC, Interpretive Guidance (n 319) 33-34.

³²⁴ *ibid* 72.

³²⁵ Apart from instances of short-term detention as a form of disciplinary punishment. See **Chapter 6**, section 6.2.

³²⁶ See *Kvočka et al.* (Appeals Judgment) IT-98-30/1-A (28 February 2005) [561].

³²⁷ ICRC, Interpretive Guidance (n 319) 25.

³²⁸ See Newton (n 302).

protection under IHL is arguably weakened by the fact that such acts remain governed by comprehensive IHRL obligations accepted by State authorities under both treaty regimes and customary law.³²⁹ **Chapter 4** will explain that in the case of judicial proceedings the vast majority of related human rights law guarantees are non-derogable, even in times of armed conflict. Accordingly, the risk of a protection gap is limited and the debate is, ultimately, reduced to the question of whether certain acts qualify as war crimes and can be prosecuted as such.³³⁰ In this regard, it could be argued that there is no added value in IHL encroaching upon a domain that is adequately regulated by IHRL.³³¹

However, concerns about a protection gap are more prevalent when it comes to individuals belonging to non-State parties to a conflict, in particular members of armed groups properly so-called. Even if it were generally accepted that armed groups incur IHRL obligations – and **Chapter 2** has demonstrated that this is far from clear – few would argue that such groups are bound by the full panoply of human rights applicable to States under the various treaty regimes and customary law. The few core human rights obligations, such as the prohibition of torture and inhumane treatment, whose application to armed groups can arguably draw on increasing State practice and *opinio juris*, do not provide adequate protection from unfair trials and arbitrary punishments. Consequently, a convincing normative case can be made to extend the protection of

³²⁹ Some States have considered these IHRL obligations as potential obstacles to the enforcement of military discipline. France, for example, still maintains reservations to Articles 9 and 14 ICCPR ‘to the effect that these articles cannot impede enforcement of the rules pertaining to the disciplinary régime in the armies.’

³³⁰ See, more generally, **Chapter 5**.

³³¹ However, as **Chapter 2** has already pointed out, a certain degree of convergence and parallelism of IHL and IHRL is inherent to the law of NIAC. This convergence is reflected in the obligations of humane treatment found in CA 3 and AP II, which incorporate the principle of humanity that also underlies human rights law. See Rodenhäuser (n 298) 189; Theodor Meron, ‘On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument’ (1987) 77 AJIL 589, 593-594. See also ICRC 1987 AP II Commentary, [4509]-[4510] and [4513].

IHL to members of armed groups in situations where other regimes are silent or inadequate.

3.1.2. *The Material Scope of IHL Protection (The Nexus Requirement)*

Even if an individual or group of individuals falls under the personal scope of protection that IHL offers under CA 3, AP II or customary law, not every form of conduct is regulated by these provisions. Indeed, the fact that an act occurs during a NIAC does not mean that it is automatically governed by IHL.³³² The applicability of IHL to specific conduct is often said to require a so-called ‘nexus’ between that act and the armed conflict.³³³ Acts that have no such connection to the conflict remain regulated by other legal regimes, including domestic criminal law and (international) human rights law.³³⁴ Curiously, there is no explicit reference to the nexus requirement in any IHL treaty framework.³³⁵ Rather, this requirement has been said to derive from the ‘whole spirit of IHL’, as well as the ‘object and purpose’ of its rules.³³⁶ Moreover, it is arguably reflected in the two Additional Protocols, in particular the fundamental guarantees provided by Article 75 AP I and Article 4 AP II, both of which only apply to persons ‘affected’ by the armed conflict.³³⁷ With regard to trials and punishments, this general rule is further concretised by Article 6(1) AP II, which explicitly mentions

³³² In the case of States, for example, it was considered ‘exaggerated to lay down the automatic application of all the Protocol provisions to the entire territory of a High Contracting Party’. See Commentary to the Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (ICRC 1973) 134.

³³³ See e.g. Rodenhäuser (n 210) 11; ICRC 2020 GC III Commentary [494]; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems arising in Warfare* (Elgar 2019) 201, [6.80]; *Akayesu* (Appeals Judgment) ICTR-96-4-A (1 June 2001) [444].

³³⁴ ICRC 2020 GC III Commentary [494].

³³⁵ Rodenhäuser (n 210) 11.

³³⁶ Antonio Cassese, ‘The Nexus Requirement for War Crimes’ (2012) 10 JICJ 1395, 1397.

³³⁷ See also Meron (n 331) 596-59.

that its provisions apply only to the prosecution and punishment of ‘criminal offences *related* to the armed conflict’. Similarly, Article 5(1) AP II provides protection for persons who have been deprived of their liberty ‘for reasons *related to* the armed conflict’.

Unfortunately, the precise content and nature of the nexus requirement remains largely unexplored within IHL scholarship.³³⁸ However, it has been developed significantly through the jurisprudence of international criminal tribunals.³³⁹ Given that every war crime requires an underlying violation of IHL, the nexus requirement developed for the purpose of distinguishing war crimes from purely domestic offences can help to delimit the required nexus for the purpose of determining when IHL applies.³⁴⁰ **Chapter 5** will analyse the nexus requirement under ICL in more detail, including the problem it entails for the passing of sentences by armed groups.

Under both regimes, IHL and ICL, the difficult question is to determine when an individual is ‘affected’ by an armed conflict. It is frequently argued that where armed groups have established control over a given territory as a result of the armed conflict, civilians living in said territory must automatically be considered ‘affected’ by the armed conflict.³⁴¹ When armed groups acquire power over a civilian population, so the argument, they will always be acting under the ‘guise of the armed conflict’ in their relations with that population.³⁴² This position has recently been confirmed by an

³³⁸ Éric David, *Principes de droit des conflits armés* (6th ed, Bruylant 2019) 955. Only recently has the concept of a ‘nexus’ received more scholarly attention, see e.g. Elvina Pothelet, ‘Searching for the “Nexus”: A Proposal to Refine the Scope of Applicability of International Humanitarian Law and War Crimes Law’, Doctoral Thesis, University of Geneva, 2021.

³³⁹ Sassòli (n 333) 201, [6.80].

³⁴⁰ Rodenhäuser (n 333) 14 and fn 67.

³⁴¹ Rodenhäuser (n 333) 13; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict* (n 51) 43.

³⁴² Katharine Fortin, ‘The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control’ (2016) 63 NILR 161, 178.

ICC Pre-Trial Chamber, which noted that the fact that the penal sentences in question were pronounced in a region controlled by an armed group was sufficient to demonstrate the necessary link to the armed conflict.³⁴³ However, the fact that an area is controlled by an armed group cannot in and of itself suffice to establish the existence of a nexus to the conflict for an individual act occurring in that area. The control of territory by the group may not derive from the current armed conflict or could have been acquired without the use of force triggering the threshold of a NIAC.³⁴⁴ The key question is, therefore, whether the fact that an authority exercises power over an individual *for reasons related to the armed conflict* suffices to apply IHL to all interactions between that authority and the individual.³⁴⁵

Furthermore, as pointed out by Pothelet, such a broad interpretation of the nexus criterion would run contrary to the explicit wording of certain IHL provisions, in particular Articles 5 and 6 AP II, which regulate the deprivation of liberty or the prosecution and punishment only in relation to ‘*offences related to the armed conflict*’.³⁴⁶ The fact that an offence takes place in the territory controlled by an armed group, even if that control is a result of an armed conflict, does not suffice to make the offence itself related to that conflict. Consequently, if a common thief is tried and punished by an armed group the judicial guarantees provided by Article 6 AP II would not apply.³⁴⁷ Whereas the circumstances of the trial and punishment may be shaped by

³⁴³ *Al-Hassan* (n 13) [486].

³⁴⁴ See Elvina Pothelet, ‘Life in Rebel Territory: is Everything War?’ (*Armed Groups and International Law*, 20 May 2020) available at <<https://armedgroups-internationalallaw.org/2020/05/20/life-in-rebel-territory-is-everything-war>> accessed 22 September 2022. If, for example, Hezbollah enters into another armed conflict with Israel, or with other Lebanese militias or state forces, the group’s exercise of authority over the civilian population in southern Lebanon would not derive from these novel NIACs.

³⁴⁵ See Rodenhäuser (n 157) 119. This view has also been indirectly adopted by Melzer. See Nils Melzer, *Targeted Killing in International Law* (OUP 2009) 142-43, fn 16.

³⁴⁶ Pothelet (n 344).

³⁴⁷ Rodenhäuser (n 333) 13.

the conflict in the sense that the conflict has led to a change of the authorities in charge in the respective territory, the wrongdoing itself (i.e. stealing) bears no such relationship to the conflict.³⁴⁸

The idea that control of territory by an armed group automatically leads to the application of IHL, in particular during law enforcement operations, has thus been criticized by commentators.³⁴⁹ As a potential compromise, Pothelet suggests distinguishing between a general nexus criterion in IHL, as well as more specific nexus requirements enshrined in certain rules.³⁵⁰ In the context of AP II, as explained above, the default position is that the Protocol applies to ‘all persons *affected* by an armed conflict’.³⁵¹ Under this general rule, every interaction between a civilian and an armed group that exercises authority over a certain territory as a consequence of an armed conflict would indeed be governed by the provisions of AP II but only insofar as the individual rules themselves do not contain a stricter, more specific nexus. The latter is the case with regard to Articles 5 and 6 AP II, which require detention to be carried out ‘for reasons *related* to the conflict’ or the offence for which an individual is prosecuted to be ‘*related* to the conflict’. In the absence of such a specific nexus to the conflict, judicial proceedings and punishments administered by the group would remain governed exclusively by human rights law (to the extent that it is applicable) and domestic criminal law.

³⁴⁸ The conclusion differs, of course, if the thief steals provisions of the armed group in order to weaken its military capacities.

³⁴⁹ See Fortin (n 342). See also Schabas, arguing that ‘the observation that a group may be in a position to do things after it has taken power that it was not previously able to do hardly seems an adequate nexus for war crimes law to apply’, William Schabas, ‘Al-Mahdi Has Been Convicted of a Crime He Did Not Commit’ (2017) 49 CaseWResJIntlL 75, 97.

³⁵⁰ Pothelet (n 344).

³⁵¹ Art 1 AP II.

Unfortunately, this compromise creates difficulties with regard to the relationship between AP II and CA 3. While CA 3 does not contain an implicit reference to the nexus requirement similar to the Protocols, it has long been maintained that its application equally requires a nexus between violations and the armed conflict.³⁵² Contrary to AP II, however, CA 3 does not contain a specific nexus requirement in its section on judicial guarantees requiring the prosecuted offence itself to be linked to the conflict. As a consequence, far more trial situations would be encompassed by CA 3 compared to Article 6 of AP II.

It is sometimes suggested to interpret CA 3 in light of AP II, meaning that the same specific nexus requirement for penal sanctions under Article 6 AP II should be read into CA 3.³⁵³ This approach raises several issues with regard to the relationship between the two instruments.³⁵⁴ Most importantly, it would be problematic if Article 6 AP II had the effect of actually removing a significant amount of trial situations or penal sanctions that would have otherwise been included under CA 3 from the scope of IHL protection. Already the preamble of AP II, after invoking the humanitarian principles of CA 3, emphasizes the ‘need to ensure a better protection for the victims of those armed conflicts’. In addition, the chapeau of Article 1 AP II explicitly specifies that the Protocol is meant to ‘develop and supplement Article 3 common to the Geneva Conventions of 12 August 1949 *without modifying its existing conditions of application*’.³⁵⁵ As stipulated in the ICRC’s commentary on AP II, CA 3 ‘retains an autonomous existence, which means that its applicability is neither limited nor affected

³⁵² See e.g. *Akayesu*, Appeals Judgment (n 333) [444].

³⁵³ Rodenhäuser (n 333) 13-14.

³⁵⁴ See also section 3.2.2.

³⁵⁵ Art 1(1) AP II.

by the material field of application of the Protocol'.³⁵⁶ Relying on AP II to narrow the scope of application of CA 3 thus seems to be an argument that it is difficult to sustain. Nevertheless, this position could be considered as (normatively) convincing if one accepts that trials over common crimes unrelated to the conflict remain governed by the fair trial guarantees under human rights law, while trials over crimes related to the conflict would be governed by CA 3 and Article 6 AP II. However, as explained in **Chapter 2** and the previous sub-section, even if it was accepted that armed groups are bound by certain core (customary) human rights law obligations, these obligations are minimal and do not comprise the full range of IHRL fair trial rights applicable to States. As the subsequent sections will explain, CA 3 and AP II, on the other hand, incorporate the fair trial guarantees applicable to States under IHRL and transpose them onto armed groups via IHL. Reading CA 3 in light of the specific nexus of Article 6 AP II thus involves the risk of reducing the scope of protection, an outcome incompatible with the Protocol's own preamble, as well as its object and purpose.

The more convincing approach is therefore to simply accept that the rules of CA 3 and AP II regarding penal proceedings differ in their *ratione materiae* scope of application. Indeed, it is well established that AP II has a different field of application and only regulates a narrowly defined subset of NIACs between armed groups and State armed forces. The threshold of application of AP II is higher than that of CA 3 as it requires the armed group to 'exercise control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.³⁵⁷ In situations where AP II applies, it is supposed to provide better protection than CA 3. Under this approach, CA 3 would continue to govern trials that

³⁵⁶ ICRC 1987 AP II Commentary [4457].

³⁵⁷ Art 1(1) AP II.

meet the broader nexus requirement under CA 3, while Article 6 AP II would provide additional details with regard to a specific subgroup of trials, namely those over offences related to the armed conflict. This is probably the most coherent approach based on a textual interpretation of CA 3 and the preamble of AP II. However, **Chapter 4** will demonstrate that the guarantees applicable under CA 3 and Article 6 AP II (as well as their customary law equivalents) are virtually identical, thereby rendering the distinction between the general and specific nexus practically irrelevant in determining the level of protection offered by IHL in relation to penal proceedings.

Applying the nexus test to the trial and punishment of enemy fighters or civilians suspected of supporting the enemy is relatively straightforward.³⁵⁸ If an individual is detained and tried based on their (real or perceived³⁵⁹) allegiance to an enemy party or acts allegedly carried out in support of that enemy party, that person is clearly ‘affected’ by the armed conflict and the proceedings will be governed by IHL.³⁶⁰ Moreover, the conduct to be prosecuted in such a case is obviously ‘related’ to the armed conflict in the sense of Article 6 AP II. The issue is less straightforward in situations where penal proceedings and punishments are used to maintain discipline within the armed group properly so-called. If, for example, a fighter is punished for mistreating a captured enemy combatant it is evident that the conduct to be punished is linked to the conflict. If, however, a military commander beats a subordinate soldier as a form of punishment for stealing supplies – as he may have done already in peacetime

³⁵⁸ See also 2020 ICRC GC III Commentary [580].

³⁵⁹ See section 3.1.1.

³⁶⁰ See e.g. *Haradinaj et al.* (Retrial Judgment) T-04-84bis-T (29 November 2012) [610], where the ICTY held that the nexus requirement was fulfilled because the victims were punished by the KLA for being ‘traitors’.

– IHL would not apply to the act.³⁶¹ Yet, if this soldier is an involuntary conscript (e.g. a child soldier) recruited for a specific armed conflict, then the existence of said conflict would have played a substantial part in the commander’s ability to commit the abuse and IHL applies accordingly.³⁶² These examples demonstrate that the dividing line between the existence and non-existence of a nexus to the armed conflict is often blurred and must be determined on a case-by-case basis.

The most problematic scenario, however, remains the application of the nexus requirement to acts of rebel governance, in particular the trial and punishment of common crimes that do not, in and of themselves, *relate* to the armed conflict. As explained above, under a broad interpretation of the nexus criterion such proceedings remain governed by IHL (in the form of CA 3 and its customary law equivalent) by virtue of the fact that they are committed in territory held by an armed group as a result of the armed conflict. Some have argued that this broad interpretation of the nexus requirement leads to an unequal or asymmetrical application of IHL to armed groups in comparison to States.³⁶³ The reason is that the very same governance activities would not be considered to have a nexus with the armed conflict (and, consequently, are not governed by IHL) when carried out by a State party to a NIAC on its own territory vis-à-vis its citizens.³⁶⁴ As a result, the trial of a common thief – to the use the example given earlier – would be governed by IHL if conducted by the armed group but not if conducted by the governmental authorities.

³⁶¹ A similar example is used in Gloria Gaggioli, ‘Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law’ (2014) 96 IRRC 503, 515.

³⁶² See *Ntaganda* (Trial Judgment) ICC-01/04-02/06 (8 July 2019) [984]-[986].

³⁶³ See e.g. Rodenhäuser (n 333) 18; 14; Schabas (n 349) 98; Alessandra Spadaro, ‘Rebel Rulers and Rules for Rebels: Rebel Governance and International Law’ in Katharine Fortin and Ezequiel Heffes (eds), *Armed Groups in the Shadowland of International Law* (forthcoming 2023, on file with the author).

³⁶⁴ Spadaro (n 363) 14.

Such governmental authorities remain of course bound by IHRL and **Chapter 4** will demonstrate that the level of substantive protection provided to the individual being tried is essentially the same in both scenarios due to the almost complete convergence of IHL and IHRL in the field of judicial guarantees. Nevertheless, it has been argued that this asymmetry in the application of IHL conflicts with the principle of belligerent equality.³⁶⁵ The principle of belligerent equality stipulates that all parties to a conflict, regardless of their status or the cause of the conflict, enjoy the same rights and obligations under IHL.³⁶⁶ Although the scope of its application to NIAC remains disputed, the principle is said to apply in the sense that CA 3 and AP II impose the same obligations on both the State and the non-State party to a conflict.³⁶⁷

While it has rightly been pointed out that the substantive obligations of both Parties, strictly speaking, remain the same, it has also been asserted that the principle of belligerent equality should extend to the applicability of those norms *ratione materiae*, in other words, the interpretation of the nexus criterion.³⁶⁸ If a change of authorities in power within a given territory as a result of the armed control is the defining criterion for a population to be ‘affected’ by the conflict, States will naturally be in a privileged position. Except for the rare cases where armed groups held territory before the outbreak of the conflict, governmental institutions will be the ‘default’ authorities at the beginning of a NIAC and their regular governance activities remain unaffected by IHL. Governance functions performed by the armed group, on the other

³⁶⁵ *ibid* 13.

³⁶⁶ ‘[T]he provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict’. Preamble, AP I.

³⁶⁷ 2020 ICRC GC III Commentary [538]; 1987 ICRC AP II Commentary [4442]; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (n 51) 17-18.

³⁶⁸ Spadaro (n 363) 13.

hand, will always be considered to have a nexus to the conflict when carried out in territory related to that conflict.³⁶⁹ While this understanding of the nexus criterion might not strictly speaking be ‘asymmetric’ in the sense that different interpretations apply to the different types of parties to a NIAC, it can be said to be at least ‘discriminatory’. As pointed out by Schabas, this discriminatory application ‘does not sit well with the fundamental principles of international humanitarian law by which all parties to a conflict are approached as equals’.³⁷⁰

This is not merely a theoretical or purely academic matter. The practical consequences of this inequality become more evident when ICL enters the stage. As **Chapter 5** will explain, the discriminatory application of the nexus requirement will in some cases lead to the criminalisation of rebel governance although the very same acts may be carried out with impunity by State authorities.³⁷¹ This form of inequality between the parties provides for a strong argument against an expansive interpretation of the nexus requirement in relation to such acts, including with regard to the punishment of common crimes. Especially in protracted armed conflicts, in which armed groups have developed State-like government structures, the broad application of IHL to trials over common crimes unrelated to the conflict should reach its limits.³⁷²

However, these alternative approaches must – once again – be weighed against the risk of a protection gap arising from the fact that the related human rights law

³⁶⁹ See also Rodenhäuser (n 54), 19, concluding that ‘the nexus requirement is almost necessarily met if governance functions are performed by members of the NSAG’.

³⁷⁰ Schabas (n 349) 98.

³⁷¹ See **Chapter 5**, section 5.3.

³⁷² See also Rodenhäuser (n 333), 18, arguing that ‘the more that State-like governance structures exist with a separation of powers between the administration’s civilian and military components, the more it may be questioned whether IHL is still the appropriate and applicable body of international law with regard to “governance acts” by what looks like a new quasi-State authority’.

obligations of armed groups remain disputed and underdeveloped.³⁷³ The concerns here echo those explained above in relation to the application of IHL to intra-party conduct. Therefore, it is unsurprising that commentators who are critical towards the application of IHRL to armed groups, for example the ICRC, promote this expansive and potentially discriminatory interpretation of the nexus requirement in relation to rebel governance.³⁷⁴ Moreover, recent ICL jurisprudence has further entrenched this broad understanding of the nexus requirement.³⁷⁵ Consequently and irrespective of the normative critique advanced above, this approach necessarily informs the analysis of the subsequent sections and Chapters.

3.1.3. The Temporal Scope of IHL Protection in Relation to Judicial Proceedings

In order to establish that a certain act has a nexus to an armed conflict and is governed by IHL, it is necessary to establish whether said conflict was in existence at the relevant time. **Chapter 2** has already explained that it is often difficult to determine when a NIAC has come into existence, and even more so when it has come to a conclusion. Moreover, while the majority of IHL norms will cease to apply at the end of an armed conflict, certain obligations remain applicable even thereafter. Most notably, Article 2(2) AP II stipulates that ‘at the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted *after the conflict*

³⁷³ Indeed, expansive or overreaching approaches to IHL are often predicated on assertions that IHRL would not apply the given situation. See e.g. Helen Duffy, ‘Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication’ in Ziv Bohrer, Janina Dill and Helen Duffy (eds), *Law Applicable to Armed Conflict* (CUP 2020) 15.

³⁷⁴ See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (n 51) 53. See also Fortin (n 371) 20-21.

³⁷⁵ See **Chapter 5**, section 5.3.

for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty'. This provision thus extends the application of the judicial guarantees provided by the Protocol under Article 6 AP II beyond the conclusion of the armed conflict. These guarantees 'remain valid at all times and without any restriction in time, until the deprivation or restriction of the liberty of those concerned has come to an end'.³⁷⁶ It is important to point out that the phrase 'for reasons related to such conflict' in Article 2(2) further reinforces the narrower nexus requirement included in Articles 5 and 6 AP II.

CA 3, on the other hand, is silent on the end of its applicability, including in relation to its section on judicial guarantees. However, it has been argued that the broader scope of protection offered by CA 3 in relation to trials and penal sentences equally continues to apply after the end of an armed conflict. The position of the ICRC, for example, is that '[p]ersons protected under common Article 3, even after the end of a non-international armed conflict, continue to benefit from the article's protection as long as, *in consequence* of the armed conflict, they are in a situation for which common Article 3 provides protection'.³⁷⁷ Accordingly, if an armed group continues to govern territory as a result of an armed conflict, the trial and punishment of common crimes in that territory, even if unrelated to the conflict, would remain governed by IHL. This result seems to further exacerbate the aforementioned asymmetry in relation to the application of IHL to governance activities carried out by non-State parties. At the end of most armed conflicts, however, the armed group will either have been defeated or

³⁷⁶ 1987 ICRC AP II Commentary [4494]. See also Bothe, Partsch and Solf (n 236) 723.

³⁷⁷ 2020 ICRC GC III Commentary [535] (emphasis added). A similar opinion was expressed as early as 1963 by a commission of experts: 'The Commission therefore considers that the provisions of article 3 remain applicable to situations arising from the conflict and to the participants in that conflict', see ICRC, 'Humanitarian aid to the victims of internal conflicts. Meeting of a Commission of Experts in Geneva, 25–30 October 1962', (1963) 3 IRRC 79, 83.

have successfully replaced the previous government. The question of the temporal scope will thus rarely arise in relation to armed groups.

3.2. The Legal Capacity of Armed Groups to Establish Courts

After having determined the protective scope of IHL and explained the so-called nexus requirement between the relevant conduct and the armed conflict, the following sections now proceed to an analysis of how the substantive IHL provisions that govern penal proceedings during NIACs affect the legal capacity of armed groups to establish their own judicial systems, most notably CA 3 and Article 6 AP II. To reiterate, CA 3 of the 1949 Geneva Conventions prohibits:

[T]he 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.³⁷⁸

Two distinct requirements can be identified in this provision, namely that a court must a.) be regularly constituted and b.) afford all the judicial guarantees recognized as indispensable. This Chapter is mainly concerned with the former criterion, the idea of ‘regular constitution’, while the identification and analysis of the individual ‘judicial guarantees recognized as indispensable’ are discussed in **Chapter 4**.

3.2.1. The Requirement of a ‘Regularly Constituted Court’ in CA 3

The first question is, therefore, what is to be understood by a ‘regularly constituted’ court, and whether this term can accommodate judicial institutions of armed groups. Unfortunately, the preparatory materials of the 1949 Conventions do not shed much

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Art 3(1)(d) GC I-IV.

light on the exact meaning of this phrase and the 1952 ICRC commentary gives the impression that the term ‘regularly constituted’ was merely intended to prohibit summary executions while noting that ‘it leaves intact the right of *the State* to prosecute, sentence and punish according to the law’.³⁷⁹ Indeed, an early version of this provision, introduced by the ICRC’s 1948 Stockholm Conference Draft, was limited to executions.³⁸⁰ During the 1949 Diplomatic Conference the term ‘executions’ was first replaced by ‘penal sanctions’³⁸¹ and ultimately by ‘sentences’³⁸². However, this final amendment did not alter the understanding that this provision refers to the prosecution and punishment of penal offences (as opposed to mere administrative offences).³⁸³

Some commentators have interpreted ‘regularly constituted’ as ‘meaning that the tribunal has been established by law in order to decide cases relating to certain subject matters’.³⁸⁴ This would mean that the ‘jurisdictional power of a tribunal is not created for a specific case, nor by an arbitrary administrative act’.³⁸⁵ Others take the view that ‘regular constitution’ simply incorporates the condition that a court must meet the requirements of ‘independence and impartiality’.³⁸⁶ The following sections will explain why this latter interpretation should be rejected and that the most coherent

³⁷⁹ Pictet Commentary (n 116) 54 (emphasis added).

³⁸⁰ ICRC, ‘Revised and New Draft Conventions for the Protection of War Victims’, Texts Amended and Approved by the XVIIth International Red Cross Conference (ICRC 1948) 113.

³⁸¹ Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, Vol II-A, 779.

³⁸² *ibid*, Vol III, 97.

³⁸³ See 2020 ICRC GC III Commentary [712]. For the delimitation between penal and administrative offences, see **Chapter 6**, section 6.1.2.

³⁸⁴ Louise Doswald-Beck, ‘Judicial Guarantees under Common Article 3’ in Clapham, Gaeta and Sassòli (n 138) 471; Nehal Bhuta, ‘Fair Trial Guarantees in Armed Conflict’ (*EJIL: Talk!*, 11 October 2016) available at <<https://www.ejiltalk.org/joint-series-on-international-law-and-armed-conflict-fair-trial-guarantees-in-armed-conflict/>> accessed 20 December 2022.

³⁸⁵ *ibid*.

³⁸⁶ This position is mainly based on the wording of Article 6(2) AP II and the elements of crime of Article 8(2)(c)(iv) of the ICC Statute. See e.g. La Rosa and Wuerzner (n 39) 340; and Knut Dörmann, *Elements of War Crimes* (CUP 2003) 413.

interpretation of the phrase ‘regular constituted’ is indeed that it refers to courts or tribunals that are ‘established by law’.

The concept that a court must be ‘established by law’ is well known in contemporary human rights law.³⁸⁷ This principle, as found for example in Article 14(1) ICCPR or Article 6(1) ECHR, requires that a judicial organ be established pursuant to some form of legislation and complies with the rules enshrined therein, in particular those relating to the body’s composition and jurisdiction.³⁸⁸ This concerns only the procedural and institutional law governing the court in question, not the substantive penal law applied by it. The latter is subject to specific regulations and safeguards, such as the principles of legality and non-retroactivity, which will be addressed as separate judicial guarantees in **Chapter 4**.

Somer points out that when the 1949 Conventions were drafted, binding human rights obligations did not yet exist and it is, therefore, unlikely that the drafters had specific human rights concepts in mind.³⁸⁹ While this is generally correct³⁹⁰, the connection between CA 3 and the emerging field of human rights law was explicitly made in the early versions of the provision as enshrined in the 1948 Stockholm Draft. The chapeau of the preamble, which declared certain actions to be prohibited at all times and included the provision on judicial guarantees for executions, made clear that the parties ‘undertake to respect the principles of human rights’.³⁹¹ In addition, the

³⁸⁷ See e.g. art 14(1) ICCPR, art 6(1) ECHR, art 8 ACHR.

³⁸⁸ See e.g. *Jorgic v Germany*, App no 74613/01 (ECtHR, 12 October 2007) [64]. See also William Schabas, *U.N. Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (N.P. Engel 2019) 365.

³⁸⁹ Somer (n 39) 673.

³⁹⁰ The Universal Declaration of Human Rights (UDHR) was passed by the UN General Assembly in 1948, but as a mere GA Resolution it did not contain any binding force. Technically, however, it would be possible to describe the Genocide Convention, which had also been adopted in 1948, as the first binding international human rights law instrument.

³⁹¹ ICRC, Revised and New Draft Conventions (n 380) 113.

concept of human rights, as well as the Universal Declaration of Human Rights, were invoked multiple times during the negotiations of the 1949 Conventions, including when discussing CA 3.³⁹² However, the specific requirement that a tribunal must be ‘established by law’ did not formally emerge in international law until it appeared in Article 6 of the ECHR in 1950.³⁹³ Apart from the regional instrument that is the ECHR, this requirement was incorporated into a globally applicable international treaty only in 1966, when the same phrase was included in Article 14(1) of the ICCPR. Therefore, while it is clear that the drafters of CA 3 were influenced by nascent concepts of human rights law, it is difficult to ascertain that it was the idea of courts being ‘established by law’ that they had in mind when adopting the term ‘regularly constituted’.³⁹⁴

Irrespective of the meaning of ‘regularly constituted’ in 1949, however, it is plausible to argue that the Parties chose to adopt a dynamic (or evolutive) approach for the interpretation of the term, which they presumably intended to be given its meaning in light of the circumstances prevailing at the time of interpretation.³⁹⁵ The ‘established by law’ criterion under customary IHRL could, therefore, be read into the definition of ‘regularly constituted’ under IHL by adopting a contemporary and dynamic interpretation of the term.³⁹⁶ Even more so, the phrase ‘all the judicial guarantees

³⁹² See for example the statements made by the Danish Delegation that ‘Article 3 could not be interpreted in such a way as to deprive persons, not covered by the provisions of Article 3, of their human rights’, Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, Vol II-B, 268; or the statement made by the Italian Delegation that ‘[o]ur task was not to produce an ideal Convention, but one which would reconcile human rights with the requirements of war’, *ibid*, 536.

³⁹³ See art 6(1) ECHR.

³⁹⁴ The UDHR incorporated the right to a fair trial but did not include the ‘established by law’ criterion. See art 10 UDHR.

³⁹⁵ See e.g. *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, [66]; Oliver Dörr, ‘Article 31’, in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties : A Commentary* (Springer 2018) 572.

³⁹⁶ Somer (n 39) 673; see also Sassòli, noting that ‘l’exigence d’un tribunal régulièrement constitué qui figure à l’article 3 commun ne peut qu’être interprétée, à la lumière des droits humains, comme requérant un tribunal établi par la loi’, Marco Sassòli, ‘L’administration d’un territoire

recognized as indispensable’ suggests a flexible standard that may evolve over time and is shaped by the development of fair trial guarantees under customary human rights law.³⁹⁷ **Chapter 4** will explain this connection in detail. As pointed out by the ICJ, the interpretation of a treaty ‘cannot remain unaffected by the subsequent development of law by way of customary law’.³⁹⁸ In addition, the ICRC’s Customary IHL study explicitly highlights the requirement of a ‘regularly constituted court affording all the judicial guarantees which are recognised as indispensable’ as an example of a provision which cannot be interpreted without reference to contemporary human rights law.³⁹⁹ It has therefore been argued that CA 3 incorporates due process rights under customary human rights law by reference, ‘including all of Article 14 ICCPR’.⁴⁰⁰ This approach can be justified through a dynamic interpretation of the terms ‘judicial guarantees recognised as indispensable’, or through an implicit *renvoi* to customary human rights law enshrined therein.

If CA 3 indeed incorporates human rights principles, it is important to point out that what is considered ‘indispensable’ may change over time. When the ICCPR was adopted, for example, Article 14 had not been included in the list of non-derogable provisions under its Article 4(2). Four decades later, however, the HRC declared that at least the requirements of *competence*, independence and impartiality of a tribunal in

par un groupe armé, peut-elle être régie par le droit?’ in Michel Hottelier et al. (eds), *Etudes en l'honneur du Professeur Thierry Tanquerel* (Schulthess 2019) 270.

³⁹⁷ See Justice Stevens in *Hamdan v Rumsfeld*, 548 US 557 (2006) 70, who noted that regular constitution is ‘inextricably intertwined’ with the judicial guarantees recognized as indispensable.

³⁹⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion* [1971] ICJ Rep 16, [53].

³⁹⁹ ICRC Customary IHL Study, xxxvii.

⁴⁰⁰ Jordan J. Paust, ‘Executive Plans and Authorizations to Violate International Law concerning Treatment and Interrogation of Detainees’ (2005) 43 *ColumJTransnatlL* 811, 818, fn 25; Derek Jinks, ‘The Declining Significance of POW Status’ (2004) 45 *HarvIntlLJ* 367, 406.

the sense of Article 14(1) ICCPR is an absolute right that is not subject to any exception.⁴⁰¹ Since ‘competence’ is, in fact, nothing else than a more specific formulation of the ‘established by law’ requirement, it is arguable that it forms part of what is considered ‘indispensable’ today.⁴⁰² Already the 1984 Siracusa Principles suggested that no derogation from the ICCPR can be justified with regard to the right to a ‘fair trial by a competent, independent and impartial court *established by law*’.⁴⁰³ In 1989, Meron thus identified the right to a tribunal ‘established by law’ as part of the customary law of due process and understood this criterion to be reflected in CA 3.⁴⁰⁴ The ILC, in its 1996 Draft Code of Crimes Against Peace and Security of Mankind, equally noted that ‘the essential requirement for purposes of the judicial guarantees required for a fair trial is that the court be “duly established by law”’.⁴⁰⁵

It is also arguable that the requirement that courts be ‘established by law’ forms a general principle of law and therefore applies to all penal procedures, irrespective of who conducts them.⁴⁰⁶ In its famous interlocutory appeal decision in the *Tadić* case, the ICTY Appeals Chamber described the ‘established by law’ criterion as a general

⁴⁰¹ HRC, ‘General Comment 32’ (23 August 2007) UN Doc CCPR/C/GC/32 [19] (emphasis added). In addition, other relevant instruments, such as the 2004 Arab Charter on Human Rights, explicitly exclude the right to fair trial before a ‘competent, independent and impartial court that has been constituted by law’ from its derogation regime.

⁴⁰² See Council of Europe, ‘Problems arising from the co-existence of the ICCPR and the ECHR’, Report of the Committee on Experts on Human Rights to the Committee of Ministers, CoE Doc(70)7 (1 August 1970) 37. Similarly, the ICRC 2020 GC III Commentary [1125] interprets the term ‘competent’ in the context of tribunals charged with determining entitlement to POW status as ‘established by or in accordance with domestic law or regulations’. See also Schabas (n 388) 365 [24].

⁴⁰³ American Association of the International Commission of Jurists, ‘Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’, April 1985, 12, [70].

⁴⁰⁴ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon 1989) 96 and fn 43.

⁴⁰⁵ ILC, Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries, UN Doc A/CN.4/SER.A/ 1996/Add.1, 1996(II) YILC 35 [12].

⁴⁰⁶ Recall **Chapter 2**, section 2.2 on the difference between the personal scope of general principles and regular custom.

principle of law applicable to the ‘administration of criminal justice in a municipal setting’.⁴⁰⁷ Striking a similar tone, the ECtHR has described it as a ‘fundamental expression of the rule of law’.⁴⁰⁸ Further support for this interpretation can be found in the US Supreme Court’s decision in *Hamdan v Rumsfeld*.⁴⁰⁹ In its majority opinion, the Court relied on the ICRC’s customary IHL study, which defines ‘regularly constituted’ as ‘established and organized in accordance with the laws and procedures already in force in a country’.⁴¹⁰ Justice Kennedy, concurring, similarly concluded that ‘the regular military courts in our system are the courts-martial *established by congressional statutes*’.⁴¹¹

To better understand this approach of the Supreme Court, it is necessary to analyse the historical predecessor of the *Hamdan* decision: the *Quirin* case. In *Quirin*, decided in 1942, a group of German saboteurs was tried before a special military commission established by presidential decree.⁴¹² The defence had argued that the commission ought to have been established by statute, but the Supreme Court held that no specific legislation was required under the US constitution because it incorporated certain substantive war crimes and the right to punish them under the ‘law of war’.⁴¹³ By the time *Hamdan* reached the Supreme Court, however, the 1949 Conventions and in particular CA 3 had addressed this issue by explicitly requiring a regularly constituted court. It was against this background, that the Supreme Court found the

⁴⁰⁷ *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [42].

⁴⁰⁸ *Jorgic v Germany* (n 388) [64].

⁴⁰⁹ *Hamdan v Rumsfeld* (n 397) 69.

⁴¹⁰ *ibid.*

⁴¹¹ *ibid*, Concurring Opinion of Justice Kennedy, 8 (emphasis added).

⁴¹² *Ex parte Quirin*, 317 US 1 (1942).

⁴¹³ *ibid*, 28-29.

commission that had tried *Hamdan* not to be regularly constituted, because it was not based on a law emanating from Congress.⁴¹⁴

Furthermore, it is important to point out that while the idea that a court must be ‘established by law’ is related to the requirements of independence and impartiality – both of which will be discussed in **Chapter 4** – the three concepts remain separate and cannot simply be equated.⁴¹⁵ A court may be independent and impartial, yet fails to be regularly constituted or vice versa.⁴¹⁶ Indeed, a predefined composition and procedure not only limits the potential for undue external influence over the proceedings (and thereby safeguards the court’s independence)⁴¹⁷, they are also crucial for the exercise of rights and means of defence. The ‘established by law’ requirement thus protects aspects of a fair trial that are not adequately captured by the concepts of independence and impartiality alone.

This understanding is amply reflected in the case law of international courts and quasi-judicial bodies. The Inter-American Commission for Human Rights (IACCommHR), for example, concluded that ‘international humanitarian law mandates compliance with minimum due process and fair trial protections in any criminal proceedings, including most fundamentally *the right to trial by an impartial*,

⁴¹⁴ Provost (n 40) 197-198.

⁴¹⁵ *Ástráðsson v Iceland*, App no 26374/18 (ECtHR, 1 December 2020) [231].

⁴¹⁶ See also Provost (n 40) 205.

⁴¹⁷ The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, for example, noted that ‘[i]n order to be “independent”, a tribunal shall be established by law to have adjudicative functions to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner’. See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Sub-Commission on Prevention of Discrimination and Protections of Minorities on its 46th Session, ‘The Administration of Justice and the Human Rights of Detainees’ (3 June 1994) UN Doc. E/CN.4/Sub.2/1994/24 [13] (Draft Body Of Principles On The Right To A Fair Trial And A Remedy).

independent and regularly constituted court'.⁴¹⁸ The Commission thus not only viewed regular constitution as a non-derogable requirement firmly enshrined in IHL, but also as a requirement that is distinct from (and not equal to) independence and impartiality. This interpretation finds further support in the *Simić* case, in which an ICTY Trial Chamber elaborated on the content of the fair trial rights in CA 3 and held that:

These rights [to a fair trial] are encompassed in Common Article 3 of the Geneva Conventions of 1949, paragraph (d), which prohibits the passing of sentences without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees, recognizable as indispensable by civilized peoples [...]. Such rights include [...] the right to a fair and public hearing within a reasonable time by an *independent and impartial tribunal established by law*.⁴¹⁹

In conclusion, there is considerable authority to suggest that the term 'regular constitution' under CA 3 and customary law should be equated with the requirement that a court be 'established by law'. If and how armed groups can meet this requirement will be discussed in section 3.2.5. below.

3.2.2. Additional Protocol II

The previous section has argued that the term 'regularly constituted' in CA 3 is best understood as an alternative formulation of the 'established by law' criterion found in human rights law, or, alternatively, incorporated into CA 3 by reference to customary human rights law. This section will analyse to what extent this conclusion is altered by AP II. It was already explained above that AP II is meant to develop and supplement CA 3. Nevertheless, the threshold of its application is higher as it requires armed groups

⁴¹⁸ IACommHR, Report on Terrorism and Human Rights, Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002 [258].

⁴¹⁹ *Simić et al.* (Trial Judgment) IT-95-9-T (17 October 2003) [678] (emphasis added).

to ‘exercise control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.⁴²⁰ While CA 3 is silent on the specific judicial guarantees required from a ‘regularly constituted court’, Article 6 AP II introduces a list of detailed provisions on penal prosecutions that will be discussed in more detail in **Chapter 4**. Paragraph 1 clarifies that Article 6 applies to the prosecution and punishment of criminal offences related to the armed conflict. Paragraph 2 then states that:

‘No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.’⁴²¹

Article 6(2) thus replaces the requirement of a court to be ‘regularly constituted’ with the requirement of ‘essential guarantees of independence and impartiality’. This represents a shift away from how a court is constituted towards its capacity to actually conduct a fair trial.⁴²² Therefore, as Somer rightly points out, Article 6 AP II does in fact nothing to ‘develop or supplement’ CA 3 but rather loosens its provisions in clear contradiction to AP II’s disclaimer regarding the unmodified application of CA 3.⁴²³

This leads to the paradoxical situation where CA 3, which is usually seen as the absolute minimum standard, actually imposes stricter conditions than AP II.⁴²⁴ Yet, as pointed out above, AP II was meant to offer greater protection than CA 3.⁴²⁵ One way

⁴²⁰ Art 1(1) AP II.

⁴²¹ Art 6(2) AP II.

⁴²² ICRC 2020 GC III Commentary [714].

⁴²³ Somer (n 39) 670-71.

⁴²⁴ Recall the description of CA 3 as a ‘minimum yardstick’ of humanitarian protection by the ICJ (n 303).

⁴²⁵ Already the preamble of AP II, after invoking the humanitarian principles of CA 3, emphasizes the ‘need to ensure a better protection for the victims of those armed conflicts’.

around this contradiction would be to argue that Article 6 AP II was not meant to establish a new, independent standard but merely to clarify the definition of a ‘regularly constituted court’ in CA 3.⁴²⁶ However, AP II cannot simply be regarded as an interpretative device for CA 3 due to their different fields of operation.⁴²⁷ The 1977 Diplomatic Conference made the deliberate choice to make the scope of protection dependent on the intensity of the conflict and the level of organisation of the armed group involved.⁴²⁸ In addition, AP II does not cover certain types of NIACs that are governed by CA 3, for example conflicts between two armed groups.⁴²⁹

Nevertheless, it could be argued that the parties to AP II wanted to clarify the definition of ‘regularly constituted’ irrespective of the type of NIAC. As such, the Protocol could be seen as a subsequent agreement under Article 31(3)(a) of the VCLT and its customary law equivalent. Indeed, some provisions of the 1949 Conventions, including CA 3, have been interpreted through the Protocols in the past⁴³⁰ and this was also the approach taken by the Stockholm District Court in *Sakhanh*.⁴³¹ However, one must bear in mind that while the 1949 Conventions enjoy universal adherence, a number of States have not yet signed or ratified AP II.⁴³² An authoritative interpretation established by subsequent agreement normally requires the agreement of all State

⁴²⁶ Dörmann (n 386) 412.

⁴²⁷ Dinstein (n 2) 81 [499].

⁴²⁸ ICRC 1987 AP II Commentary [4457], noting that that the different field of application of the Protocol ‘has the advantage of furnishing a guarantee against any reduction of the level of protection long since provided by common Article 3’.

⁴²⁹ According to art 1(1) AP II, a conflict covered by the scope of the Protocol must take place in the territory of a High Contracting Party between its armed forces and an organized armed group.

⁴³⁰ See e.g. IACCommHR, Third Report on the human rights situation in Colombia, OEA/Ser.L/V/II.102 (26 February 1999), Chapter IV [44]; Zegveld (n 225) 77; Knut Dörmann, ‘The Legal Situation of “Unlawful/Unprivileged Combatants”’, (2003) 85 IRRC 45, 50. See also Opinion of Justice Stevens in *Hamdan* (n 409) 70.

⁴³¹ *Sakhanh* (n 46) [26].

⁴³² ICRC 2020 GC III Commentary [388].

Parties to the original treaty.⁴³³ Accordingly, the Protocol cannot constitute such agreement.⁴³⁴ Alternatively, the Protocol could be considered as subsequent practice under Article 31(3)(b) of the VCLT. While the dividing line to a ‘subsequent agreement’ is often blurry, the ILC has noted that subsequent practice does not necessarily require the practice of all States to the original treaty, as long as the inactive States accept that practice.⁴³⁵ Consequently, two questions arise: First, whether Article 6 AP II established an ‘agreement’ in relation to the interpretation of CA 3. Second, if that is the case, whether those Parties to the 1949 Conventions that did not accede to AP II have accepted this practice.

In order to answer the first question, namely whether AP II established an agreement on behalf of the Parties to interpret CA 3, it is necessary to consult the *travaux préparatoires* of Article 6. According to the ICRC commentary on the Draft Additional Protocols, the words ‘regularly constituted’ were deliberately removed because ‘some experts considered that it was not very likely that such a court could be regularly constituted within the meaning of the national legislation if it were set up by the insurgent party’.⁴³⁶ This, however, does not reveal anything about whether this change was meant to clarify the interpretation of CA 3, modify its conditions or introduce a separate standard that would apply only to groups falling under the higher threshold of the Protocol.

⁴³³ See art 31(2)(a) VCLT.

⁴³⁴ Jean-Marie Henckaerts and Elvina Pothelet, ‘The interpretation of IHL treaties: Subsequent practice and other salient issues’ in Heike Krieger and Jonas Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law* (Elgar 2021) 158, fn 47.

⁴³⁵ ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Report of the ILC, Seventieth session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, conclusion 10(2); Dörr (n 395) 599.

⁴³⁶ Commentary to the Draft Additional Protocols (n 332) 142.

During the diplomatic negotiations, an ICRC representative noted that the penal provisions enshrined in Draft Articles 9 and 10 (later merged into Article 6) should be read in light of Article 1, which stipulates that the Protocol applies to organized armed groups under responsible command, which ‘exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.⁴³⁷ She went on to clarify that:

It was therefore no longer hypothetical to admit that the insurgent forces would be in a position to apply articles 9 and 10 if they intended to try those who were in their power. The insurgent party could for that purpose make use of the courts existing within the part of the territory under its control which could set in motion or set up people's courts.⁴³⁸

In the following debate, no delegation expressed any discomfort with that statement. This could be understood to mean that the delegates made a deliberate choice to introduce a new and independent standard that would allow insurgents that have met the higher organisational threshold of AP II to establish their own courts by adapting the requirements of a regularly constituted court. Such interpretation is supported by the fact that the delegates retained the phrase ‘regularly constituted court’ in Article 75(4) of AP I, which was negotiated in parallel.

Another ICRC delegate, however, noted that:

[A]rticle 10, paragraph 1 which dealt with penal prosecutions, *reaffirmed*, in the context of draft Protocol II, *a legal rule already contained in Article 3 common to the Geneva Conventions* of 1949, namely, the rule that no sentence should be passed ... without previous judgment pronounced by a regularly constituted court affording all

⁴³⁷ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 20 February 1974 to 10 June 1977, Vol VIII, CDDH/1/SR.33 [24].

⁴³⁸ *ibid.*

the judicial guarantees of independence and impartiality which were generally recognized as essential.⁴³⁹

This statement, which was equally uncontested, rather points towards Article 6 being a mere clarification of CA 3. Ultimately, little attention was given to the chapeau of Article 6(2), and most delegations were only concerned with the specific judicial guarantees listed in the paragraph. The *travaux préparatoires* of AP II are, therefore, inconclusive at best. Accordingly, it is difficult to reach the conclusion that the adoption of Article 6 AP II established an agreement to clarify or modify the content of CA 3.

Even if such agreement were to be assumed, the practice of the State Parties to AP II alone would not be sufficient to amount to an authoritative interpretation or modification of CA 3. As pointed out above, there must be at least ‘good evidence’ that the other Parties to the 1949 Geneva Conventions which have not acceded to AP II accept such an interpretation.⁴⁴⁰ However, not only is it difficult to find such evidence, there are also examples of State practice clearly contradicting such an interpretation, for example the *Hamdan* decision referred to above.⁴⁴¹ Therefore, the Protocol may only be taken into account as ‘other subsequent practice’ under Article 32 VCLT, which, on its own, will not be sufficient to establish an authoritative interpretation or modification of CA 3.⁴⁴²

⁴³⁹ *ibid*, CDDH/1/SR.34 [3] (emphasis added).

⁴⁴⁰ Dörr (n 395) 601.

⁴⁴¹ The 1990 Turku Declaration of Minimum Humanitarian Standards – although an expert document that does not necessarily reflect state practice – also repeats the requirement of a regularly constituted court. See Declaration of Minimum Humanitarian Standards (n 441) art. 9.

⁴⁴² Oliver Dörr, ‘Article 32’, in Dörr and Schmalenbach (n 395) 627.

Under these circumstances, the default position must be that CA 3 applies unmodified, as specified in AP II's Preamble. Consequently, the requirement of regular constitution, in the sense that courts must be 'established by law', would equally apply in conflicts governed by AP II.⁴⁴³

3.2.3. *The Rome Statute*

In order to clarify the meaning of a 'regularly constituted court', reference is sometimes made to Article 8(2)(c)(iv) of the Rome Statute of the ICC, which incorporates the exact same language of CA 3 by criminalising 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'.⁴⁴⁴ The Elements of Crimes, which are meant to assist the Court in the interpretation and application of the Statute, specify that the phrase 'regularly constituted' is to be interpreted as 'affording the essential guarantees of independence and impartiality' or 'other judicial guarantees generally recognized as indispensable under international law'.⁴⁴⁵

Some commentators have thus referred to the Elements of Crimes as evidence that 'regular constitution' and 'affording essential guarantees of independence and impartiality' are, in fact, the same thing.⁴⁴⁶ This was also the position taken by the

⁴⁴³ See also Provost (n 40) 215-216, noting that 'this requirement flowing from Common Article 3 does not disappear if and when the conflict reaches the threshold of Protocol II. Common Article 3 also governs this narrower class of non-international armed conflicts, and the very notion of a court speaks to some form of regular constitution'.

⁴⁴⁴ Art. 8(2)(c)(iv) ICCSt (emphasis added).

⁴⁴⁵ 'Elements of Crimes', Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court (New York, 3-10 September 2002), ICC-ASP/1/3/Add.1 (Vol II) 147, art 8(2)(c)(iv), Element 4.

⁴⁴⁶ See e.g. Dörmann (n 386) 413.

ICRC during the negotiations of the Rome Statute⁴⁴⁷, even though its own customary IHL study later contradicted this approach.⁴⁴⁸ However, one has to bear in mind that the Rome Statute does not impose obligations on armed groups as a collective (in contrast to CA 3 and AP II) but only on individual members, be they fighters or commanders.⁴⁴⁹ Although war crimes are serious violations of IHL that carry individual criminal responsibility, this does not mean that the scope of these crimes is exactly the same as that of their underlying rule of IHL.⁴⁵⁰ Using the Rome Statute to interpret CA 3 is, therefore, methodologically problematic. Indeed, as **Chapter 5** will demonstrate in more detail, it seems that the drafters of the Elements of Crime made a conscious decision to set the bar for individual criminal responsibility under Article 8(2)(c)(iv) higher than for an ordinary violation of CA 3.⁴⁵¹ For the moment, it suffices to say that the Pre-Trial Chamber in the Confirmation of Charges Decision in the *Al-Hassan* case – the only judicial decision applying Article 8(2)(c)(iv) so far – concluded

⁴⁴⁷ The ICRC paper argued that ‘it may be concluded that Art. 6 (2) AP II *rather explains* common Art. 3 (1) (d) GC *than extends* it’. It then goes on to note that under CA3 ‘special courts set up on an ad hoc basis by rebel groups are prohibited’ and that this problem of courts set up by rebel groups led to a change of wording in the drafting of Article 6 AP II, ‘which was thought to *clarify* the general rule of common Art. 3 GC’. Finally, the paper argues that ‘one may conclude that independence and impartiality are the main features of a “regularly constituted court”’. The use of the term ‘clarifying’, however, is misleading, as the ICRC at the same time seems to acknowledge that CA 3 in its original meaning would have prohibited armed groups to establish ad-hoc courts. See ICC PrepComm, ‘Note verbale dated 7 July 1999 from the Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa to the United Nations and the Permanent Observer Mission of Switzerland to the United Nations addressed to the Secretary-General’, Annex II: Paper prepared by the International Committee of the Red Cross on article 8, paragraph 2 (c), of the Statute of the International Criminal Court (14 July 1999) UN Doc PCNICC/1999/WGEC/INF.2, 91-92.

⁴⁴⁸ See ICRC Customary IHL Study, Rule 100, defining regularly constituted as ‘established and organized in accordance with the laws and procedures already in force in a country’.

⁴⁴⁹ See Marko Milanović, ‘Is the Rome Statute Binding on Individuals? (And Why We Should Care)’ (2011) 9 JICJ 25. To recall, the idea to include criminal responsibility of legal persons was indeed discussed during the drafting of the Rome Statute but, ultimately, ultimately rejected.

⁴⁵⁰ O’Keefe (n 215) 50 and 136; Sivakumaran (n 14) 106.

⁴⁵¹ This understanding is corroborated by the intense debate about whether the violation of a single fair-trial guarantee would automatically amount to a war crime, see Dörmann (n 386) 409. See also more generally **Chapter 5**.

that the drafters of the Elements of Crime deliberately departed from CA 3 by not including regular constitution as a separate requirement in addition to the requirements of independence and impartiality.⁴⁵² Accordingly, the suggestion that the Elements of Crimes – which are non-binding and subsidiary to the Statute⁴⁵³ – support an equation of ‘established by law’ with ‘independent and impartial’ in CA 3 should be rejected.

3.2.4. Customary Law

The previous sections have argued that neither Article 6 AP II nor Article 8(2)(c)(iv) of the Rome Statute can be understood as having removed the requirement of regular constitution from CA 3 or altered its interpretation as ‘established by law’. Indeed, while adaptive interpretations that aim to reconcile outdated text through subsequent practice are doctrinally legitimate⁴⁵⁴, they require the consent of all or at least a significant majority of the original State Parties.⁴⁵⁵ However, it might be possible that general practice and *opinio juris* have created a rule of customary IHL that supersedes or at least modifies the original treaty-based rule, in this case CA 3. An adaptive interpretation or modification of the term ‘regularly constituted’ could thus be brought about through the development of new general custom as *lex posterior*. However, the requirements for treaty modification by subsequent customary law are extremely strict in the sense that practice must establish not only the Parties’ agreement concerning the

⁴⁵² *Al-Hassan* (n 13) [377]. See also **Chapter 5**, section 5.1.2.

⁴⁵³ See art 9(3) ICCSt and Dörmann (n 386) 10.

⁴⁵⁴ It needs to be mentioned that not every State Party must individually engage in subsequent practice for such practice to authoritatively establish a certain interpretation of a treaty. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction. See ILC, Draft conclusions on subsequent agreements and subsequent practice (n 435) conclusion 10(2).

⁴⁵⁵ Rebecca Crootoof, ‘Change Without Consent: How Customary International Law Modifies Treaties’ (2016) *YaleJIntL* 237, 252.

substance of the new customary rule, but also their intention to modify the treaty.⁴⁵⁶ Without this ‘double consent’ a new customary rule may have formed but the treaty rule will prevail as *lex specialis* among the parties.⁴⁵⁷

It was already mentioned that the ICRC’s study has identified a rule of customary IHL that prescribes that ‘[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees’.⁴⁵⁸ This rule mentions neither the requirements of independence and impartiality nor the ‘regular constitution’ criterion explicitly. Yet, all three of these requirements could possibly be enshrined in the ‘essential judicial guarantees’ limb. In addition, the study does not mention whether this rule is meant to supersede CA 3 or simply applies alongside CA 3. Most importantly, the study does not argue that ‘regularly constituted’ should be equated with ‘independent and impartial’. To the contrary, the explanatory text to the rule identified by the ICRC explicitly notes that both CA 3 and Article 75(4) AP I require a regularly constituted court and then goes on to define ‘regularly constituted’ as ‘established and organized in accordance with the laws and procedures already in force in a country’.⁴⁵⁹

Moreover, many instances of State practice relied upon by the ICRC for the identification of this rule actually do repeat the ‘regularly constituted’ formula enshrined in CA 3.⁴⁶⁰ In addition, various instruments invoked by the study are in fact human rights treaties (or domestic human rights law provisions) which replicate the

⁴⁵⁶ Irina Buga, *Modification of Treaties by Subsequent Practice* (OUP 2018) 231.

⁴⁵⁷ *ibid* 219.

⁴⁵⁸ ICRC Customary IHL Study, Rule 100, 352.

⁴⁵⁹ *ibid*, 355.

⁴⁶⁰ ICRC Customary IHL Study, vol II, practice relating to Rule 100 [3038]-[3111].

language of Article 14(1) ICCPR, namely that a court must be ‘established by law’.⁴⁶¹ As a result, it is submitted that the customary law rule identified by the ICRC study simply reflects the lowest common denominator – namely that any trial must afford certain essential judicial guarantees – without specifying what these guarantees are. In any case, the study does not contain any indication that this customary law rule has superseded the requirement of a ‘regularly constituted court’ in CA 3. To the contrary, given the authoritative declaration of CA 3 – which explicitly requires a regularly constituted court – as customary law⁴⁶² (and potentially *jus cogens*⁴⁶³), any related State practice would need to be sufficiently clear. In conclusion, there is little evidence to suggest that customary IHL has done away with the requirement that courts be regularly constituted (that is, established by law) or that such a rule has superseded the treaty-based requirements of CA3.

3.2.5. *Armed Group Courts ‘Established by Law’?*

Having concluded that CA 3 indeed incorporates the ‘established by law’ criterion, either directly through the concept of a ‘regularly constituted court’, or indirectly by reference to customary human rights, the pertinent question is whether armed groups are capable of complying with this requirement. It has been argued that if courts could only be ‘regularly constituted’ according to State law, all armed group courts would be

⁴⁶¹ *ibid* [3038]-[3111].

⁴⁶² See *Military and Paramilitary Activities in and against Nicaragua* (n 135) [218]-[219]; *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [98]; *Naletilić and Martinović* (Trial Judgment) IT-98-34-T (31 March 2003) [228]; and *Akayesu*, Trial Judgment (n 109) [608]-[609].

⁴⁶³ The ‘basic rules of international humanitarian law’ are generally accepted as peremptory norms of international law, see ILC, ‘Peremptory norms of general international law (*jus cogens*)’, Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN Doc A/74/10, 147. CA 3, described by the ICJ as ‘minimum yardstick of humanitarian protection’, certainly qualifies as a ‘basic rule’. See also *Legality of the Threat or Use of Nuclear Weapons* (n 158) [73].

inherently illegal.⁴⁶⁴ However, the rationale behind the requirement that sentences are passed by a regularly constituted court is not the safeguarding of State sovereignty or the judicial monopoly of the State but rather the humanitarian protection of those tried during armed conflict.⁴⁶⁵ Indeed, even the Stockholm District Court in *Sakhanh* noted that ‘the principle of sovereignty does not prevent a non-State actor from establishing a court’.⁴⁶⁶

In this regard, it is often pointed out to that even under a State-centric definition of ‘established by law’ armed groups are not prevented from taking over pre-existing court structures established under domestic law already in force in territories under their control.⁴⁶⁷ However, several problems arise with this proposition. First, if only State law can supply the basis for a court being operated or controlled by armed groups, governments would be free to deprive these courts of their legal basis by simply amending the law that allocates them jurisdiction. Following the outbreak of hostilities and the proclamation of the LPR and DPR in Eastern Ukraine, for example, the Ukrainian government passed a law that transferred the jurisdiction of courts operating in those areas to courts in Kiev and other government-controlled regions.⁴⁶⁸ This effectively led to a judicial vacuum in the affected areas, which was eventually filled by the establishment of a separate court system by the LPR and DPR authorities.⁴⁶⁹ While it might be argued that such actions violate a State’s positive obligation to provide access to justice in insurgent-held areas, such positive obligations remain

⁴⁶⁴ La Rosa and Wuerzner (n 39) 340.

⁴⁶⁵ See also Provost (n 40) 199.

⁴⁶⁶ *Sakhanh* (n 46) [30].

⁴⁶⁷ 2020 ICRC GC III Commentary [728]; Somer (n 39) 657.

⁴⁶⁸ See OSCE Special Monitoring Mission to Ukraine (n 10) 10.

⁴⁶⁹ *ibid* 4.

limited and will rarely prevent a government from depriving courts in rebel-held areas from their legal and jurisdictional basis.⁴⁷⁰

Second, if armed groups take over pre-existing courts and interfere with their operation, for example by appointing their own judges or altering their jurisdictional competencies,⁴⁷¹ then such courts will cease to be ‘established by [State] law’.⁴⁷² The proper composition of a court according to the law is as much part of the ‘established by law’ criterion as its specific jurisdictional power.⁴⁷³ If, however, an armed group allows a pre-existing court to function as usual, in line with pre-existing State law, it would be wrong to characterise it as an ‘armed group court’. The institution effectively remains an organ of the State and its actions remain attributable to that State, even if it operates in rebel-held territory.⁴⁷⁴ As a result, none of the problems discussed in this thesis effectively arise. Indeed, in many armed conflicts, State courts remained operative alongside parallel judicial institutions established by armed groups. A prime example are the Crown Courts in Ireland, which continued to operate in parallel to the IRA’s Dáil Courts.⁴⁷⁵

⁴⁷⁰ The ECtHR has so far adopted a rather lenient approach to such positive obligations in relation to the access to justice in insurgent territories, see e.g. *Tsezar and Others v. Ukraine*, App nos 73590/14, 73593/14, 73820/14, 4635/15, 5200/15, 5206/15 and 7289/15 (ECtHR, 13 February 2018) and *Khlebiuk v Ukraine*, App no. 2945/16 (ECtHR, 25 July 2017).

⁴⁷¹ See generally Zachariah Mampilly and Megan A. Steward, ‘A Typology of Rebel Political Institutional Arrangements’ (2021) 65 *Journal of Conflict Resolution* 15, 20.

⁴⁷² The MLC, for example, appointed its own magistrates to the pre-existing DRC courts, selecting only those favourable to the MLC and who followed instructions from its leader. See *Bemba*, Trial Judgment (n 52) [402].

⁴⁷³ *Ástráðsson v Iceland* (n 415) [213]; *Bandajevsky v Belarus* (28 March 2006) UN Doc CCPR/C/86/D/1100/2002 [10.10].

⁴⁷⁴ See art 4 ARSIWA.

⁴⁷⁵ See Frank Ledwige, *Rebel Law: Insurgents, Courts and Justice in Modern Conflict* (Hurst 2017) 51-52. However, the Crown Courts often struggled to enforce their judgments and the IRA pressured civilians to resort to the Dáil Courts instead. See also Zachariah Mampilly, ‘Insurgent Governance in the Democratic Republic of the Congo’, in Krieger (n 56) 65, describing how groups in the DRC preferred to retain the pre-existing administrative and judicial infrastructure.

To establish an ‘armed group court’ properly so called, a legal basis must therefore be found elsewhere, beyond State law. In this regard, three alternative legal sources exist: (domestic) customary law, international law itself, and, finally, the ‘laws’ of the armed group. These sources will be assessed in turn.

As a first alternative, it is sometimes suggested that armed groups may rely on customary or religious courts, operating under local customary or religious law. In South Sudan, for example, customary courts have been hailed as providing a ‘resilient form of civil authority capable of dealing with everyday criminality’, especially in SPLA/M held areas.⁴⁷⁶ The Taliban in Afghanistan, on the other hand, established a very effective (but also brutal) system of courts based on Islamic law (*shari’a*) to replace both pre-existing customary courts and the State-operated judicial system.⁴⁷⁷ However, at least under human rights law, the jurisdiction of religious and customary courts should be limited to minor civil and criminal matters and may not be used to try serious criminal offences.⁴⁷⁸ In addition, the HRC has pointed out that judgments of such courts must be reviewable by regular courts in light of the guarantees set out in the ICCPR.⁴⁷⁹ While customary courts may therefore be a permissible and useful tool to provide dispute resolution services and maintain basic public order in armed group territories, it is doubtful whether they can serve as a proper forum for the prosecution of serious domestic offences or war crimes.

⁴⁷⁶ Rachel Ibrek, Hannah Logan and Naomi Pendle, ‘Negotiating Justice: Courts as Local Civil Authority During the Conflict in South Sudan’, Research Paper, LSE Justice and Security Research Programme, 2017, 1. See also Jan Hessbruegge, ‘Customary Law and Authority in a State under Construction: The Case of South Sudan’ (2012) 5 AJLS 295, 302.

⁴⁷⁷ See Jackson and Weigand (n 33).

⁴⁷⁸ HRC, General Comment 32 (n 401) [30].

⁴⁷⁹ *ibid* [19]. The HRC uses the language of ‘State courts’, presumably in order to highlight the distinction to the religious or customary courts. This should not necessarily be seen as a dismissal of the possibility that ‘regularly constituted’ armed group courts could carry out such review function.

Another potential legal basis for an armed group court to comply with the ‘established by law’ criterion is international law itself. Whether international law can provide a concrete legal basis for the establishment of a criminal court or tribunal was subject to a lengthy discussion in the ICTY’s very first case. In *Tadić*, the defendant challenged the Tribunal’s competency on the basis that it was not ‘established by law’ but by a resolution of the UNSC.⁴⁸⁰ The ICTY Appeals Chamber, however, concluded that while the ‘established by law’ criterion is a general principle of law applicable to the ‘administration of criminal justice in a municipal setting’, in an international setting it should be equated to ‘established according to the rule of law’.⁴⁸¹ In this context, the Appeals Chamber defined ‘rule of law’ as referring to the provision of all the necessary judicial guarantees according to international standards.⁴⁸² As pointed out by Alvarez, this interpretation should be viewed critically as it renders the ‘established by law’ criterion completely redundant.⁴⁸³ A more coherent approach might have been to simply adopt a less strict approach as to the nature of the required ‘legislative power’.⁴⁸⁴ Applying this approach to armed groups, however, it is very difficult to imagine a situation where an international treaty or UNSC Resolution would actually provide the legal basis for a court operated by an armed group in the sense that it determines its jurisdictional powers and composition. International law is thus unlikely to serve as a legal basis of armed group courts in practice.

⁴⁸⁰ *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [26].

⁴⁸¹ *ibid* [45].

⁴⁸² *ibid*.

⁴⁸³ José E. Alvarez, ‘Nuremberg Revisited: The Tadic Case’ (1996) 7 EJIL 247, 258. See also Somer (n 39) 666.

⁴⁸⁴ Indeed, the legislative powers of the UNSC, which created the ICTY, seem to be more accepted today than in the immediate aftermath of the cold war. See e.g. Stefan Talmon, ‘The Security Council as World Legislature’ (2005) 99 AJIL 75.

Finally, it has been argued that ‘laws’ passed by the armed group itself could serve as a legal basis for their courts and render them ‘established by law’. In its most recent commentary on CA 3, for example, the ICRC argues that armed group courts could be considered as regularly constituted as long as they are constituted in accordance with the ‘laws’ of the armed group.⁴⁸⁵ Although the idea of formally treating legislation passed by rebel groups as ‘law’ may seem far-reaching at first, the idea was discussed during the negotiations of AP II. Nigeria argued that it was ‘only logical that if rebels could organize themselves sufficiently to observe the Protocols, and thereby enjoy their protection, they could also organize a recognizable body of law’.⁴⁸⁶ Similar positions were expressed by Hungary⁴⁸⁷ and the Soviet Union⁴⁸⁸. The Soviet delegate noted that ‘the armed conflicts in question were those in which the anti-government forces had their own machinery, authority or administration *and could therefore make their own laws*’.⁴⁸⁹

This understanding is also reflected in contemporary State practice. The UK Manual on the Law of Armed Conflict, for example, recognizes that the term ‘law’ in Article 6 AP II is ‘wide enough to cover “laws” passed by an insurgent authority’.⁴⁹⁰ Moreover, the ICTY took the internal laws and regulations of armed groups into account in determining the legal capacity of a commander to take certain measures

⁴⁸⁵ 2020 ICRC GC III Commentary [728]. See also Sivakumaran (n 30) 499-500.

⁴⁸⁶ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 20 February 1974 to 10 June 1977, vol VIII, CDDH/I/SR.34 [20].

⁴⁸⁷ *ibid*, vol XI, CDDH/II/SR.40 [88].

⁴⁸⁸ *ibid* [83].

⁴⁸⁹ *ibid* (emphasis added).

⁴⁹⁰ United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) 403, [15.42] fn 94.

under the doctrine of command responsibility.⁴⁹¹ This approach is further supported by scholars such as Bothe, Partsch and Solf, who argue that ‘there 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’.⁴⁹² Accordingly, there is some authority to support the position that IHL accepts ‘laws’ enacted by armed groups for the purpose of ‘regular constitution’.

Contemporary IHRL case law also provides support for the position that certain non-State or unrecognized entities are, at least in principle, capable of creating a court or tribunal that is ‘established by law’. In *Cyprus v Turkey*, the ECtHR held that ‘notwithstanding the illegality of the TRNC under international law’ the TRNC courts can be considered as ‘established by law’ for the purpose of adjudicating on civil rights and obligations.⁴⁹³ Later, in *Foka v Turkey*, the Court found that ‘[i]t would not be consistent [...] if the adoption by the authorities of the “TRNC” of civil, administrative or *criminal law* measures, or their application or enforcement within that territory, were to be denied any validity or regarded as having no “lawful” basis in terms of the Convention’.⁴⁹⁴ The Court continued by saying that when an act of the TRNC authorities is in compliance with laws in force within the territory of northern Cyprus – in this case the TRNC’s Criminal Procedure Law – those acts ‘should in principle be regarded as having a legal basis in domestic law for the purposes of the Convention’.⁴⁹⁵

A few years later, in *Ilaşcu v Moldova and Russia*, the ECtHR noted that:

⁴⁹¹ *Hadžihasanović* (Trial Judgment) IT-01-47-A (15 March 2006) [2056]-[2058]; *Blaškić* (Trial Judgment) IT-95-14-T (3 March 2000) [488]. See also **Chapter 6**, section 6.3.2.

⁴⁹² Bothe, Partsch and Solf (n 236) 746.

⁴⁹³ *Cyprus v Turkey*, App no 25781/94 (ECtHR, 10 May 2001) [231] and [236]-[237]. See also *Foka v Turkey*, App no 28940/95 (ECtHR, 24 June 2008) [83]-[84].

⁴⁹⁴ *Foka v Turkey* (n 493) [83].

⁴⁹⁵ *ibid.*

In certain circumstances a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal “established by law” provided that it forms part of a judicial system operating on a “constitutional and legal basis” reflecting a judicial tradition compatible to the Convention, in order to enable individuals to enjoy the Convention guarantees.⁴⁹⁶

Here, the term ‘operating on a constitutional basis’ was interpreted as a judicial system that is based on a legal system that incorporates the ECHR’s values.⁴⁹⁷ In *Mozier v Moldova and Russia*, the ECtHR further specified that in assessing whether courts of an unrecognised entity (the MRT in Moldova) form ‘part of a judicial system operating on a constitutional and legal basis [...] compatible with the Convention’, the Court will attach weight to ‘whether they can be regarded as independent and impartial *and are operating on the basis of the rule of law*’.⁴⁹⁸

Unfortunately, since the Court has previously described the requirement of a court to be established by law as a ‘fundamental expression of the rule of law’, the entire definition becomes rather circular.⁴⁹⁹ This problematic circularity notwithstanding, the ECtHR’s approach to the ‘established by law’ criterion indicates a certain amount of flexibility by placing the emphasis on the actual judicial guarantees provided by the courts in question rather than the source of their legal basis. In any case, the Court seems to accept that non-State actors are in principle capable of operating courts that are established by law. What seems irrelevant, on the other hand, is the question of whether such legal basis is in compliance with the constitutional system of the *de-jure* sovereign of the territory in question. Indeed, neither IHL nor

⁴⁹⁶ *Ilașcu v Moldova and Russia* (n 168) [460].

⁴⁹⁷ *Mozier v Moldova and Russia*, App no 11138/10 (ECtHR, 23 February 2016) (Grand Chamber) [147].

⁴⁹⁸ *Ibid* [144] (emphasis added).

⁴⁹⁹ *Jorgic v Germany* (n 388) [64]. See Alvarez (n 483) 258, arguing in the context of the ICTY that the equation of ‘established by law’ with ‘according to the rule of law’ would render the criterion completely redundant.

IHRL seem to be concerned with the protection of any particular domestic constitutional order in that regard.⁵⁰⁰ Moreover, if IHRL, which is generally perceived as the more State-centric regime⁵⁰¹, seems to accommodate ‘laws’ enacted by a non-State actor, there is no reason why IHL cannot.

It has to be noted that the TRNC and MRT cases are special in the sense that the acts of these two non-State entities had been attributed to States, namely Turkey and Russia, respectively. The precedential value of these decisions should, therefore, be treated with caution. However, international law seems to accept legal acts by insurgent as ‘law’ even in situations where they cannot be attributed to a State. A prime example is the decisions of the Franco-Italian Conciliation Commission. The Commission had been set up through the 1947 Treaty of Peace between Italy and the victorious powers of World War II and was endowed with jurisdiction to hear cases arising out of the conduct of the so-called ‘Salo Republic’ in 1943.⁵⁰² The ‘Salo Republic’ was established by Nazi Germany as a rival Government to the Italian authorities and exercised powers through its own administrative and judicial organs.⁵⁰³ The Conciliation Commission had to decide whether post-war, the laws enacted by the Salo Republic could be treated as ‘laws in force in Italy’.⁵⁰⁴ It held that the ‘Salo Republic’ was not an agent of the German Reich (and its action therefore not

⁵⁰⁰ See e.g. *Fals Borda et al v Colombia*, where the HRC held that the fact that a military tribunal had been found to be unconstitutional was not sufficient to violate Article 14 of the ICCPR as ‘the Committee does not deal with questions of constitutionality, but with the question whether a law is in conformity with the Covenant’. *Orlanda Fals Borda et al. v Colombia*, Comm no 46/1979 (27 July 1982) UN Doc CCPR/C/OP/1 [13.3]. This decision, however, has faced some criticism, see e.g. Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights* (OUP 2013) 454.

⁵⁰¹ See **Chapter 2**, section 2.2.2.

⁵⁰² Treaty of Peace with Italy (signed 10 February 1947, entry into force 15 September 1947) 49 UNTS 3, art 83.

⁵⁰³ Fortin (n 78) 382.

⁵⁰⁴ *ibid.*

attributable to Germany) but a local insurgent *de-facto* Government and, relying on the principle of effectiveness, that its laws qualified as ‘legislation in force in Italy’.⁵⁰⁵

In support of its decision, the Commission cited Guggenheim who stated that: ‘[t]he seizure of power by belligerents and insurgents in a part of the territory of the State conflicts with State positive law, entails the creation of a new provisional legal order’.⁵⁰⁶ The Commission adopted the same position in all three cases.⁵⁰⁷ Indeed, the fact that an effective legal order might have been established in parts of a country in violation of the pre-existing constitutional order should not alter its interpretation as ‘law in force’ from the perspective of international law.⁵⁰⁸ This is coherent with the established practice of treating domestic law as an objective matter of ‘fact’ in the international legal realm.⁵⁰⁹

Nevertheless, there remains a practical question of whether these ‘laws’ need to be of a certain quality or nature. For example, whether it is sufficient for a court to be established according to some provision in a code of conduct issued by the armed group, or if the ‘law’ needs to have been passed by a proper legislative body. In his influential commentary on the ICCPR, Nowak takes a strict approach towards the term ‘law’ under Article 14 by requiring a formal parliamentary statute or equivalent unwritten norm of common law, which must be accessible to all persons subject to it.⁵¹⁰ Indeed, the case law examples above all concerned well-established *de-facto* regimes

⁵⁰⁵ *Fubini Case*, Decision No. 201 (1959) 14 RIAA 420, 429-30.

⁵⁰⁶ Paul Guggenheim, *Traité de Droit International Public* (Librairie de l'Université, Georg & Cie. 1954) 203, cited in *Fubini* (n 505) 430.

⁵⁰⁷ *Fubini Case* (n 505) 429-30; *Baer Case*, Decision No. 199 (1959) 14 RIAA 402, 406; *Falco Case*, Decision No. 200 (1959) 14 RIAA 408, 417.

⁵⁰⁸ See e.g. Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010) 242.

⁵⁰⁹ See *Case concerning certain German interests in Polish Upper Silesia*, Judgment No. 7, 1926, P.C.I.J. Series A, No. 7, 19.

⁵¹⁰ Schabas/Nowak (n 388) 365.

that included their own legislative bodies. However, it could be argued that Nowak's interpretation is overly narrow and not always reflected in the relevant case law.⁵¹¹ It also has to be borne in mind that in contrast to the fair trial provisions in IHRL, the body of IHL is not normally concerned with the protection of democratic principles but only with providing a minimum of humanitarian protection.⁵¹² Even though IHL incorporates standards from IHRL, their purpose under the two regimes may differ.

It might thus be better to focus on the second limb of Nowak's criteria, namely the requirement that such 'laws' be accessible to all persons subject to it, in order to ensure the foreseeability of punishment. When evaluating the form or quality of a legal basis for courts established by armed groups, particular weight should thus be given to assessing whether it is sufficiently clear and properly made known to those individuals who can be brought before the court it regulates.⁵¹³ In that sense, it might be sufficient, for example, that provisions governing a court martial of an armed group are enshrined in a code of conduct that is issued to all fighters subject to its jurisdiction.

⁵¹¹ The ECtHR has shown a certain flexibility in this regard. In *Golder v. United Kingdom*, for example, the Court accepted prison rules issued by the Home Secretary as 'law' for the purpose of art 5 ECHR, see *Golder v. United Kingdom*, App no 4451/71 (ECtHR, 21 February 1975) [45]. In *Amuur v France*, the Court found that an administrative provision which served as the legal basis for detention violated the principle of legal certainty because it was not sufficiently precise but not because of its quality as an administrative provision as such. See *Amuur v France*, App no 19776/92 (ECtHR, 25 June 1996) paras. 50-54. This interpretation also finds support in the report on the administration of justice issued by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, which noted that in order to be 'established by law', a tribunal may 'be established by legislative, executive, or judicial power', see (n 417) [13].

⁵¹² According to the ECtHR, the object of the term 'established by law' in Article 6 ECHR '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 *Richert v Poland*, App no 54809/07 (ECtHR, 25 October 2011) [42]. See also Sassòli (n 396) 275, noting more generally on armed group legislation that '[l]'aspect démocratique du principe de légalité n'est pas en mesure de s'adresser à un groupe armé'.

⁵¹³ See Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Pedone 2013) 483-84, arguing in the context of detention that emphasis should be placed on the quality of the 'law' of armed groups rather than its form. See also Sassòli (n 396) 275, '[i]l doit donc être suffisant que la règle soit générale et abstraite, qu'elle émane d'une autorité compétente du point de vue du groupe armé, qu'elle ne régisse que des cas futurs et qu'elle soit rendue publique'.

In conclusion, it is challenging but not impossible for armed groups to operate courts that are ‘established by law’. Commentators that are hesitant in applying this criterion to armed groups often doubt that these groups would ever be able to comply with such a requirement.⁵¹⁴ They seem to fear this might lead to what Sivakumaran has called ‘sacrificing real protection for the sake of paper standards’.⁵¹⁵ However, dropping the ‘established by law’ criterion might equally water down the guarantees that are required from States during NIAC, or, if dropped only in relation to armed groups, erode the principle of belligerent equality.⁵¹⁶ This tension between keeping standards realistic and maintaining the equality between armed groups and State parties to a NIAC will be further discussed in **Chapter 4**. Ultimately, as argued by Wuerzner and La Rosa, maintaining an open debate on the ways in which armed groups should comply with the requirements of a fair trial should not imply that these guarantees must be relaxed or downgraded.⁵¹⁷ Therefore, a better view might be to accept that armed group courts must be established by law, but to adopt a certain flexibility in relation to what exactly constitutes ‘law’ for that purpose.⁵¹⁸

Provost arrives at a similar conclusion when he notes that the concept of a ‘regularly constituted court’ should be understood as the ‘need for deliberate consideration by an established authority to constitute a court of general jurisdiction that will apply “law” broadly defined’.⁵¹⁹ Indeed, this understanding would place the internal judicial

⁵¹⁴ See e.g. La Rosa and Wuerzner (n 39) 340.

⁵¹⁵ Sivakumaran (n 30) 503.

⁵¹⁶ See **Chapter 4**, section 4.4. See also Doswald-Beck (n 384) 494.

⁵¹⁷ Wuerzner and La Rosa (n 39) 340.

⁵¹⁸ See also Sivakumaran (n 14) 306.

⁵¹⁹ Provost (n 40) 202.

regulation of all the parties to a NIAC in an equal position and, in turn, arguably enhance respect for the rule of law.⁵²⁰

3.3. The Legal Capacity to Establish Courts as a ‘Weak Permission’

The previous sections have demonstrated that the requirement of a ‘regularly constituted’ court, or a court ‘established by law’ for that matter, does not explicitly or implicitly prohibit the establishment of courts and passing of penal sentences by armed groups, provided they comply with the necessary judicial guarantees that will be discussed in **Chapter 4**. However, is this absence of a prohibition alone sufficient to render armed group courts ‘legal’ under international law?

3.3.1. The ‘Lotus’ Principle and the Role of Permissions under IHL

Despite a century of debate over its contemporary relevance or scope of applicability,⁵²¹ the point of departure for answering this question must still be the *Lotus* principle, which postulates a residual freedom to act under international law, absent any prohibitive rule.⁵²² In other words, in order for conduct to be ‘legal’, only the absence of a prohibition is required, but no specific authorization. However, it is sometimes argued that this general presumption is reversed in the sub-field of IHL.⁵²³

⁵²⁰ See Ezequiel Heffes, ‘Can Armed Groups Legally Establish Their Own Courts?’ (*Humanitarian Law & Policy*, 8 March 2017) available at <<https://medium.com/law-and-policy/can-armed-groups-legally-establish-their-own-courts-c0842c4b9740>> accessed 20 December 2022.

⁵²¹ See e.g. *Legality of the Threat or Use of Nuclear Weapons* (n 158), Declaration of President Bedajoui [12].

⁵²² *Case of the ‘SS Lotus’ (France v. Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10; See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 [56].

⁵²³ These arguments are usually linked to the Martens Clause, see Sassòli (n 333) 54, 380-31, 489; Michael N. Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’ (2010) 50 *VaJIntL* 795, 800–801.

The validity of this argument depends on whether IHL constitutes a restrictive or permissive regime. This question about the nature of IHL has been subject to much scholarly debate⁵²⁴ and the answer is not necessarily black or white. Indeed, as Quintin's in-depth study demonstrates, IHL primarily functions as a restrictive regime but also contains some rare '*strong permissions*'.⁵²⁵ In legal theory, a strong permission is a permission that is based on the existence of a valid enabling rule instead of just the absence of a prohibition.⁵²⁶ It is often argued that where certain conduct is prohibited by another rule of international law, an IHL 'authorization' in the form of a strong permission is needed as the *lex specialis* to prevail over the prohibition found elsewhere.⁵²⁷ A strong permission is also required where another norm explicitly allows for certain restrictions as long as these restrictions have a legal basis elsewhere.⁵²⁸ For example, killing is prohibited in peace time and IHL removes that prohibition with regard to acts that cause death or injury to lawful targets when carried out in accordance with the applicable rules on the conduct of hostilities.⁵²⁹

The law of NIAC is peculiar in this regard because it is almost entirely devoid of strong permissions that could be seen as attaching a normative value to certain acts

⁵²⁴ See e.g. Sassòli (n 333) 486-487; Sivakumaran (n 14) 301.

⁵²⁵ Anne Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime* (Elgar 2020) 94, 339; Sassòli (n 333) 493. See also Katja Schöberl and Linus Mührel, 'Sunken Vessel or Blooming Flower? Lotus, Permissions and Restrictions within International Humanitarian Law' in Björnstjern Baade, Linus Mührel and Anton O. Petrov (eds), *International Humanitarian Law in Areas of Limited Statehood* (Nomos 2018) 79.

⁵²⁶ Quintin (n 525) 4-7.

⁵²⁷ Sassòli (n 333) 438 and 488.

⁵²⁸ Sassòli (n 333) 488 and 491-93. As pointed out by Sassòli, requiring an authorization under IHL to engage in certain conduct is 'theoretically distinct from but overlaps in practice' with the case that another rule of international law, for example in IHRL, itself requires a legal basis for certain conduct to be lawful. The concept of a 'legal basis' is discussed below.

⁵²⁹ Quintin (n 525) 263; Sassòli (n 333) 488.

of insurgent groups and, accordingly, be interpreted as legitimizing their conduct.⁵³⁰ However, IHL does not require conduct to be explicitly permitted in order to be lawful under IHL itself. Indeed, lawfulness under IHL is determined exclusively by compliance with its positive rules, not the existence of (strong) permissions.⁵³¹ Accordingly, the legal capacity of an armed group to conduct trials and pass sentences under IHL is best described as a ‘*weak permission*’.⁵³² Permissions in the weak sense are characterised as conduct that is permitted solely by the absence of any norm prohibiting the performance of the relevant action.⁵³³ Absent a prohibitive rule in another applicable body of international law (for example IHRL), a weak permission must be considered sufficient to render conduct ‘legal’ within the broader realm of international law.⁵³⁴ Moreover, weak permissions do not carry any normative force.⁵³⁵ This understanding maintains the equality of belligerents while avoiding any form of potential legitimization for armed group actions.

3.3.2. *The Concept of a ‘Legal Basis’*

Another term that is often invoked in relation to armed group courts and their proceedings is that of a ‘legal basis’.⁵³⁶ This term has been used in sections of this

⁵³⁰ Quintin (n 525) 337 and 340. However, CA 3 contains an implicit strong permission to target civilians directly participating in hostilities.

⁵³¹ ibid 341. See also Schöberl and Mührel (n 525) 79

⁵³² See Sassòli (n 333) 585-86 [10.223].

⁵³³ Joseph Raz, *Practical Reason and Norms* (OUP 1999) 85. See also Quintin (n 525) 4.

⁵³⁴ Quintin (n 525) 34; See also Carlo Focarelli, *International Law as a Social Construct: The Struggle for Global Justice* (OUP 2012) 280-282.

⁵³⁵ Quintin (n 525) 5; Sassòli (n 339) 491. See also more generally Raz (n 533) 87 and Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* (Routledge and Kegan Paul 1963) 86.

⁵³⁶ See e.g. Heffes (n 520); Sivakumaran (n 485) 507; Daragh Murray, ‘Non-State Armed Groups in NIAC: Does IHL Provide Legal Authority for the Establishment of Courts?’ (*EJIL:Talk!*, 4 June 2014) available at <<https://www.ejiltalk.org/non-state-armed-groups-in-niac-does-ihl-provide-legal-authority-for-the-establishment-of-courts/>> accessed 20 December 2022.

Chapter to refer to legal instruments governing the composition and jurisdiction of a court to render it ‘established by law’. However, the notion of a ‘legal basis’ also has a special and distinct meaning in IHRL and domestic human rights law, which is linked to the more general principle of legality.⁵³⁷ As described by Debuf, this notion is based on ‘the premise that a general principle of legality governs the restriction of individual rights and freedoms in any legal system construed on the basis of the rule of law’.⁵³⁸ In this context, a legal basis requires that restrictions of rights and freedoms must be explicitly prescribed by law.⁵³⁹ In other words, a *legal basis* cannot be established by the mere absence of a prohibitive rule but requires a *strong permission*.⁵⁴⁰

Moreover, depending on whether one adopts a ‘thick’ or ‘thin’ conception of legality and the rule of law more broadly⁵⁴¹, a legal basis may also involve a *material* or *substantive* aspect, meaning that restrictions must be based on some legitimate purpose.⁵⁴² Under this interpretation, a legal basis requires a formal legal entitlement that also complies with certain substantive requirements.⁵⁴³

A well-known practical example for the problems posed by the two aspects of a valid legal basis (*formal* and *material*) is the problem of security detention of civilians in NIAC. Under IHRL⁵⁴⁴, any deprivation of liberty must be based on legitimate

⁵³⁷ Quintin (n 529) 337; Sassòli (n 333) 488.

⁵³⁸ Debuf (n 513) 41.

⁵³⁹ *ibid.* See also 2020 ICRC GC III Commentary [765].

⁵⁴⁰ However, strong permissions may be formulated implicitly and in ways that might fail to meet the formal requirements for a *legal basis*. Consequently, as pointed out by Quintin, every *legal basis* involves a *strong permission*, but not every *strong permission* functions as a *legal basis*. See Quintin (n 525) 9 and 338.

⁵⁴¹ See e.g. Tom Bingham, *The Rule of Law* (Penguin 2010) 42-52.

⁵⁴² Debuf (n 513) 42. See also Jelena Pejic, ‘Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence’ (2005) 87 *IRRC* 375, 383.

⁵⁴³ See Quintin (n 525) 337; Heffes (n 282) 163-164.

⁵⁴⁴ And arguably also under customary IHL. See ICRC Customary IHL Study, Rule 99.

grounds that are established by law, in addition to being accompanied by certain procedural safeguards.⁵⁴⁵ As this rule equally applies in NIAC, detention or internment without such legal basis is considered arbitrary and violates the respective IHRL norm.⁵⁴⁶ In the context of IACs, the required *legal basis* in the form of a *strong permission* can be found, for example, in Articles 41, 42 and 78 GC IV. These Articles provide for certain grounds of detention that would not apply in peace time, as well as procedural safeguards.⁵⁴⁷ However, no such explicit legal basis to detain exists in the body of IHL applicable in NIACs. It is therefore disputed whether such a legal basis is somehow inherent to the body of IHL itself or must be found elsewhere, for example in the domestic legislation of the State or, potentially, the armed group.⁵⁴⁸

Contrary to detention, IHRL does not contain an explicit prohibition against ‘arbitrary trials’. Under IHRL, judicial guarantees are usually framed as positive obligations⁵⁴⁹ and the fact that a fair trial has been undertaken and a sentence passed constitutes an accepted ground for the restriction of other fundamental rights such as the right to liberty⁵⁵⁰ (through the imposition of prison sentences), the right to property⁵⁵¹ (in case of monetary fines or confiscation of goods), or the right to life⁵⁵² (in case of the death penalty). Conversely, a death sentence or prison sentence imposed

⁵⁴⁵ Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016) 67. See also art 9 ICCPR; *Medvedyev And Others v. France*, App no 3394/03 (ECtHR, 29 March 2010) (Grand Chamber) [79].

⁵⁴⁶ For the application of IHRL in times of armed conflict more generally, see **Chapter 2**.

⁵⁴⁷ See *Hassan v UK*, App no 29750/09 (ECtHR, 16 September 2014) (Grand Chamber) [104].

⁵⁴⁸ 2020 ICRC GC III Commentary [765]. See also Andrew Clapham, ‘Detention by Armed Groups under International Law’ (2017) 93 ILS 1; Maria Gavrilova, ‘Administrative Detention by Non-State Armed Groups: Legal Basis and Procedural Safeguards’ (2020) 53 IsLR 35.

⁵⁴⁹ On the fair trial rights under IHL and IHRL and the distinction between positive and negative obligations, see **Chapter 4**, section 4.4.

⁵⁵⁰ See e.g. art 5(1)(a) ECHR.

⁵⁵¹ See e.g. art 1 First Protocol to the ECHR.

⁵⁵² See e.g. art 6(2) ICCPR.

based on an unfair trial may amount to an ‘arbitrary deprivation of life’⁵⁵³ or ‘arbitrary detention’⁵⁵⁴. In other words, the existence of a sentence based on a fair trial forms part of the ‘legal basis’ for the restriction of other fundamental rights.

So what does this mean in relation to armed group courts and the sentences they pass? First, as explained in the previous subsection, IHL does not require a positive authorisation (in the form of a *strong permission*) in order for conduct to be lawful under IHL itself. Accordingly, no general requirement of a ‘legal basis’ can be said to exist under IHL.⁵⁵⁵ However, in the field of criminal law, the principle of legality is nevertheless reflected in the more specific maxims of *nullum crimen sine lege* and *nulla poena sine lege*.⁵⁵⁶ As **Chapter 4** will explain, these principles apply to trials by armed groups as part of the ‘judicial guarantees recognized as indispensable’ prescribed by CA 3. Moreover, as was demonstrated in the previous sections, CA 3 and more specifically the notion of a ‘regularly constituted court’ requires courts to be ‘established by law’. It can therefore be said that the ‘legal basis’ for the passing of sentences by armed group courts under IHL is a combination of the penal law authorizing punishment for certain conduct in combination with the ‘laws’ establishing the judicial institution in question.⁵⁵⁷

⁵⁵³ HRC, General Comment No. 36 (30 October 2018) UN Doc CCPR/C/GC/36 [17]; see also Daniel D. Nsereko, ‘Arbitrary Deprivation of Life: Controls on Permissible Deprivations’, in Bertie G. Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff 1985) 248.

⁵⁵⁴ According to the HRC, imprisonment after a manifestly unfair trial is arbitrary, but not every violation of the specific procedural guarantees for criminal defendants in Article 14 ICCPR results in arbitrary detention, see General Comment No. 35 (16 December 2014) UN Doc CCPR/C/GC/35 [17]; *Sineiro Fernández v. Spain*, Comm no 1007/2001 (7 August 2003) UN Doc. CCPR/C/78/D1007/2001 [6.3].

⁵⁵⁵ See also Quintin (n 525) 337, noting that the notion of a ‘legal basis’ has little meaning in IHL.

⁵⁵⁶ Debuf (n 513) 42. See also Shane Darcy, ‘The Principle of Legality at the Crossroads of Human Rights and International Criminal Law’ in Margaret De Guzman and Dianne M. Amann (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas* (OUP 2018) 203-226

⁵⁵⁷ Murray (n 60) 225-36, suggests some additional (at least implicit) authority authorizing the conduct of trials is required, which can be found, for example, in the obligation to ensure public order or to prosecute war crimes. However, it is conceptually wrong to require such additional permission in order to render armed group trials ‘legal’ under international law. This suggestion

3.3.3. ‘Rights’ under IHL and Combatant Immunity

As part of the debates surrounding the administration of justice by armed groups commentators sometimes speak of a ‘right’ to establish courts or to conduct judicial proceedings.⁵⁵⁸ In his early treatment of CA 3, for example, Draper noted that ‘the article precludes it [an armed group] from asserting *rights* to undertake activities, *such as trials*, which it cannot ensure will comply with the standards of civilised people’.⁵⁵⁹ But what does it mean for a party to a conflict to enjoy a *right* under IHL? Traditionally, the concept of *rights* under IHL is used to refer to the right of belligerent States to engage in actions otherwise prohibited in peace time.⁵⁶⁰ In legal theory, however, a *right* goes even beyond the legal entitlement granted by a *strong permission*.⁵⁶¹ Indeed, a *right* comes with a corollary obligation, namely the obligation of other entities to respect that right in the sense that they may not hinder or prevent the holder of a strong permission from carrying out the permitted action.⁵⁶² The use of the term ‘belligerent *rights*’ is therefore often misleading and rarely refer to rights properly so called.⁵⁶³

For example, it is said that combatants enjoy a *right* to participate in hostilities, which in turn prevents them from being prosecuted for their mere participation in

seems to treat armed groups akin to an occupying power, an analogy that, as **Chapter 4** will demonstrate, is not entirely appropriate.

⁵⁵⁸ See e.g. Doswald-Beck (n 384) 490.

⁵⁵⁹ G.I.A.D. Draper, ‘Internal Conflicts’ (1965) 114 RdC 91 (emphasis added).

⁵⁶⁰ See Lawrence Hill-Cawthorne, ‘Rights under International Humanitarian Law’ (2018) 28 EJIL 1187, 1212.

⁵⁶¹ Quintin (n 525) 7.

⁵⁶² *ibid.* In classic Hohfeldian terms, this would equal a ‘privilege’ combined with a ‘claim-right’ to non-interference. See Wesley Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 YaleLJ 16, 16-53. There are few examples of such actual rights in the law of armed conflict apart from certain rights of neutrals and the title to property lawfully acquired under the laws of occupation. See Hersch Lauterpacht, *Oppenheim’s International Law* (7th ed, Longmans 1952) 673.

⁵⁶³ Such rights are sometimes referred to, more properly, as ‘rights of a particular nature’. See Henri Meyrowitz, *Le principe de l’égalité des belligérants devant le droit de la guerre* (Pedone 1970) 112; see also Christopher Greenwood, ‘The relationship between *ius ad bellum* and *ius in bello*’ (1983) 9 RevIntlStud 221, 227-228.

lawful acts of war (commonly referred to as combatant immunity or combatant privilege).⁵⁶⁴ However, this is not a *right* within the traditional understanding of the term as this would imply that those attacked must tolerate the exercise of this right.⁵⁶⁵ IHL merely contains a specific obligation incumbent on States not to prosecute enemy combatants in IACs for their mere participation in hostilities.⁵⁶⁶ Members of armed groups in NIACs, however, do not even enjoy this a limited ‘*right*’ to participate in hostilities and international law does not accord them immunity from domestic criminal prosecution.⁵⁶⁷ Indeed, nothing prevents States from prosecuting fighters belonging to armed groups even if all their acts have been carried out in compliance with IHL.⁵⁶⁸

Nevertheless, Provost argues that a similar form of combatant privilege attaches to individuals who operate armed group courts:

If it can be demonstrated that, under public international law, non-state armed groups may establish and operate their own courts to administer justice under their own or international legal standards, then it would seem to follow that any state attempting to hold judges and lawyers accountable for taking part in the operation of insurgent courts would thus breach international law.⁵⁶⁹

This line of argumentation must be rejected. Provost seems to conflate the capacity of armed groups to establish courts without violating IHL with an actual *right* to do so, which in his view would entail a form of combatant immunity for individuals involved in such courts. Yet, as explained above, the legal capacity of an armed group to conduct

⁵⁶⁴ See Art 43(2) AP I. Whether this right is conferred directly onto the individual is disputed, consider Hill-Cawthorne (n 560) 1187-1215.

⁵⁶⁵ Sassòli (n 333) 490. See also Quintin (n 529) 8 and Robert Kolb, *Advanced Introduction into International Humanitarian Law* (Elgar 2014) 18.

⁵⁶⁶ Quintin (n 525) 263, fn 49.

⁵⁶⁷ Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 68.

⁵⁶⁸ Sassòli (n 333) 490.

⁵⁶⁹ Provost (n 56) 445.

trials is based on the absence of any explicit or indirect prohibition to do so, that is, it is based on a *weak permission*. Therefore, States are not prevented from interfering with the permitted act, for example by subjecting individuals participating in armed group trials to domestic criminal sanctions.

Arguing that such acts benefit from some form of combatant immunity would be difficult to reconcile with the principle of State sovereignty and the legal distinction between IAC and NIAC. To better understand this distinction it is vital to recall what was mentioned in **Chapter 1**, namely that international law is ‘neutral’ towards rebellion.⁵⁷⁰ It neither authorises non-State actors to take up arms against their government, nor does it condemn such acts, irrespective of their legality under domestic law. Where insurrection amounts to an armed conflict, international law simply declares illegal certain acts and methods of conducting such armed struggle through the regimes of IHL and ICL (and potentially IHRL). Therefore, IHL is indifferent to whether the passing of sentences actually occurs or not. Moreover, it carefully avoids attaching normative legitimacy to certain acts of armed groups through the non-inclusion of *strong permissions* otherwise found in the law of IACs. Nevertheless, IHL recognises the factual possibility of such acts in NIACs and contains regulations as to *how* they should be performed.⁵⁷¹

Consequently, no form of immunity is attached to the passing of sentences through an armed group court (even if operated in compliance with IHL).⁵⁷² The establishment of insurgent courts remains an ordinary act of rebellion and there is no legal reason why individuals cannot be prosecuted for their participation in these acts.

⁵⁷⁰ See **Chapter 1**, section 1.3. and (n 42).

⁵⁷¹ Quintin (n 525) 10.

⁵⁷² While there is indeed a debate in scholarship on whether some form of ‘combatant immunity’ should be extended to NIAC to make compliance with IHL more attractive, it is certainly not the case *de lege lata*.

This understanding is amply reflected in State practice: Rojava judges in Northern Syria, for example, face arrest warrants by the Syrian government for creating ‘an illegal judiciary’.⁵⁷³ Prosecutors in Eastern Ukraine had charges filed against them for remaining in non-government-controlled areas and working with the parallel ‘justice systems’ of the DPR and LPR.⁵⁷⁴ Moldova opened criminal investigations into ‘prosecutors’ and ‘judges’ involved in trials in the rouge province and stabilized *de-facto* regime of Transnistria.⁵⁷⁵ When the FMLN in El Salvador announced its intention to prosecute its *own* members for the murder of American servicemen, the President of the Supreme Court of El Salvador warned that any ‘Salvadoran national participating in a [FMLN] tribunal [...] would be subject to criminal proceedings under Salvadoran law’.⁵⁷⁶ In conclusion, there is no authority to suggest that individuals involved in armed group courts would benefit from any form of immunity simply because they have complied with all applicable fair trial guarantees.

Provost nevertheless argues that the granting of immunity to officers of a rebel court would act as an incentive for them to ensure that the institution operates in conformity with international law.⁵⁷⁷ While **Chapter 6** will explain that this suggestion has some merit from a normative point of view, it is not specific to the idea of armed groups passing sentences and conducting trials as such but belongs to the more general debate on whether (*de lege ferenda*) fighters of armed groups should benefit from

⁵⁷³ Matthias Krause, ‘Northeastern Syria: Complex Criminal Law in a Complicated Battlespace’ (*Just Security*, 28 October 2019) available at <<https://www.justsecurity.org/66725/northeastern-syria-complex-criminal-law-in-a-complicated-battlespace/>> accessed 20 December 2022.

⁵⁷⁴ OSCE Special Monitoring Mission to Ukraine (n 10) 12-13 and fn 46.

⁵⁷⁵ *Ilașcu* (n 168) [221]. Ultimately, however, these investigations proved to be futile as the Moldavian authorities lacked control over Transnistrian territory.

⁵⁷⁶ La Rosa and Würzner (n 39) 338, fn 27.

⁵⁷⁷ See art 8(2)(c)(iv) ICCSt.

combatant immunity in NIAC.⁵⁷⁸ Even under the current state of positive law, however, incentives exist for members of armed groups to conduct trials in accordance with the judicial guarantees required under IHL. As **Chapter 5** will demonstrate, the passing of sentences in violation of fair trial standards may trigger the individual criminal responsibility of those involved. In addition, States are under a customary law obligation to prosecute and try such war crimes when committed by their nationals or on their territory.⁵⁷⁹

Finally, while Article 5(6) AP II encourages the granting of ‘broadest possible amnesty to persons who have participated in the armed conflict’ at the end of hostilities, there is growing practice and *opinio juris* that such amnesties shall not be granted in relation to the commission of war crimes.⁵⁸⁰ Individuals involved in armed group courts – as with any other act of war – therefore still have an inherent interest to comply with IHL and the fair trial guarantees enshrined therein.

3.4. Conclusions

This Chapter has demonstrated that IHL, in particular CA 3 and Article 6 AP II, regulates trials conducted by armed groups and that its protective scope covers enemy fighters, civilians and arguably also members of the armed group. However, a careful approach should be taken with regard to the nexus requirement implicitly enshrined in CA 3 and the more specific nexus requirement found in Article 6 AP II. Under a broad understanding of the general nexus requirement under CA 3, any kind of interaction

⁵⁷⁸ See e.g. Ilana Rothkopf, ‘International Humanitarian Law and Non-State Practice in Armed Conflict: Combatant’s Privilege and Kurdish Fighters in Syria’ (2019) 24 JC&SL 71; Geoffrey S. Corn, ‘Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?’ (2018) 22 Stanford Law & Policy Review 53.

⁵⁷⁹ ICRC Customary IHL Study, Rule 158.

⁵⁸⁰ ICRC Customary IHL Study, Rule 159.

between an armed group and individuals living in territory under its control would be governed by IHL, as long as the control of said territory is a direct consequences of the armed conflict in question. This understanding, while apparently reflecting the majority view in scholarship and ICL jurisprudence, entails a problematic inequality between the State and the non-State party to the conflict in relation to governance activities, including the punishment of common crimes.

Where IHL applies, it requires courts established by armed groups to be ‘regularly constituted’. It was demonstrated that this term is best understood as incorporating the IHRL concept that a court be ‘established by law’, that is, its specific composition and jurisdictional power must be enshrined in some form of positive ‘law’. Even if one does not follow this interpretation, the ‘established by law’ criterion may nevertheless apply as part of the ‘judicial guarantees recognized as indispensable’ under CA 3, due to its status as a well-accepted, non-derogable right under customary international law. It was also explained that the term ‘law’ in this regard should not be interpreted in an overly formalistic fashion and that ‘laws’ of the armed group can, in principle, meet this requirement. Support for this position can be found in the jurisprudence of the ECtHR, ICTY, arbitral case law and the discussion of the term ‘law’ during the negotiations of AP II. Indeed, adopting such a flexible approach is also normatively preferable to dispensing with the ‘established by law’ criterion altogether, as this could also result in the watering down of guarantees expected from States. Moreover, neither AP II nor subsequent developments can be understood as having removed the requirement of ‘regular constitution’ from the body of rules applicable to armed groups under CA 3 and customary law.

Finally, this chapter explained that the fact that IHL regulates the passing of sentences by armed groups during NIACs does not entail any form of ‘right’ or ‘strong

permission’ to do so. Rather, IHL remains indifferent as to whether such acts are actually carried out, without any normative preference. In that sense, and to answer the first research question, it can be said that armed groups enjoy a limited legal capacity to undertake trials and pass sentences. This capacity is best understood as a ‘weak permission’. Accordingly, operating insurgent courts remains an ordinary act of rebellion and States are free to subject individuals participating in such acts to domestic penal sanctions. In any case, trials need to be conducted according to certain institutional and procedural safeguards, some of which may exceed the factual capacity of armed groups. These safeguards and their application to non-State actors will be discussed in **Chapter 4**.

4. Judicial Guarantees and Elements of Fair Trials

Chapter 3 has explained the protective scope of IHL over trials conducted by armed groups and analysed the meaning of a regularly constituted court in this context. It concluded that ‘regularly constituted’ is best interpreted as equivalent to the term ‘established by law’, as generally understood under human rights law, and that armed groups are not generally prevented from meeting this requirement. However, in addition to being ‘established by law’, any court passing a penal sentence during armed conflict has to comply with a range of other judicial guarantees enshrined in CA 3, Article 6 AP II, and customary law, most notably the guarantees of independence and impartiality, as well as certain procedural rights. While these guarantees might not pose a similar challenge to the legal capacity of armed groups to pass sentences as the ostensibly State-centric notion of ‘regular constitution’, they might nevertheless limit their factual capacity to do so.

Section 1 of this Chapter thus aims to determine which judicial guarantees must be considered as ‘indispensable’ in the sense of CA 3, and thereby constitute the minimum set of fair trial rights expected from all armed groups during NIAC. It will argue that these ‘indispensable’ guarantees can be identified either by reference to non-derogable fair trial rights under customary IHRL, or through specific subsequent practice and customary IHL. The section will demonstrate that both approaches lead to a similar result and that the judicial guarantees required by CA 3, AP I, AP II, the ICCPR and customary law, ultimately, overlap to a very large extent.

Sections 2 and 3 then proceed to flesh out the content of each of these indispensable guarantees, focussing on specific problems that might arise in their application to armed groups as opposed to State-operated judicial systems. Section 2

will analyse the institutional guarantees of independence and impartiality, as well as the selection and qualification of judges. It will explain that the criterion of independence cannot be interpreted to require an absolute separation between the executive and judiciary. Moreover, it will show that positive international law does not provide any specific requirements for individuals sitting on armed group courts.

Section 3 then addresses the relevant procedural guarantees, as well as the principle of legality and the capacity of armed groups to ‘legislate’. It will argue that that armed groups are not categorically precluded from changing the legal order in territories under their control and may also impose their own penal laws. Moreover, it will explain that the law of occupation, which is often invoked by analogy in this regard, cannot simply be transposed to armed groups in NIAC.

Finally, section 4 of this Chapter will analyse the feasibility of these judicial guarantees in light of the concept of belligerent equality. It will demonstrate that since CA 3 incorporates exacting fair trial standards from IHRL, armed groups are required to meet these requirements irrespective of their organisational capacities. While many armed groups will fail to implement these standards in practice, this lack of compliance can equally be observed among State authorities. This section will thus argue that existing proposals to relax judicial guarantees in NIACs are both conceptually flawed and normatively undesirable.

4.1. Judicial Guarantees Recognised as Indispensable

As mentioned in the previous Chapter, CA 3 requires a court not only to be ‘regularly constituted’ but also to offer ‘all the judicial guarantees which are recognized as indispensable by civilized peoples’. Since CA 3 forms the humanitarian minimum

applicable to all armed conflicts – via both treaty and custom⁵⁸¹ – it is thus essential to clarify the precise content of the ‘judicial guarantees recognized as indispensable’ that it prescribes.

While both the US and the French delegations during the 1949 Diplomatic Conference wanted CA 3 to clearly spell out the specific guarantees, the ICRC’s draft remained unchanged and the abstract reference to indispensable guarantees was retained.⁵⁸² To identify these ‘indispensable guarantees’, guidance must therefore be found elsewhere. Two approaches exist in this regard. First, reference may be made to those fair trial guarantees that are usually required under IHRL.⁵⁸³ Second, fair trial guarantees found in other instruments of IHL, in particular the Additional Protocols as subsequent practice, as well as customary IHL and related jurisprudence, might help to clarify the precise content of the indispensable guarantees recognised by CA 3.⁵⁸⁴ These two routes will be addressed in turn. As will be seen, they ultimately lead to similar results.

4.1.1. Non-derogable Fair Trial Rights under IHRL

It was submitted in **Chapter 3** that the ‘judicial guarantees recognised as indispensable’ in CA 3 are not static but incorporate an evolving standard that tracks the development of customary international law in the area of fair trial rights more generally.⁵⁸⁵ Indeed, it is sometimes argued that the drafters of CA 3 were in fact

⁵⁸¹ See *Case concerning Military and Paramilitary Activities in and against Nicaragua* (n 135) [218].

⁵⁸² Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, Vol II-B, 83-84.

⁵⁸³ Doswald-Beck (n 384) 473-74.

⁵⁸⁴ *ibid.*

⁵⁸⁵ See also Jinks (n 400) 406.

referring to the judicial guarantees considered to be well-established in their own countries for criminal trials, and which were later included into major IHRL instruments.⁵⁸⁶ Within the area of human rights law, Article 14 of the ICCPR is commonly understood as reflecting the customary law standard of fair trial guarantees today.⁵⁸⁷ The ICTY Trial Chamber in the *Simić* case, for example, expressed the view that the fair trial rights under Article 14 of the ICCPR are encompassed by CA 3.⁵⁸⁸

The problem, however, is that the ICCPR allows for rights to be derogated from in times of public emergency which threatens the life of the nation, most notably situations of armed conflict.⁵⁸⁹ While certain rights cannot be derogated from even under such extreme circumstances, the fair trial provisions of Article 14 ICCPR were not included in this list of non-derogable rights.⁵⁹⁰ If these judicial guarantees are subject to derogation it would be difficult to argue that they are in fact *indispensable* in the sense of CA 3.⁵⁹¹ Conversely, guarantees that may never be dispensed with under IHRL, even in times of armed conflict, can reasonably also be considered as *indispensable* under CA 3.

Under the treaty text of the ICCPR, only the requirement of *nulla poena sine lege*, enshrined in Article 15, is not subject to derogation under Article 4(2). In addition, since the imposition of a death penalty following an unfair trial can arguably amount

⁵⁸⁶ Doswald-Beck (n 384) 473.

⁵⁸⁷ Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (OUP 2021) 19; Patrick Robinson, 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 2 *BerkeleyJIntlL: Publicist* 1, 5; *Aleksovski* (Appeals Judgment) IT-95-14/1-A (24 March 2000) [104].

⁵⁸⁸ *Simić*, Trial Judgment (n 419) [678].

⁵⁸⁹ Art 4(1) ICCPR.

⁵⁹⁰ Art 4(2) ICCPR.

⁵⁹¹ Lindsay Moir, *The Law of Internal Armed Conflict* (OUP 2002) 206.

to ‘inhumane treatment’,⁵⁹² the absolute prohibition against torture and inhumane treatment under Article 7 could also provide protection in such cases. Nevertheless, if *indispensable* guarantees were reduced to these two provisions, the protection against sentences based on unfair trials under CA 3 would be severely limited.

In recent decades, however, human rights law has developed considerably and moved beyond the derogation regime established by Article 4 of the Covenant. In its General Comment 32, for example, the HRC described the requirement of a competent, independent and impartial court enshrined in Article 14(1) ICCPR as an ‘absolute right that is not subject to derogations’.⁵⁹³ In addition, there is now considerable authority to suggest that irrespective of the applicability of the Covenant via treaty law, most of its fair trial provisions are non-derogable under customary law and some potentially even form part of *jus cogens*.⁵⁹⁴ While non-derogable rights and *jus cogens* are separate concepts (albeit with a significant overlap in the field of human rights)⁵⁹⁵, both can arguably serve as a starting point for determining which guarantees must be considered indispensable today in the context CA 3.

The challenge, however, is determining the exact scope of this non-derogable core of the right to a fair trial. Some commentators argue that this scope is limited to

⁵⁹² See e.g. *Larrañaga v The Philippines*, Comm no 1421/2005 (24 July 2006) UN Doc CCPR/C/87/D/1421/2005 [7.11]; *Öcalan v Turkey*, App No 46221/99 (ECtHR, 12 May 2005) [175].

⁵⁹³ HRC, General Comment 32 (n 401) [19].

⁵⁹⁴ See e.g. HRC, ‘General Comment 29’ (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add. 11, [11]; *Kadi v Council and Commission* (n 185) [290]; ILC, Fourth report on peremptory norms of general international law (*jus cogens*), 31 January 2019, UN Doc A/CN.4/727 [123]; Consider also Aniel Caro de Beer, *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (Brill/Nijhoff 2019) 178-82; Robinson (n 587) 5-7; Clooney and Webb (n 587) 15.

⁵⁹⁵ Koji Teraya, ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights’ (2001) 12 EJIL 917. See also Dina Shelton, *The Oxford Handbook of International Human Rights Law* (OUP 2013) 545.

those IHRL guarantees that are coterminous with IHL.⁵⁹⁶ By analysing which judicial standards apply in armed conflict as the worst form of emergency – so the argument – the non-derogable aspects of the right to a fair trial can be identified (*a fortiori*).⁵⁹⁷ Indeed, the inclusion of the fair trial provisions into the list of non-derogable rights under the ICCPR was opposed as unnecessary by its drafters precisely because they were of the view that such judicial guarantees would apply anyway during armed conflict by virtue of the 1949 Geneva Conventions.⁵⁹⁸ This understanding is further corroborated by the HRC’s General Comment No. 29, which highlights that ‘State parties may under no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law [...] by deviating from fundamental principles of fair trial’.⁵⁹⁹

However, while the 1949 Conventions⁶⁰⁰ and AP I⁶⁰¹ provide for a set of explicit, autonomous and non-derogable fair trial guarantees for IACs, Article 6 AP II determines individual standards only for a specific subset of NIACs. If IHL were to serve as the minimum yardstick to determine the content of the non-derogable customary law (or even peremptory) right to a fair trial, one would need to look at its lowest common denominator, namely CA 3. However, CA 3 cannot help flesh out the content of this customary law norm because it is phrased in abstract terms without listing any actual guarantees but instead refers back to human rights law. In other

⁵⁹⁶ David Weissbrodt, ‘International Fair Trial Guarantees’ in Clapham and Gaeta (n 5) 416. See also Evelyne Schmid, ‘The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights’ (2009) 1 GoJIL 29, 38.

⁵⁹⁷ Schmidt (n 596) 38-39; Moir (n 591) 207.

⁵⁹⁸ Moir (n 591) 207.

⁵⁹⁹ HRC, General Comment 29 (n 594) [11].

⁶⁰⁰ Art 49 GC I; art 50 GC II; arts 84, 86, 99, 102–08 GC III; arts 5, 64, 66–75, and 117 GC IV.

⁶⁰¹ Art 75 AP I.

words, the argument becomes circular: what is indispensable under IHL must be determined by reference to human rights law, which allows for derogations, except for cases where such derogations would be incompatible with what is indispensable under IHL.

Another methodological problem is the fact that emergencies that allow for derogation under Article 4 ICCPR include situations that fall short of an armed conflict and, therefore, are not regulated by IHL. The practice of relying on IHL as a minimum yardstick to justify the non-derogable status of Article 14 ICCPR has therefore been criticised.⁶⁰² While it is possible to rely on IHL based on an *a fortiori* argument⁶⁰³, one should also not forget that for a long time it was not uncommon for IHL to actually provide better protection to certain groups of protected persons (e.g. POWs) than civilians might have enjoyed under IHRL even in peace time. After all, IHL is based on the concept of reciprocity between belligerents, which has no equivalent in the individual-State relationship inherent to human rights law.⁶⁰⁴ In addition, as **Chapter 3** has demonstrated, IHL is by its very nature discriminatory as it makes protection dependent on a certain status requirements (civilian, POW, *hors de combat* etc.) whereas any person under the jurisdiction of the State concerned enjoys human rights equally.⁶⁰⁵ Therefore, relying on IHL to make the case for the absolute or non-derogable nature of certain fair trial rights in peace time is not without problems.

Be that as it may, Clooney and Webb's recent and comprehensive study on the right to a fair trial in international law concludes that, based on the jurisprudence and

⁶⁰² See e.g. Clémentine Olivier, 'Revisiting General Comment No. 29 of the United Nations Human Rights Committee: About Fair Trial Rights and Derogations in Times of Public Emergency' (2004) 17 LJIL 405.

⁶⁰³ Moir (n 591) 207.

⁶⁰⁴ Olivier (n 602) 407-8.

⁶⁰⁵ *ibid.*

practice it has surveyed, among the rights encompassed by Article 14 of the ICCPR, only the right to a public trial and some aspects of the right to an interpreter may be lawfully derogated from under customary law.⁶⁰⁶ While this conclusion is partially based on the logical fallacy described above, namely the reference to fair trial rights in IHL treaties applicable only in certain types of armed conflict and only to certain types of protected persons, the study nevertheless includes a significant amount of other practice in support of its findings. Even so, the current Chapter will deviate slightly from Clooney and Webb's conclusion by arguing that two specific guarantees, namely the right to appeal a conviction and the principle of *ne bis in idem* need not be provided or are limited in NIACs, and, accordingly, cannot be said to constitute *indispensable* guarantees under CA 3. The grounds for these exclusions, which are very much related to unique nature of NIACs and the role of armed groups, will be discussed in subsections 4.3.5. and 4.3.6. below.

4.1.2. Fair Trial Rights under the Additional Protocols and Customary IHL

Another route to determine the indispensable guarantees required by CA 3 is to directly interpret it in light of other IHL instruments. The ICRC's position as expressed in its most recent commentary on CA 3, for example, is that the 'judicial guarantees recognized as indispensable' have to be interpreted in the light of Article 6(2) AP II, as well as its customary law equivalent.⁶⁰⁷ Other commentators have equally argued that Article 6 AP II serves as an authoritative declaration of the 'judicial guarantees deemed

⁶⁰⁶ Clooney and Webb (n 587) 20-26; 481-482.

⁶⁰⁷ 2020 ICRC GC III Commentary [720]. See also 1987 ICRC AP I Commentary [3084], noting that 'Article 3 relies on the "judicial guarantees which are recognized as indispensable by civilized peoples", while Article 75 rightly spells out these guarantees. Thus this article, and to an even greater extent, Article 6 of Protocol II '(Penal prosecutions)' gives valuable indications to help explain the terms of Article 3 on guarantees'.

indispensable' under CA 3, irrespective of whether the State in question has acceded to AP II.⁶⁰⁸

Article 6(2) AP II contains a detailed but non-exhaustive list of judicial guarantees:

- (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
- (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
- (c) 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; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
- (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
- (e) anyone charged with an offence shall have the right to be tried in his presence;
- (f) no one shall be compelled to testify against himself or to confess guilt.

These guarantees were modelled closely after Article 14 of the ICCPR.⁶⁰⁹ Indeed, the delegates of the 1974-77 Diplomatic Conference were mindful of this by then well-established human rights instrument and made ample reference to the Covenant's provisions.⁶¹⁰ Moreover, a comparison with the Covenant shows that many provisions have been replicated verbatim or only slightly modified.⁶¹¹

⁶⁰⁸ Wolfgang A. Solf, 'Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict' (1983) 13 GAJIntl&CompL 291, 296; Moir (n 591) 207-8.

⁶⁰⁹ Commentary to the Draft Additional Protocols (n 332) 140-41.

⁶¹⁰ Already the Preamble of AP II invokes the 'international instruments relating to human rights'. Many delegates also made explicit references to the ICCPR during the negotiation of the judicial guarantees section of Article 6; see Official Records of the Diplomatic Conference (n 437), Vol VIII, CDDH/1/SR.33, [38], [41] and [63]-[64].

⁶¹¹ Bothe, Partsch and Solf (n 236) 745-746.

Accordingly, as an alternative to the argument that CA 3 contains an indirect *renvoi* to customary IHRL, the ICCPR could be invoked to inform the interpretation of CA 3 via the guarantees enshrined in AP II. This brings us back to a question addressed in the previous Chapter, namely to what extent CA 3 can and should be interpreted by reference to AP II. It has been pointed out in **Chapter 3** that AP II was meant to supplement CA 3 without modifying its existing conditions of application or loosen its protection.⁶¹² Fleshing out the individual judicial guarantees required from a court or judicial body, and which are only mentioned in the abstract terms of ‘judicial guarantees recognized as indispensable’ in CA 3, *does* constitute such clarification without prejudice to the Preamble’s disclaimer against modification. Hence, contrary to loosening the requirement of a regularly constituted court, it is doctrinally sound to interpret CA 3 through the subsequent practice of those States parties to the 1949 Conventions that are also parties to AP II.⁶¹³ However, in light of the drafting history of Article 6 AP II discussed in the previous Chapter, it remains unclear whether this was indeed the intention of the Parties or whether they instead intended the guarantees enshrined in this Article to apply only in the specific circumstances of a conflict that meets the heightened threshold of Article 1 AP II.⁶¹⁴ Other problems mentioned in **Chapter 3**, for example the fact that several High Contracting Parties of the 1949 Conventions have still not acceded to AP II, also persist. Therefore, while not unreasonable as such, the legal argument that the judicial guarantees required by CA 3 must correspond to those spelled out in Article 6(2) includes some doctrinal shortcomings.

⁶¹² See **Chapter 3**, section 3.2.2; ICRC 1987 AP II Commentary [4457].

⁶¹³ Henckaerts and Pothelet (n 434) 158, fn 47.

⁶¹⁴ Recall **Chapter 3**, section 3.2.2.

As a result of these uncertainties, it is worthwhile to look beyond specific treaty practice and analyse whether customary IHL might provide a standard of fair trial rights applicable to all armed conflicts, which might in turn help inform the judicial guarantees in CA 3. For this purpose, the evident point of departure is the ICRC's customary IHL study, which has identified a set of fair trial guarantees applicable in both IAC and NIAC.⁶¹⁵ In doing so, the study does not differentiate between NIACs that meet the threshold of AP II and 'ordinary' NIACs.⁶¹⁶ However, it is usually assumed that where the study finds a rule to be applicable in NIAC this applies to both types of NIAC, although this assumption has not been without criticism.⁶¹⁷

The individual guarantees identified by the ICRC to constitute customary law applicable in NIAC go beyond Article 6(2) AP II and seem to have been taken directly from Article 75(4) AP I. More specifically, Article 75(4) AP I contains three additional criteria that are not mentioned in Article 6(2) AP II:

- (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
- (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly

In addition, subsection (j) of Article 75(4) AP I provides that a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised. This guarantee is also included in Article 6 AP II, albeit

⁶¹⁵ ICRC Customary IHL Study, Rule 100.

⁶¹⁶ Sivakumaran (n 14) 77 and 192.

⁶¹⁷ See e.g. Michael Bothe, 'Customary International Humanitarian Law: Some Reflections on the ICRC Study' (2006) 8 YIntHL 143, 175-176.

in the separate paragraph (3). The reason why this guarantee was given a separate paragraph is probably because it was originally part of a much more comprehensive obligation providing for a right to appeal a penal conviction.⁶¹⁸ For reasons that will be discussed below, this idea was abandoned, leaving only the rump obligation to advise the convict on potential legal remedies.

The customary law status of Article 75 AP I in IAC is now well recognised⁶¹⁹, including by States that have not yet acceded to the Protocol.⁶²⁰ Its customary status and application in NIAC, on the other hand, remains disputed. While the ICRC maintains the position that Article 75 AP I reflects customary law applicable in all armed conflicts⁶²¹, commentators remain critical of this claim.⁶²² It is often pointed out that Justice Stevens in *Hamdan v Rumsfeld* argued that the indispensable guarantees of CA 3 are best reflected in the customary law standards of Article 75 AP I but it is doubtful whether this was a conscious decision against Article 6 AP II or simply ignorance of its relevance.⁶²³

⁶¹⁸ See art. 10(2) ICRC Draft Additional Protocol II, 1973; Official Records of the Diplomatic Conference, Vol. IV, CDDH/I/262, 36, draft art. 10(3).

⁶¹⁹ See e.g. *Delalić et al.* (Trial Judgment) IT-96-21-T (16 November 1998) [314]; Eritrea-Ethiopia Claims Commission, *Civilians' Claims, Eritrea's Claims* 15, 16, 23 & 27-32, Partial Award, XXVI RIAA 195 (17 December 2004) [30]; *Armed Activities on the Territory of the Congo* (n 158) Separate Opinion of Judge Simma [28]

⁶²⁰ See e.g. *Hamdan v Rumsfeld* (n 397) 70-71; US Department of Defense, Law of War Manual, June 2015 (Updated December 2016), [8.1.4.2], *The Public Committee against Torture in Israel et al v. The Government of Israel*, HCJ 769/02, 11 December 2006 [25].

⁶²¹ ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Report for the 31st International Conference of the Red Cross and Red Crescent (2011) 16.

⁶²² See e.g. Michael W. Lewis, 'Does AP I Art. 75 apply to NIAC's?' (15 March 2011, *Opinio Juris*) available at <<http://opiniojuris.org/2011/03/15/does-ap-i-art-75-apply-to-niacs/>> accessed 22 December 2022.

⁶²³ *Hamdan v Rumsfeld* (n 397) 70. See also Michael W. Lewis, 'International Myopia: Hamdan's Shortcut to "Victory"' (2008) 42 University of Richmond Law Review 687, arguing that '[i]n summary, the Hamdan Court ignored the protections explicitly provided for Common Article 3 defendants by Protocol II'.

Other commentators on the US practice in this regard refer to the 2011 ‘White House Statement’ on the detention policy in Guantanamo, which noted that current US practices (presumably including those relating to Al-Qaida and Taliban members detained in the context of a NIAC) are ‘already consistent’ with the provisions of Article 75 AP I.⁶²⁴ However, it remains unclear whether the statement really implies that this policy was based on any related legal obligation in NIAC.⁶²⁵ Nevertheless, the 2015 DOD Military Manual reiterates the ICRC’s position and notes that the judicial guarantees under CA 3 are to be interpreted in the light of both Article 75 AP I and Article 6 AP II.⁶²⁶ It also lists specific rights only mentioned under Article 75 AP I such as the right to examine witnesses, the right to a public judgment, and most importantly the provision against double jeopardy (*ne bis in idem*).⁶²⁷

The UK LOAC Manual, on the other hand, does not refer to Article 75 AP I, yet includes both the right to examine witnesses and the right to a public judgment (but not the provision on *ne bis in idem*) as part of the indispensable judicial guarantees applicable in internal armed conflicts under CA 3.⁶²⁸ Most other LOAC manuals, however, do not spell out the individual guarantees required.⁶²⁹ The 1990 Turku

⁶²⁴ The White House, ‘Fact Sheet: New Actions on Guantánamo and Detainee Policy’, 7 March 2011, available at <<https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>> accessed 20 December 2022.

⁶²⁵ See Sarah L. Hodgkinson, ‘Detention Operations: A Strategic View’ in Geoffrey S. Corn et al. (eds), *U.S. Military Operations: Law, Policy, and Practice* (OUP 2015) 282; John B. Bellinger III, ‘Further Thoughts on the White House Statement About Article 75’ (*Lawfare*, 13 March 2011) available at <<https://www.lawfareblog.com/further-thoughts-white-house-statement-about-article-75>> accessed 20 December 2022.

⁶²⁶ US Department of Defense, *Law of War Manual*, June 2015 (Updated December 2016) [8.16] and fn 117; [17.4.3] and fn 84.

⁶²⁷ *ibid.*

⁶²⁸ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) 399, [15.30.5].

⁶²⁹ The German LOAC Manual, for example, requires a ‘fair and public hearing within a reasonable time by a competent, independent and impartial tribunal established by law’, while mentioning only the presumption of innocence, the principle of no punishment without the law and the requirement that judgments must be made public. See German Federal Ministry of

Declaration of Minimum Humanitarian Standards – which constitutes an expert document but does not reflect State practice – repeats the guarantees listed in Article 6 AP II but adds the principle of *ne bis in idem*.⁶³⁰ These examples demonstrate that State practice is not entirely consistent and that it is therefore not possible to conclude with certainty whether Article 75(4) AP I in its entirety reflects custom applicable in NIAC today (and if so, in what type of NIAC).

In contrast, it is widely accepted that most provisions of AP II do reflect existing customary law.⁶³¹ Nevertheless, while arguing that Article 6 AP II has crystalized into custom might not be particularly controversial, it remains unclear whether this customary rule would also apply to a NIAC that does not meet the contextual and organisational threshold of Article 1(1) AP II. The general trend seems to be that the majority of norms enshrined in AP II apply via customary law even in conflicts below the Protocol's threshold and it is arguable that this includes the section on judicial guarantees.⁶³² In addition, the judicial guarantees required by CA 3 could be interpreted in light of Article 6 AP II and even Article 75 AP I, irrespective of whether these provisions apply directly via customary law. Indeed, international bodies have interpreted provisions of CA 3 against the backdrop of AP I without suggesting that AP I itself applies in NIAC via custom.⁶³³

Defence, Law of Armed Conflict Manual, Joint Service Regulation (ZDv) 15/2, March 2013, 97.

⁶³⁰ Declaration of Minimum Humanitarian Standards, adopted by the expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/Åbo, Finland, 2 December 1990, (Turku Declaration), art 9.

⁶³¹ See e.g. *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [117].

⁶³² See e.g. Sivakumaran (n 14) 308. The ICTY, in particular, applied AP II rules found to reflect customary law to all NIACs, irrespective of whether they met the additional threshold criteria required by Article 1 of the Protocol. See *Strugar* (Trial Judgment) IT-01-42-T (31 January 2005) [220]-[222], [227]-[233]; *Limaj* (Trial Judgment) IT-03-66-T (30 November 2004) [88]-[90].

⁶³³ The IACommHR, for example, noted that ‘many of the rules in Protocol I, which applies only to international armed conflicts, are particularly useful referents for interpreting the substantive content of similar, but less detailed, provisions in Protocol II and common Article 3’. See

Moreover, the actual difference between the due process guarantees listed in Article 6 AP II and Article 75 AP I is limited to three specific rights, namely the right to examine witnesses, the right to a public judgment and the prohibition against double trials (*ne bis in idem*). In this regard, it has been pointed out by a commentator who was present during the 1977 negotiations that the right to examine witnesses and the requirement of a public judgment were dropped by the drafters of Article 6(2) AP II only to keep the list as short and concise as possible and not because they did not want these guarantees to apply.⁶³⁴ Indeed, as the words ‘in particular’ indicate, the list of guarantees in Article 6(2) AP II was never meant to be exhaustive. Furthermore, the preparatory materials indicate that the right to examine witnesses is encompassed by the ‘rights and means of defence’ enshrined in subparagraph (a).⁶³⁵ Therefore, the difference between the individual guarantees listed under Article 75 AP I and Article 6 AP II ultimately comes down to the principle of *ne bis in idem*, which will be discussed in more detail in subsection 4.3.6 below.

In conclusion, it matters little whether one interprets the judicial guarantees recognised as indispensable under CA 3 through subsequent practice in the form of AP II and AP I or adopts the position that CA 3 incorporates fair trial rights under customary IHRL. Ultimately, both routes involve certain methodological challenges but at the same time reinforce each other and lead to a very similar result. Based on the conclusions of the previous two subsections, it is therefore submitted that the procedural guarantees formulated in Article 75 AP I can be considered *indispensable* in the sense of CA 3, with certain caveats relating to prohibition of double trials (*ne bis*

IACommHR, Third Report on the human rights situation in Colombia, OEA/Ser.L/V/II.102 (26 February 1999), Chapter IV [44]. See also *Al-Hassan* (n 13) [383].

⁶³⁴ Bothe, Partsch and Solf (n 236) 745.

⁶³⁵ Commentary to the Draft Additional Protocols (n 332) 142.

in idem). Moreover, the ICCPR essentially provides for the same set of procedural rights, while adding the right to appeal a criminal conviction.⁶³⁶ It will be argued below that the non-derogable nature of the right to appeal is still uncertain and, therefore, that it arguably does not form part of what is considered indispensable under CA 3.

4.2. The Individual Guarantees in Detail: Institutional Guarantees

The following sections will analyse the individual guarantees mentioned above in greater detail. In doing so, they will distinguish between ‘institutional guarantees’ and ‘procedural guarantees’. While the former are concerned with the composition of a judicial body, including its independence and impartiality, the latter relate to the accused’s effective participation in their criminal trial. The requirement that courts be ‘established by law’ would, of course, also qualify as an institutional guarantee. However, its content and application to armed groups was already discussed in **Chapter 3** and this analysis will not be repeated here.

That any court or tribunal must be independent and impartial is explicitly spelled out in Article 6(2) AP II. While the language of Article 6(2) AP II gives the impression that the individual procedural guarantees listed in that paragraph are those that make a court ‘independent and impartial’, independence and impartiality are in fact separate and additional institutional requirements.⁶³⁷ As discussed in the previous sections, the requirements of independence and impartiality form the core of the right to a fair trial and can reasonably be regarded as a non-derogable part of the right to a fair trial under customary international law. As such, although not explicitly mentioned, they are without doubt part of the guarantees required by CA 3. Some

⁶³⁶ Art. 14(5) ICCPR.

⁶³⁷ Weissbrodt (n 596) 419.

commentators have even argued that an obligation to set up an independent judiciary can be considered to follow from general principles of law.⁶³⁸

4.2.1. Independence

IHL treaty law remains silent on a precise definition of ‘independence’, as well that of ‘impartiality’. It thus appears appropriate to refer to IHRL for guidance. Indeed, irrespective of the route taken to identify the individual judicial guarantees required by CA 3, it seems generally accepted that their precise content cannot be interpreted without reference to human rights law.⁶³⁹ The Pre-Trial Chamber in *Al-Hassan*, for example referred to Article 21(3) of the ICC Statute and noted that the meaning of ‘independence’ and ‘impartiality’ must be assessed in light of IHRL.⁶⁴⁰ More specifically, the Pre-Trial Chamber referred directly to Article 14(1) of the ICCPR, as well as the case law of the HRC, ECtHR and the AfCommHPR.⁶⁴¹

Under IHRL, the independence of courts is usually interpreted as the ability to decide cases without pressure or influence of the executive.⁶⁴² The HRC, for example, has made clear that a situation ‘where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial

⁶³⁸ Beate Rudolf, ‘Non-State Actors in Areas of Limited Statehood as Addressees of Public International Law Norms on Governance’ (2010) 4 Human Rights and International Legal Discourse 127, 132.

⁶³⁹ See ICRC Customary IHL Study, xxxvii. See also Doswald-Beck (n 384) 473; Françoise Hampson, ‘The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Body’ (2008) 90 IRRC 549, 561; Hans-Joachim Heintze, ‘On the Relationship between Human Rights Law Protection and International Humanitarian Law’ (2004) 86 IRRC 789, 795; Noam Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 87 IRRC 737, 739.

⁶⁴⁰ *Al-Hassan* (n 13) [378].

⁶⁴¹ *ibid* [379].

⁶⁴² Doswald-Beck (n 384) 472; IACtHR, *Atala Riffó v Chile*, Ser C No 239, 24 February 2012 [186]. See also *Al-Hassan* (n 13) [379].

tribunal’ within the meaning of Article 14 of the ICCPR.⁶⁴³ However, armed groups rarely establish the sort of clear-cut separation of powers commonly found in constitutional States and their political and combat wings are often intertwined.⁶⁴⁴ Nevertheless, the right to a fair trial embodies a certain flexibility in the sense that – while aiming to safeguard judicial independence – it does not impose any specific ‘theoretical constitutional concepts regarding the permissible limits of the powers’ interaction’.⁶⁴⁵ It is therefore arguable that in the context of an armed group, the requirement of independence simply requires that any body charged with the resolution of disputes must be independent of the persons or body that created the applicable rules, and that it must be independent of those whose conduct is monitored.⁶⁴⁶

In its assessment of the Islamic Tribunal established by AQMI/Ansar Dine in Timbuktu, for example, an ICC Pre-Trial Chamber highlighted the fact that many of the judges appointed to it also carried out other functions within the armed group, including media affairs and recruitment.⁶⁴⁷ However, that alone can hardly be said to taint the independence of a tribunal. As pointed out above, carrying out other official functions is not prohibited *per-se* but becomes problematic when it subjects judges to the chain of command of those whose conduct they are supposed to monitor, or if they are simultaneously involved in making the applicable rules

Support for such flexibility can be found in the ICRC Commentary on CA 3, which notes that courts may be composed of persons belonging to the executive, such as members of the armed forces, as long as procedures are in place to ensure they

⁶⁴³ HRC, *Bahamonde v. Equatorial Guinea*, Comm no 468/1991 (10 November 1993) UN Doc. CCPR/C/49/D/468/1991 [9.4].

⁶⁴⁴ Provost (n 40) 201; Murray (n 60) 212.

⁶⁴⁵ *Ástráðsson v Iceland* (n 415) [215].

⁶⁴⁶ Rudolf (n 638) 132.

⁶⁴⁷ *Al-Hassan* (n 13) [418].

perform their judicial functions independently and impartially.⁶⁴⁸ Indeed, even in a State context, the separation between the judiciary and the executive is not always absolute, in particular where a domestic judicial order allows for the use of military courts. In IAC, GC III and GC IV explicitly contemplate the use of military courts for the trial of POWs or civilians in occupied territory.⁶⁴⁹ It has therefore rightly been pointed out that the most adequate comparator for institutional and due process guarantees applicable to armed group courts are those that apply to State military courts during armed conflict.⁶⁵⁰

However, human rights courts and treaty bodies have always been very critical of the use of such courts for the trial of civilians.⁶⁵¹ Under the ECHR, the determination of criminal charges against civilians in military courts is compatible with Article 6 of the Convention only in ‘very exceptional circumstances’.⁶⁵² The HRC has taken a similar position, allowing for recourse to such courts only when ‘unavoidable’, that is, when civilian courts would have been ‘inadequate’ to undertake the particular type of trial.⁶⁵³ More recently, the Committee also held that civilians must not be tried by military tribunals for crimes carrying the death penalty.⁶⁵⁴ However, only the American

⁶⁴⁸ ICRC 2020 GC III Commentary [716].

⁶⁴⁹ Art 84 GC III and art 66 GC IV.

⁶⁵⁰ Provost (n 40) 298.

⁶⁵¹ The main reasons seems to be that military courts are perceived as not being sufficiently independent of the executive arm of government. See Peter Rowe, ‘How well do international human rights bodies understand military courts?’ in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (CUP 2020) 26.

⁶⁵² *Martin v United Kingdom*, App no 40426/98 (ECtHR, 24 October 2006) [44]; *Mustafa v Bulgaria*, App no 1230/17 (ECtHR, 28 November 2019) [28]-[37].

⁶⁵³ HRC, *Ebenezer Derek Mbongo Akwanga v. Cameroon*, Comm no 1813/2008 (22 March 2011) UN Doc CCPR/C/101/D/1813/2008 [7.5]; General Comment 32 (n 401) [22]. A party is required to provide objective reasons to try a civilian in a military court and must show that ordinary courts could not be used. See also Evelyne Schmid, ‘A few comments on a comment: the UN Human Rights Committee's General Comment No. 32 on Article 14 of the ICCPR and the question of civilians tried by military courts’ (2010) 14 *IJHR* 1058.

⁶⁵⁴ HRC, General Comment 36 (n 553) [45].

and African regional human rights systems seem to prohibit the trial of civilians by military courts altogether.⁶⁵⁵

The use of military courts has been considered as particularly problematic if civilians are tried for acts against the armed forces or military wing of the armed group.⁶⁵⁶ Hamas in the Gaza Strip, for example, uses military courts to try civilians for ‘collaboration with Israel’, as well as for severe common offences such as rape and murder, despite the existence of a parallel civilian court system.⁶⁵⁷ Many armed groups, however, do not operate separate courts for civilians and their internal (military) judicial structure is likely to be the only one available.⁶⁵⁸ Since neither IHL, nor general human rights law seem to categorically prohibit trials of civilians by military courts (with some regional exceptions)⁶⁵⁹, it is arguable that armed groups may resort to military courts where civilian courts do not exist or have become dysfunctional. In these circumstances, the use of such courts may indeed become ‘unavoidable’.⁶⁶⁰

The determination of criminal charges by military courts against military personnel, on the other hand, is generally accepted as compatible with fair trial rights.⁶⁶¹ However, human rights courts have emphasised certain practices that should

⁶⁵⁵ *Durand and Ugarte Case*, IACtHR, Ser C No 68, 16 August 2000 [117]; *Castillo Petruzzi v. Peru*, IACtHR, Ser C No. 52, 30 May 1999 [128]; AfCommHPR, *Media Rights Agenda v Nigeria*, Comm no 224/98, 6 November 2000 [61].

⁶⁵⁶ See *Ergin v Turkey (No. 6)*, App no 47533/99 (ECtHR, 4 May 2006) [49].

⁶⁵⁷ Tariq Mukhimer, *Hamas Rule in Gaza: Human Rights under Constraint* (Palgrave Macmillan 2013) 66.

⁶⁵⁸ Murray (n 60) 210.

⁶⁵⁹ See also Rain Liivoja, ‘Trying civilian contractors in military courts: a necessary evil?’ in Duxbury and Groves (n 651) 87, noting that the practice reveals no unanimity between human rights bodies on a general principle that military tribunals are absolutely precluded from exercising jurisdiction over civilians.

⁶⁶⁰ See also Rowe (n 651) 30, arguing more generally that ‘if a military court is able to exhibit the necessary qualities of independence and impartiality as a civilian court, there is no logical basis for drawing a distinction between the two systems to the extent that a civilian should only be tried by the latter’.

⁶⁶¹ See e.g. *Cooper v United Kingdom*, App no 48843/99, (ECtHR, 16 December 2003) [110].

be avoided in order to guarantee such courts' independence. In particular, members of the court should not fall within the chain of command of the convening officer or, in the alternative, must at least enjoy similar constitutional safeguards provided to regular judges if appointed by their hierarchical superior.⁶⁶² It is important to note that none of the cases referred to in this section have involve trials before military courts during an active armed conflict and that the requirement of independence during an ongoing conflict situation might require different arrangements in practice than for courts in peace time.⁶⁶³ In the case of trials over POWs, to give one example, Article 84 GC III has been interpreted to require the trial to be conducted independently from the chain of command within the respective POW camp.⁶⁶⁴ Similar considerations may apply to enemy fighters detained and tried by armed groups in NIAC in the sense that they should not be tried by someone within the chain of command of their captors.

The *Al-Hassan* Pre-Trial Chamber, for example, observed that decisions of the Islamic Tribunal in Timbuktu were regularly influenced by high-ranking members of AQMI.⁶⁶⁵ In particular, decisions considered as 'too important' appear to have in fact been taken by the group's leadership, which then asked the judges to rule accordingly.⁶⁶⁶ The Pre-Trial Chamber thus correctly held that the Islamic Tribunal

⁶⁶² *Findlay v United Kingdom*, App No 22107/93 (ECtHR, 25 February 1997) [76]; *Gürkan v Turkey*, App No 10987/10 (ECtHR, 3 July 2012) [13]-[20]. See also Public Commission to Examine the Maritime Incident of 31 May 2010 (Turkel Commission), Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law (February 2013) 138, [98].

⁶⁶³ Provost (n 40) 437.

⁶⁶⁴ 2020 ICRC GC III Commentary [3615]; Peter Rowe 'The trial of prisoners of war by military courts in modern armed conflicts', in Caroline Harvey, James Summers and Nigel D. White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (CUP 2014) 321.

⁶⁶⁵ *Al-Hassan* (n 13) [419].

⁶⁶⁶ *ibid* [420].

was not protected from outside interference and, therefore, failed to offer the fundamental guarantee of independence.⁶⁶⁷

Occasionally, armed groups resort to so-called ‘revolutionary courts’. In the Revolutionary Armed Forces of Colombia (FARC), for example, members were tried by a ‘Revolutionary Court-Martial’ formed by fighters taking on the judicial roles,⁶⁶⁸ with punishments ranging from community services to execution.⁶⁶⁹ The unit commander was not allowed to take part in the proceeding and had to withdraw to another location in order to prevent undue influence.⁶⁷⁰ However, it is difficult to envisage how an ad-hoc court of soldiers, comprising peers of the accused, could meet the criteria of independence and impartiality. Indeed, the UN Special Rapporteur on the Independence of Judges has voiced serious concerns over the use of any kind of ‘revolutionary courts’, the procedures of which he considered as ‘clearly falling outside internationally recognized criteria for the administration of justice’.⁶⁷¹

Finally, it is noteworthy that the UN Basic Principles on the Independence of the Judiciary specify that the independence of judges, as well as their term of office and conditions of service ‘shall be adequately secured by law’.⁶⁷² The *Al-Hassan* Pre-Trial Chamber seems to have been guided by similar considerations when it identified the way judges are appointed and the duration of their mandate as relevant

⁶⁶⁷ *ibid* [422].

⁶⁶⁸ René Provost, ‘FARC Justice: Rebel Rule of Law’, 8 UC Irvine Law Review (2018) 227, 244.

⁶⁶⁹ Geneva Call, ‘Positive Obligations of Armed Non-State Actors: Legal and Policy Issues: Report from the 2015 Garance Talks’, 10.

⁶⁷⁰ Provost (n 40) 244.

⁶⁷¹ UNHRC, ‘Report of the Special Rapporteur for the Independence of Judges and Lawyer’ (31 December 2003) UN Doc E/CN.4/2004/60 [61].

⁶⁷² UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to September 1985 and endorsed by General Assembly Resolution 40/32 (29 November 1985) UN Doc A/Res/40/32 and 40/146 (13 December 1985) UN Doc A/Res/40/146, [11].

considerations in determining whether a court or tribunal is sufficiently independent.⁶⁷³ The ICRC's commentary on CA 3 equally highlight the importance of guaranteeing the security of tenure.⁶⁷⁴ If this requirement were to be applied to armed groups, it would further reinforce the conclusion reached in **Chapter 3** that the 'established by law' criterion cannot simply be dispensed with. After all, it is difficult to envisage how a judge's tenure can be guaranteed without it being specified and recorded in some form of 'legislation' or binding instrument issued by the armed group.

4.2.2. *Impartiality*

Impartiality is generally understood as the requirement for judges 'not to allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other'.⁶⁷⁵ International courts usually distinguish between 'subjective impartiality' and 'objective impartiality'.⁶⁷⁶ To satisfy the objective impartiality test, the court or tribunal in question must be able to exclude any legitimate doubt in this respect, irrespective of whether undue preconceptions or irreconcilable personal interests of the judges actually exist.⁶⁷⁷ The ICTY has described the necessary test as being whether 'the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias'.⁶⁷⁸

⁶⁷³ *Al-Hassan* (n 13) [379]

⁶⁷⁴ 2020 ICRC GC III Commentary, [716].

⁶⁷⁵ HRC, General Comment 32 (n 401) [21].

⁶⁷⁶ See e.g. *Nahimana* (Appeals Judgment) ICTR-99-52-A (28 November 2007) [47]-[50]; *Galić* (Appeals Judgment) IT-98-29-A (30 November 2006) [37]-[41].

⁶⁷⁷ See e.g. *Kyprianou v. Cyprus*, App no 73797/01 (ECtHR, 15 December 2005) [118].

⁶⁷⁸ *Furundžija* (Appeals Judgment) IT-95-17/1-A (21 July 2000) [189]. See also Theodor Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99 AJIL 359.

Avoiding such ‘appearance of bias’ is particularly difficult in conflict or immediate post-conflict situations.⁶⁷⁹ In evaluating the ‘revolutionary courts’ set up by the Sandinista in Nicaragua, for example, the IACommHR held that subjecting individuals to the legal judgment of ‘political enemies’ who are ‘influenced by the psychology of their victory’ violated the fair trial guarantees of Article 8(1) of the ACHR.⁶⁸⁰ Indeed, a lack of impartiality is frequently asserted in trials by members of the military over rebels and vice-versa, in particular where they concern war crimes or other crimes related to the armed conflict.⁶⁸¹ In this regard, Dinstein notes that:

[A]lthough in theory the court must be independent and impartial – in practice, there is always an apprehension of an innate bias on the part of the judges: either in favour of defendants who belong to the same side or against those who are adversaries.⁶⁸²

This is a problem present in all types of armed conflict and one that affects judicial systems of States and armed groups alike. Indeed, the simple fact that an armed conflict exists may itself taint the impartiality of courts if judges are required to sit in judgment against enemy combatants or fighters.⁶⁸³ Since judges will always ‘belong’ to either the government authorities or the armed group in the sense that they are appointed by one side or the other, an appearance of bias can never be fully avoided. The reality of armed conflict must therefore be taken into account when applying the ‘objective impartiality’ requirement. Otherwise, no court of either party would ever be capable of trying members of the opposite side.

⁶⁷⁹ 2020 ICRC GC III Commentary [3614].

⁶⁸⁰ IACommHR, Reports on the situation of Human Rights in the Republic of Nicaragua (30 June 1981) OEA/Ser.L/V/II.53 Doc. 25, section 4(F).

⁶⁸¹ Doswald-Beck (n 384) 473, [15].

⁶⁸² Dinstein (n 2) 254.

⁶⁸³ 2020 ICRC GC III Commentary [3614].

The ICC Pre-Trial Chamber in *Al-Hassan* concluded that the Islamic Tribunal in Timbuktu was not sufficiently impartial⁶⁸⁴, and noted in that regard that the presiding judge ‘participated in the daily activity of the armed group’.⁶⁸⁵ In particular, the Chamber noted that the judge in question had participated in a session of the group’s ‘crisis committee’, as well as in a meeting where an important military decision had been taken.⁶⁸⁶ However, it is questionable whether such acts necessarily affect a judge’s impartiality, especially since most cases heard by Islamic Tribunal concerned ‘ordinary’ *shari’a* law crimes such as adultery or alcohol consumption that were unrelated to the group’s military activities. As pointed out above, participation in high-ranking leadership bodies is rather an issue that puts into question the independence of the judge, and, therefore, the tribunal in question.

4.2.3. *Selection and Qualification of Judges*

Another aspect that indirectly affects both the independence and impartiality of a court is the level of legal or judicial training that individuals serving as judges must have obtained. Lack of adequate legal training of armed group judges has been a frequent subject of critique by States and international organisations. The US State Department, for example, highlighted in its human rights reports that the LTTE’s court system was composed of judges with ‘little or no legal training’.⁶⁸⁷ The United Nations Observer Mission in El Salvador (ONUSAL) equally noted that individuals sitting on FMLN

⁶⁸⁴ *Al-Hassan* (n 13) [427]

⁶⁸⁵ *ibid* [423].

⁶⁸⁶ *ibid*.

⁶⁸⁷ US Department of State, Bureau of Democracy, Human Rights and Labour, 2008 Country Reports on Human Rights Practices, ‘Sri Lanka’, 25 February 2009, available at <<https://2009-2017.state.gov/j/drl/rls/hrrpt/2008/sca/119140.htm>> accessed 20 December 2022 ; and 2008 Country Reports on Human Rights Practices, ‘Sri Lanka’, 11 March 2008, available at <<https://2009-2017.state.gov/j/drl/rls/hrrpt/2007/100620.htm>> accessed 20 December 2022.

courts had no legal training, which, according to the Mission ‘is one of the requisite elements for making a proper assessment of proof’.⁶⁸⁸ The Stockholm District Court in the *Sakhanh* case went even further and argued that insurgents may operate a court only if it is staffed by personnel which before the outbreak of the conflict were regularly appointed as judges or officials of the pre-existing domestic judicial system.⁶⁸⁹

From the perspective of positive law, however, neither CA 3, nor Article 6 AP II, Article 75 AP I or the ICCPR contain any direct provision on the qualification of judges. The ICRC’s Customary IHL Study does likewise not mention any specific requirements regarding legal training.⁶⁹⁰ The HRC, however, has interpreted the qualification of judges as linked to the requirement of independence in Article 14(1) ICCPR.⁶⁹¹ A similar conclusion was made by the IACommHR.⁶⁹² The HRC has further noted that judges should primarily be selected on the basis of their legal qualifications (as opposed to affiliation with a certain religion, political group or gender) and sometimes recommends appropriate training.⁶⁹³ In addition, the UN Basic Principles on the Independence of the Judiciary specify that persons selected for judicial office shall be individuals with ‘appropriate training or qualifications in law’.⁶⁹⁴ However,

⁶⁸⁸ See e.g. ONUSAL, Third Report of the United Nations Observer Mission in El Salvador (19 February 1992) UN Doc A/46/876-S/23580 [112].

⁶⁸⁹ *Sakhanh* (Stockholm District Court) (n 46) at [31], [38] and [52].

⁶⁹⁰ ICRC Customary IHL Study, Rule 100.

⁶⁹¹ HRC, General Comment 32 (n 401) [19].

⁶⁹² IACommHR, ‘Report on the Situation of Human Rights in Chile’ (9 September 1985) Doc. OEA/S.R.L./V/II.66 [139].

⁶⁹³ See HRC, Concluding Observations on Sudan (19 November 1997) UN Doc UN doc CCPR/C/79/Add.85 [28]. See also HRC, Concluding Observations on the Republic of Congo (25 April 2000) UN Doc CCPR/C/79/Add.118 [14].

⁶⁹⁴ UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to September 1985 and endorsed by General Assembly Resolution 40/32 (29 November 1985) UN Doc A/Res/40/32 and 40/146 (13 December 1985) UN Doc A/Res/40/146 [10].

the HRC has never found a violation of Article 14 ICCPR due to a lack of legal training alone. Moreover, the ECtHR held that courts which are entirely composed of professional judges can be generally presumed to possess appropriate experience and training enabling them to resist any outside influence.⁶⁹⁵ It thus set out what seems to be a rebuttable presumption in favour of professionally trained judges but not necessarily an absolute requirement that, if not met, would automatically taint the independence of the judicial body in question.

The question is, therefore, whether courts staffed partially or exclusively with individuals without adequate legal training *ipso facto* violate the indispensable fair trial guarantees under IHL. In this regard, it has to be born in mind that in certain jurisdictions, individuals without formal legal qualifications can hear petty criminal cases, e.g. in the ‘magistrate courts’ of the United Kingdom.⁶⁹⁶ Moreover, many domestic legal systems allow for convictions to be rendered by lay juries in criminal matters, particularly in relation to the most serious offences, although such trials do normally include oversight by a trained judge who must ensure that procedural rules are followed and that the jury is duly instructed.⁶⁹⁷ The lack of legal qualifications is particularly prevalent in military courts and courts-martial. However, this fact has been frequently criticised by NGOs.⁶⁹⁸ In the *Hamdan* case, Justice Kennedy remarked that the fact that only one member of the US Military Review Panels had to have experience

⁶⁹⁵ *Craxi v Italy*, App no 34896/97 (ECtHR, 5 March 2003) [104].

⁶⁹⁶ E.g. the United Kingdom, see *Clooney and Webb* (n 587) 77.

⁶⁹⁷ See e.g. ECtHR, ‘Guide to Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)’, 31 August 2020 [173].

⁶⁹⁸ For recent examples, consider International Commission of Jurists, ‘Military Injustice in Pakistan: Briefing Paper’, January 2019, 11; International Commission of Jurists, ‘The Jurisdiction and Independence of the Military Courts System in Lebanon in Light of International Standards: A Briefing Paper’, May 2018, 14.

as a judge (whereas there was no requirement for the other members to have any legal experience at all) was a structural flaw affecting the impartiality of the review body.⁶⁹⁹

Sufficient legal or judicial training is, therefore, not necessarily a free-standing requirement but a consideration in ensuring the impartiality and independence of the court as such. The underlying idea seems to be that it is only with appropriate professional training that members of a court can resist undue outside influence or overcome potential personal biases. Yet, it would be difficult to conclude that it is an indispensable criterion that all judges of a military court or court of an armed group must have received formal training. The UN Draft Principles Governing the Administration of Justice Through Military Tribunals explicitly note that persons selected to perform the functions of judges in military courts must show proof of the necessary legal training and qualifications.⁷⁰⁰ However, while normatively appealing, these principles have so far not been formally adopted and State practice simply does not seem to be in compliance with them.⁷⁰¹ Nevertheless, experts have identified an increasing trend towards reliance on judges with legal qualifications in State-operated military courts.⁷⁰²

It therefore seems that there is currently no clear standard as to the qualifications required from judges sitting on state-operated military courts. A recent comprehensive study on the right to a fair trial in international law concludes that this

⁶⁹⁹ *Hamdan v Rumsfeld* (n 397), Concurring Opinion of Justice Kennedy, 16.

⁷⁰⁰ UNCHR, 'Issue of Administration of Justice through Military Tribunals', Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights (13 January 2006) UN Doc E/CN.4/2006/58, 17 (Principle 13).

⁷⁰¹ See e.g. International Commission of Jurists, 'Military Jurisdiction and International Law', 1 January 2004, available at <<https://www.icj.org/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf>> accessed 20 December 2022.

⁷⁰² Yale Draft Principles Governing the Administration of Justice Through Military Tribunals, March 2018, available at <<https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf>> accessed 20 December 2022 [15].

also applies to the qualification of judges more generally by noting that ‘international human rights law does not prescribe minimum educational or training requirements for judges, and state practice varies considerably’.⁷⁰³ This makes it even more difficult to argue that IHL mandates armed groups to staff their courts with formally trained legal professionals. The finding of the Stockholm District Court that armed groups courts may only be staffed with judges duly appointed under the pre-existing legal system before the outbreak of the conflict thus has no solid basis in positive law. In addition, requiring judges to have been previously appointed by the hostile government is fundamentally at odds with the principle of belligerent equality.⁷⁰⁴ Doing so would place a significant restriction on groups without access to trained judges, especially those operating in remote areas. It has been therefore rightly pointed out that the capacity of an armed group to administer justice cannot depend on the arbitrary factor of whether it has access to regime judges.⁷⁰⁵ Rather, the focus should be placed on whether the judges are actually independent, impartial and competent.⁷⁰⁶

This conclusion notwithstanding, many armed groups are aware of the need for legally trained personnel and appear to be responsive to international criticism in this regard. A frequently invoked example is the establishment of a ‘law college’ by the LTTE in Sri Lanka, which offered a 3-year long academic legal training followed by a 2-year apprenticeship to the group’s military cadre, and later also the general

⁷⁰³ Clooney and Webb (n 587) 77.

⁷⁰⁴ See section 4.4.4.

⁷⁰⁵ Somer (n 56)

⁷⁰⁶ *ibid.*

population.⁷⁰⁷ Similarly, armed groups in the Idlib province in Syria established an institute to train individuals in judicial procedures.⁷⁰⁸

A related question is to what extent ‘legal training’ must be understood in a formalistic manner. What is adequate in term of experience or training could also depend on the law and procedure applied by the court in question. If, for example, the court applies religious law (e.g. *Shari’a* law), a trained religious scholar might satisfy this criterion.⁷⁰⁹ However, it needs to be reiterated that at least under human rights law, religious and customary courts may not be used to try serious criminal offences.⁷¹⁰ Other forms of community-based courts, such as the *gacaca* courts in Rwanda, are sometimes praised as an alternative to regular courts.⁷¹¹ Some commentators have argued that despite the fact that these courts were staffed with lay judges with little to no legal training, their ‘contextual competence’ with regard to the social and political framework of the Rwandan Genocide could efficiently replace the requirement of legal training.⁷¹² However, many human rights advocates and monitoring bodies were unconvinced that these courts provided for a fair trial and also highlighted the lack of legal training in that regard.⁷¹³

⁷⁰⁷ Sivakumaran (2009) 494.

⁷⁰⁸ Regine Schwab, ‘Insurgent courts in civil wars: the three pathways of (trans)formation in today’s Syria (2012–2017)’ (2018) 29 *Small Wars & Insurgencies* 801, 811.

⁷⁰⁹ The ICC Pre-Trial Chamber in *Al-Hassan*, for example, noted that the Islamic Tribunal established in Timbuktu had to be composed of at least one person properly trained in religious matters at all times. See *Al-Hassan* (n 13) [417].

⁷¹⁰ See **Chapter 3**, section 3.2.4.

⁷¹¹ See e.g. Murray (n 60) 217.

⁷¹² Pietro Sullo, *Beyond Genocide: Transitional Justice and Gacaca Courts in Rwanda* (Springer/Asser Press 2018) 176.

⁷¹³ See e.g. HRC, Concluding Observations, Rwanda (7 May 2009) UN Doc CCPR/C/RWA/CO/3 [17]; Human Rights Watch, ‘Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts’, 31 May 2011.

To conclude, while legal knowledge and judicial training are certainly important factors in ensuring the impartiality and independence of a court, as well as due process, the current state of international law does not seem to include any specific training standards that, if not met, would *ipso facto* result in a violation of indispensable fair trial guarantees.⁷¹⁴ Whereas it is advisable to rely on legally trained personnel to the extent possible, it cannot be ruled out that a court that is staffed exclusively by laymen but otherwise complies with all necessary judicial guarantees is permissible under IHL. This finding applies to State courts and armed groups alike.

4.3. The Individual Guarantees in Detail: Procedural Guarantees

In contrast to the institutional guarantees discussed above, procedural guarantees do not relate to the composition of the court or tribunal and its protection against outside influence, but are rather meant to ensure due process and the effective participation of defendants in their criminal trial. As explained at the beginning of this Chapter, they comprise at the very least the presumption of innocence, the right to be informed of the offence, the necessary rights and means of defence, the right not to testify against oneself, the right to a public judgment, the principle of legality (*nullum crimen sine lege*), the right to be informed of available legal remedies and the right not to be tried twice for the same offence by the same party. However, despite some assertions to the contrary, it will be argued that, for the time being, IHL does not require a right to appeal a criminal conviction.

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It should be noted that even the ICC once included a judge on its bench who had never received any form of legal or judicial training. See Geoffrey Robertson, 'Judicial Independence: Some Recent Problems' (2014) IBAHRI Thematic Papers No. 4, 22.

4.3.1. Necessary Rights and Means of Defence

4.3.1.1. Right to be informed of the charges

The right of an accused to be guaranteed ‘all necessary rights and means of defence’ is enshrined in all four 1949 Geneva Conventions, Article 75(4)(a) AP I, Article 6(2)(a) AP II, as well as Article 14(3)(b) of the ICCPR.⁷¹⁵ First and foremost, an accused must be informed without delay of the particulars of the offence alleged against him. This requirement, along with the presumption of innocence, should not be particularly difficult to implement, even for armed groups with otherwise limited capacities.

4.3.1.2. Right to legal representation

The next element of the ‘necessary rights and means of defence’, however, is the right to either defend oneself or to be assisted by counsel of one’s own choice.⁷¹⁶ It is included in Article 14(3)(b) ICCPR and both GC III and GC IV explicitly provide for a right to be assisted by a ‘qualified advocate or counsel’ of the accused’s own choice.⁷¹⁷ The ICC Pre-Trial Chamber in the *Al-Hassan* case equally highlighted the right to legal assistance and noted that none of the victims has had access to a lawyer.⁷¹⁸ Some armed groups, such as the LTTE in Sri Lanka, allowed lawyers of every part of the country to appear before their courts, subject only to taking an oath before doing so.⁷¹⁹ In Eastern Ukraine, legal aid lawyers reported that they were invited to provide their services in DPR-controlled areas but did not feel safe enough to actually travel to

⁷¹⁵ Art 49(4) GC I, art 50(4) GC II, arts 84(2) and 96(4) GC III, arts 72(1) and 123(1) GC IV.

⁷¹⁶ ICRC CIL Study, Rule 100.

⁷¹⁷ Arts 99 and 105 GC III, art 72 GC IV.

⁷¹⁸ *Al-Hassan* (n 13) [483].

⁷¹⁹ Sivakumaran (n 30) 494.

these regions.⁷²⁰ In addition, as discussed in the previous Chapter, it should be kept in mind that State authorities will often try to obstruct or even penalize individual engagement with insurgent authorities. In the DRC, for example, the local UN Mission (MONUC) organised airplanes for defence attorneys from Kinshasa to attend trials conducted by the MLC, but government authorities prevented them from boarding.⁷²¹ In the 1920s, the Irish Bar considered appearance before the illegal Dáil courts as professional misconduct and transgressing members were threatened with disbarment.⁷²² It has thus been noted that the obligation to provide access to a lawyer can pose significant difficulties for armed groups.⁷²³

Invoking these difficulties, the FMLN in El Salvador argued that a defence counsel could not be required to be a licensed attorney if there were no licensed attorneys in the region and suggested that in these situations, defence counsels should be selected on the basis of their conduct and ethical principles instead.⁷²⁴ Here, the question as to the necessary formal legal qualifications arises in a similar fashion as discussed above in relation to judges. Even in IACs, difficulties in exercising the right to free choice of counsel arise where the laws of the detaining state impose requirements relating to the defence counsel's nationality, membership of its bar or membership in its armed forces in order to appear before the respective military courts.⁷²⁵ The ICRC thus recommends that detaining powers should relax some of those requirements in order to accommodate the accused POWs choice of counsel.⁷²⁶ By

⁷²⁰ OSCE Special Monitoring Mission to Ukraine (n 10) 21.

⁷²¹ See Willms (n 56) 149.

⁷²² Brayden (n 9) 11.

⁷²³ Murray (n 60) 216.

⁷²⁴ Sivakumaran (n 14) 553 and Murray (n 60) 217.

⁷²⁵ ICRC 2020 GC III Commentary [4085] and [4090].

⁷²⁶ *ibid.*

analogy, the right to legal counsel should not be interpreted in an overly formalistic manner in the sense of requiring specific professional qualifications or memberships for counsel appearing before courts of armed groups. Indeed, the accused may prefer to have access to assistance by someone who is familiar with the armed groups' 'laws' and procedures, even though that person is not a formally qualified lawyer under the pre-existing judicial system. The chosen person should also be able to move around freely in group-controlled territory in order to collect evidence or contact potential witnesses.

4.3.1.3. Right to examine witnesses

It has already been mentioned that Article 75(4) AP I provides anyone charged with an offence with the right to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions. This provision was not included among the guarantees listed in Article 6(2) AP II. However, as mentioned above, the exclusion of this right from the listed guarantees was due to the wish of the drafters to keep the list as concise as possible.⁷²⁷ Since the list of guarantees in Article 6(2) AP II is not exhaustive, it is submitted that the right to examine witnesses is encompassed by the 'necessary rights and means of defence'. This interpretation is supported by the original Draft Additional Protocol prepared by the ICRC⁷²⁸ and has been confirmed more recently by the ICC Pre-Trial Chamber in the *Al-Hassan* case⁷²⁹. Indeed, in light of the principle of equality of arms, this guarantee is vital for ensuring

⁷²⁷ Bothe, Partsch and Solf (n 236) 745.

⁷²⁸ Commentary to the Draft Additional Protocols (n 332) 142.

⁷²⁹ *Al-Hassan* (n 13) [384].

an effective defence by the accused.⁷³⁰ In addition, several military manuals explicitly mention the right in the context of the indispensable guarantees under CA 3.⁷³¹

4.3.1.4. *Sufficient time and facilities to prepare a defence*

The accused must be provided with sufficient time and facilities to prepare the defence.⁷³² This element played a crucial role in the *Sakhanh* case before the Stockholm District Court. The Court, in determining whether the tribunal in question had complied with the applicable fair trial guarantees under CA 3, relied heavily on the fact that the time span between capture and execution of the accused amounted to only 41 hours.⁷³³ ONUSAL in El Salvador also pointed out that a time span of five days between capture and execution of an individual is incompatible with the exercise of all necessary rights and means of defence in the sense of Article 6(2)(a) AP II.⁷³⁴ Unusually short proceedings were also frequently highlighted as an element indicative of an unfair trial in several post-World War II cases that will be discussed in **Chapter 5**, particularly those involving the death penalty.⁷³⁵ The ICC Pre-Trial Chamber in *Al-Hassan* also noted the hasty way in which some of the trials were conducted in that case, with judgments rendered on the same day as confessions taken from the accused.⁷³⁶

⁷³⁰ HRC, General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant) (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [39].

⁷³¹ See e.g. UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) 399, [15.30.5]; US Department of Defense, *Law of War Manual*, June 2015 (Updated December 2016) [8.16.3.4];

⁷³² ICRC Customary IHL Study, Rule 100.

⁷³³ *Sakhanh* (n 46) [62] and [64].

⁷³⁴ ONSULA, Third Report (n 688) [114].

⁷³⁵ See e.g. *Hisakasu et al.*, US Military Commission Shanghai, 3 September 1946 (1948) 5 LRTWC 66, 71.

⁷³⁶ *Al-Hassan* (n 13) [880].

However, the requirement of sufficient time to prepare one's defence has to be contrasted with the right to be tried 'without undue delay' which can be found in several human rights instruments, including Article 14(3)(c) of the ICCPR.⁷³⁷ Indeed, undue delay may also taint a trial in the context of a NIAC.⁷³⁸ The ICTY Trial Chamber in *Simić*, for example, interpreted the judicial guarantees of CA 3 to encompass 'the right to be brought promptly before a judge [...] and to trial within a reasonable time or to release'.⁷³⁹

4.3.2. *Public Judgments*

Moving beyond the 'necessary rights and means of defence', a fair trial will require a judgment to be pronounced publicly. The publicity of trials plays an important role in human rights law.⁷⁴⁰ As explained by the HRC, 'the publicity of hearings ensures the transparency of proceedings and provides an important safeguard for the interest of the individual'.⁷⁴¹ In the *Justice Trial case*, the US Military Tribunal at Nuremberg highlighted the fact that the 'entire proceedings from beginning to end were secret and no public record was allowed to be made of them' as one of the factors showing that the victim's fair trial rights had been violated.⁷⁴²

However, the requirement of publicity can normally be waived for security reasons or other special circumstances.⁷⁴³ In times of armed conflict, security reasons may prevent the conduct of a public trial, especially in the context of armed groups that

⁷³⁷ See also 2020 ICRC GC III Commentary [724].

⁷³⁸ *ibid.* See also *Al-Hassan* (n 13) [483].

⁷³⁹ *Simić*, Trial Judgment (n 419) [678].

⁷⁴⁰ See Art. 14(1) ICCPR.

⁷⁴¹ HRC, General Comment 32 (n 401) [28].

⁷⁴² *Altstötter et al.* (1948) 6 LRTWC 1, 97 (*Justice Trial*).

⁷⁴³ Art 14(1) ICCPR; see also art 105(5) GC III and art 74(1) GC IV.

have not (yet) established territorial control. IHL thus only requires the judgement to be ‘pronounced’ publicly.⁷⁴⁴ While this requirement can be found in Article 75(4)(i) AP I, it was omitted in Article 6(2) AP II. However, it has already been mentioned above that according to a commentator present during the 1974-77 Diplomatic Conference this omission was meant to keep the list as concise as possible and not because the drafters objected to a requirement of public judgments.⁷⁴⁵ The right to a public judgment should thus be understood as included in the non-exhaustive list of guarantees under Article 6(2) AP II and CA 3. Indeed, several military manuals explicitly include the right to a public judgment among those guarantees applicable in NIAC.⁷⁴⁶ The ICRC’s customary IHL study also identified the right to have a judgment pronounced publicly as part of the customary law rule of fair trial rights applicable in all types of conflicts.⁷⁴⁷

Under certain circumstances, however, it might be unrealistic for an armed group court to render a judgment in a public session, thereby disclosing its location and making the proceedings vulnerable to attack by the enemy party. It is arguable that the essence of the right to have a judgment ‘pronounced publicly’ is that the decision is accessible to the public, which ensures transparency in the administration of justice, not necessarily that it be *pronounced* in a public session. The provision could thus be interpreted teleologically as requiring the party undertaking the trial to make the judgment ‘available to the public’. This interpretation is supported by Article 14(1)

⁷⁴⁴ 1987 ICRC AP I Commentary [3118].

⁷⁴⁵ Bothe, Partsch and Solf (n 236) 745.

⁷⁴⁶ See e.g. United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) 403, [15.30.5]; US Department of Defense, *Law of War Manual*, June 2015 (Updated December 2016) [8.16] and fn 117; [17.4.3] and fn 84; German Federal Ministry of Defence, *Law of Armed Conflict Manual*, Joint Service Regulation (ZDv) 15/2, March 2013, 97.

⁷⁴⁷ ICRC Customary IHL Study, Rule 100.

ICCPR, which does not speak of a public pronouncement but rather requires that any judgement rendered in a criminal case or in a suit at law ‘shall be made public’ even where security other compelling reasons prevent the conduct of a public trial. The German LOAC Manual, for example, explicitly stipulates that ‘[t]he judgement rendered must be made public’.⁷⁴⁸ Today, this obligation can easily be implemented, for example, by publication of judgments on the internet.

Irrespective of any legal requirement to do so, many armed groups deliberately choose to conduct entire trials publicly. The National Resistance Army’s (NRA) disciplinary committees in Uganda, for example, always determined punishments of their fighters publicly and in the presence of the civilians that were harmed.⁷⁴⁹ The group’s leadership explained that it wanted to demonstrate that the NRA would not cover up crimes of its own members like the ‘old regimes’ it was fighting against.⁷⁵⁰ With regard to the trial of civilian collaborators, on the other hand, trials and punishment are often conducted publicly in order to deter other civilians from supporting the enemy.⁷⁵¹ A good example of this practice can be found in Hamas’s ‘Operation Strangling Necks’, conducted in the Gaza Strip in 2014.⁷⁵² As mentioned in **Chapter 1**, publicity is often endorsed for strategic reasons rather than to satisfy legal requirements.

⁷⁴⁸ German Federal Ministry of Defence, Law of Armed Conflict Manual (n 746) 97.

⁷⁴⁹ Jeremy M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (CUP 2006) 226.

⁷⁵⁰ *ibid.*

⁷⁵¹ See generally Darcy (n 317).

⁷⁵² Amnesty International, ‘Strangling Necks; Abductions, Torture and Summary Killings of Palestinians by Hamas Forces during the 2014 Gaza/Israel Conflict’, 27 May 2015, MDE 21/1643/2015, 14.

4.3.3. *The Principle of Legality and Competing Legal Systems*

Article 15 ICCPR provides that '[n]o 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'. These core principles of legality, namely the maxim of *nullum crimen, nulla poena sine lege* and the prohibition against criminal retroactivity reflect not only customary international law but have also been described as general principles of law.⁷⁵³ They are included among the few provisions from which derogation is explicitly prohibited under Article 4(2) of the ICCPR, even in times of war or other national emergencies. It is thus not surprising that the language of Article 15 ICCPR was replicated almost verbatim in Article 75(4)(c) AP I and Article 6(2)(c) AP II. Moreover, the principle of legality and non-retroactivity were already enshrined in Article 99 GC III, as well as Articles 65 and 67 GC IV. Furthermore, the ICC Pre-Trial Chamber in *Al-Hassan* noted that 'the principle of legality of offences and penalties must be respected as a generally recognized judicial guarantee'.⁷⁵⁴ Therefore, reading the principles of legality and non-retroactivity into CA 3's indispensable guarantees is rather uncontroversial.

While the application of these requirements is usually straightforward in the context of trials by States, it raises some issues with regard to trials by non-State actors. When prosecuting common crimes such as theft or murder, armed groups may rely on pre-existing substantive (State) law. In addition, where groups undertake trials over conduct that amounts to genocide, war crimes, crimes against humanity, or potentially even aggression, problems with legality and retroactivity are unlikely to arise as the individual criminal responsibility for these crimes derives directly from customary

⁷⁵³ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2008) 241, 299 and 358.

⁷⁵⁴ *Al-Hassan* (n 13) [483] (translated by the author).

international law.⁷⁵⁵ This is supported by the wording of Article 15 ICCPR and the (equally authentic) French version of Article 6(2)(c) AP II which both note that the act must have been criminalised ‘*après le droit national ou international*’. In practice, however, legitimacy concerns often prevent armed groups from relying on pre-existing (domestic or international) law. As mentioned in **Chapter 1**, some of the armed group courts in Syria, for example, applied *Shari’a* law to sanction perpetrators of conflict-related as well as common crimes because it enjoyed higher legitimacy among the local population than the pre-existing State law.⁷⁵⁶ Other groups applied the Unified Arab Code instead, a set of model legal codes that was developed by experts of the Arab League between 1988 and 1996, even though it had never been implemented by the Syrian State.⁷⁵⁷

The issue becomes more complicated where armed groups aim to punish conduct not yet criminalised under either pre-existing national or international law. The first relevant question in this regard is whether armed groups can create a recognizable body of law. This was already discussed in **Chapter 3** in the context of the requirement that a tribunal must be ‘established by law’ and it will not be revisited at this point. Indeed, there is no reason why the conclusion reached – namely that armed group ‘laws’ may constitute ‘law’ for the purpose of compliance with international law – should not also apply to the enactment of substantive criminal law. To reiterate, in the English version of Article 6(2)(c) AP II, the phrase ‘national or international law’ was shortened to ‘under the law’. According to Bothe, the term ‘national law’ created difficulties as laws passed by rebel groups might not be covered by the term ‘national

⁷⁵⁵ See **Chapter 2**, section 2.2.3.

⁷⁵⁶ Baczko, Dorransoro and Quesnay (n 32) 120.

⁷⁵⁷ *ibid.*

law’ and the deletion of the words ‘national or international’ should be understood as broadening, not limiting the concept of ‘law’.⁷⁵⁸ It thus seems that retaining the words ‘national or international’ in the French and Arabic version (‘*بمقتضى القانون الوطني*’ (‘*أوالدولي*’)) was merely an oversight. Indeed, the equally authentic⁷⁵⁹ Spanish (‘*según el derecho*’), Russian (‘*по закону*’) and Chinese (‘*法律*’) versions all translate into ‘under the law’.

Another indication that the substitution of the phrase ‘national or international law’ for ‘law’ in Article 6(2)(c) AP II was meant to include armed group legislation is the fact that all six authentic language versions⁷⁶⁰ of Article 75(4)(c) AP I retained the wording ‘national or international law’, probably because it was not deemed necessary to use a more inclusive language in the context of inter-State conflicts. This understanding is further supported by statements made by delegations during the negotiations of the Protocol. The Hungarian Delegate, for example, noted that the laws of an insurgent group ‘might be more in harmony with the demands of the time and more humanitarian than the laws in force prior to the beginning of the conflict’.⁷⁶¹

Monitoring bodies equally seem to implicitly accept the law-making capacity of armed groups, even though they are usually very cautious in the language they employ. ONUSAL in El Salvador, for example, criticised the ‘Principles, Norms and Measures Ordered by FMLN in the Course of the War’ as insufficient to comply with Article 6(2)(c) AP II not because they were passed by the FMLN as a non-State actor but because it argued that this attempt at a ‘penal code’ failed to afford necessary

⁷⁵⁸ Bothe, Partsch and Solf (n 236) 746-47.

⁷⁵⁹ See art 28 AP II.

⁷⁶⁰ See art 102 AP I.

⁷⁶¹ Official Records of the Diplomatic Conference, vol XI, CDDH/II/SR.40 [88].

procedural guarantees.⁷⁶² Similarly, the OHCHR raised concerns about the ‘Criminal Procedure Code’ enacted and applied by the DPR in Eastern Ukraine due to its specific content, not the fact that it formed the basis of legal prosecutions as such.⁷⁶³

If one accepts the capacity of armed groups to ‘legislate’, the second question then becomes whether there are any limits to said capacity. For example, armed groups often penalise acts such as ‘treason’ or ‘collaboration with the enemy’ against the group.⁷⁶⁴ The RUF in Sierra Leone, for example, held a public trial for captured government officials over ‘crimes against the RUF cause’.⁷⁶⁵ Pre-existing state law will obviously not provide a basis for the prosecution of such ‘crimes’. Even more prevalent is the question of whether it is possible for the group to criminalise the mere participation in hostilities on behalf of the government (or other armed groups) and try captured members of the State armed forces accordingly. Moreover, to use the example of the *Al-Hassan* case, can the armed group penalise conduct not yet criminal in the respective territory and without a direct relation to the conflict, such as adultery or alcohol consumption, simply because it does not align with the group’s moral or religious views? As **Chapter 5** will demonstrate, the *Al-Hassan* Pre-Trial Chamber avoided answering this question by noting that in light of the amount of other fair trial

⁷⁶² ONUSAL, Third Report (n 688) [113]. See also Deborah Casalin, ‘Taking prisoners: reviewing the international humanitarian law grounds for deprivation of liberty by armed opposition groups’ (2011) 93 IRRC 743, 756, describing this report as an instance of pragmatic acceptance of armed group laws by international observers, in the interests of eliciting the armed opposition group’s compliance with IHL or IHRL standards.

⁷⁶³ OHCHR, ‘Human rights in the administration of justice in conflict-related criminal cases in Ukraine’ (April 2014 – April 2020) (17 September 2020) UN Doc A/HRC/45/CRP.9, [102]-[103].

⁷⁶⁴ See e.g. Olivier Bangerter, ‘Internal Control: Codes of Conduct within Insurgent Armed Groups’ (2012) 31 Small Arms Survey Occasional Paper, 15.

⁷⁶⁵ Cyanne E. Loyle, ‘Rebel Justice During Armed Conflict’ (2021) 65 Journal of Conflict Resolution 108, 111.

violations already established it was not necessary to further examine whether the principle of legality had been complied with.⁷⁶⁶

The position of an armed group, especially where it has established control of territory, is somewhat akin to the position of an occupying power in IAC. The relationship between domestic law and legislation enacted by an occupying power is regulated by Article 64 of GC IV.⁷⁶⁷ It stipulates that the penal laws of the occupied territory may only be altered if such changes are necessary for the implementation of the Convention, to maintain orderly government, or if required for the security of the occupying power. While the law of NIAC does not contain a ‘law of occupation’, some commentators have suggested that this rule should by analogy be applied to armed groups.⁷⁶⁸ For example, it was noted above that armed groups regularly try, imprison, and execute spies and collaborators.⁷⁶⁹ In these cases, the group will not be able to rely on domestic penal laws, which usually criminalize espionage or collaboration with the enemy *against* the State. If Article 64 GC IV were to be applied by analogy, an armed group would be allowed to criminalise acts of collaboration with enemy authorities as such behaviour compromises the group’s security. In contrast, conduct that does not pose a threat to the security of the group or ‘orderly government’, such as adultery or alcohol consumption, to use the *Al-Hassan* example, would fall outside that permitted scope.

Nevertheless, the analogy to the law of occupation should not be overstretched.⁷⁷⁰ Indeed, international tribunals have so far been rather critical of

⁷⁶⁶ *Al-Hassan* (n 13) [483].

⁷⁶⁷ Art 64 GC IV.

⁷⁶⁸ Zegveld (n 225) 71.

⁷⁶⁹ Darcy (n 317) 64.

⁷⁷⁰ For a general critic of applying GC IV rules by analogy to armed groups in NIAC see Sassòli (n 333) 229 and Spadaro (n 363).

transposing rules enshrined in the law of occupation to armed groups in NIAC.⁷⁷¹ Moreover, belligerent occupation is, by its very nature, meant to be temporary and this is why the occupying power is prohibited from taking any measures that may permanently alter the status of the territory or lead to annexation.⁷⁷² Since there is no corresponding *jus ad bellum* in NIAC prohibiting permanent unilateral control of ‘enemy territory’ – a concept that is in itself problematic in relation to NIACs – by one party to a conflict, it is difficult to see why international law should be concerned with changes to the domestic legal order in that territory. Accordingly, if one accepts the legislative capacity of armed groups, positive law does not seem to contain any specific limits to that capacity. Analogies to the law of occupation should thus be treated with caution.

A different issue is the question of whether an analogy to IHL applicable in IAC would also allow for the group to penalise mere participation in hostilities by members of the State armed forces. In IAC, a party to the conflict is prohibited from doing so in relation to members of the enemy armed forces who enjoy combatant immunity.⁷⁷³ However, as already pointed out in **Chapter 3**, combatant immunity was deliberately excluded from NIAC. Article 6(5) AP II only requires that at the end of the conflict, ‘the authorities in power’ shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict. The use of the term ‘authorities in power’ implies the possibility of a victorious rebel group punishing individuals who have participated in hostilities on behalf of the defeated

⁷⁷¹ *RUF case* (n 34) [982]-[988].

⁷⁷² Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2019) 58-59.

⁷⁷³ See art 43(3) AP I.

government.⁷⁷⁴ In addition, allowing only State authorities to prosecute rebel fighters for their mere participation in hostilities, but not vice versa, would undermine the concept of belligerent equality – insofar it exists in NIAC – an issue that will be further discussed in section 4.4 below.⁷⁷⁵ Sassòli thus rightly concludes that IHL does not preclude armed groups from prosecuting government soldiers.⁷⁷⁶

Finally, accepting rebel legislation as ‘law’ does not automatically make State law disappear in the affected territories. Acknowledging this problem, the ICRC’s 1987 commentary on Article 6 AP II noted that ‘[t]he possible co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents, makes the concept of national law rather complicated in this context’.⁷⁷⁷ Indeed, this may subject individuals to two competing and potentially conflicting regal regimes. While it has been argued that there is a general trend that factual control of a territory should be decisive in the context of conflict of laws, this does not always dispose of the problem, especially in areas where neither party has established exclusive control.⁷⁷⁸

⁷⁷⁴ In that case, however, the laws passed by the victorious insurgent party during its struggle could be retroactively considered as ‘State law’ via art 10(1) ARSIWA.

⁷⁷⁵ See also Somer (n 39) 657-58.

⁷⁷⁶ Sassòli (n 333) 585. However, Sassòli also argues that it seems ‘unfair’ that government soldiers should be bound by rebel legislation before they fall under their control. Spadaro reaches a similar conclusion, see Alessandra Spadaro, ‘The Prosecution of Conflict-related Offences by Courts of Armed Groups’ (*Armed Groups and International Law Blog*, 2 June 2022) available at <<https://www.armedgroups-internationallaw.org/2022/06/02/rebel-courts-book-symposium-the-prosecution-of-conflict-related-offences-by-courts-of-armed-groups/>> accessed 20 December 2022. But see critically Provost (n 40) 270-71.

⁷⁷⁷ 1987 ICRC AP II Commentary [4605].

⁷⁷⁸ Jochen A. Frowein, ‘De Facto Regime’, *Max Planck Encyclopedia of Public International Law* (2013) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1395>> accessed 20 December 2022 [10], see also Provost (n 40) 250.

4.3.4. Permitted Types of Punishment

An issue related to the legislative capacity of armed groups is the question of whether IHL contains limitations as to the types of punishments that may be lawfully imposed. Most notably, it is prohibited to impose collective punishments. Article 6(2)(b) AP II and Article 75(4)(b) AP I specifically highlight that no one shall be convicted of an offence except on the basis of individual penal responsibility. Moreover, a general prohibition of collective punishments can be found in Article 75(2)(d) and arguably applies in NIAC via customary law.⁷⁷⁹

While CA 3 does not contain a specific prohibition on corporal punishment, Article 4(2)(a) AP II prohibits ‘cruel treatment such as torture, mutilation or any form of corporal punishment’.⁷⁸⁰ Since CA 3 equally prohibits cruel treatment, it is arguable that this prohibition would implicitly also cover corporal punishment.⁷⁸¹ Moreover, there is some authority to suggest that corporal punishment is prohibited in any armed conflict by customary law.⁷⁸²

In relation to the use of the death penalty, the fact that the ‘carrying out of executions’ is explicitly mentioned in CA 3 is a clear indication that it is generally considered as permitted.⁷⁸³ The initial ICRC Draft on Article 6 AP II would have stipulated that executions relating to an offence in relation to the armed conflict shall not be carried out until the hostilities have ceased but this proposal faced significant rejection.⁷⁸⁴ However, certain types of executions, especially if they involve the

⁷⁷⁹ ICRC Customary IHL Study, Rule 103.

⁷⁸⁰ 2020 ICRC GC III Commentary [631].

⁷⁸¹ Ibid [630].

⁷⁸² ICRC Customary IHL Study, Rule 91.

⁷⁸³ *ibid.*

⁷⁸⁴ Bothe, Partsch and Solf (n 236) 747.

infliction of severe pain and suffering, could also amount to cruel treatment, and are, accordingly, prohibited by CA 3.⁷⁸⁵ Moreover, there are restrictions on whom the death penalty may be imposed. According to Article 6(4) AP II, the death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children. This provision goes beyond Article 6(5) of the ICCPR, which limits such exception to juveniles and pregnant women. Since these limitations are not, strictly speaking, ‘judicial guarantees’ and are found, for example, in Article 6 (the right to life) of the ICCPR rather than Article 14, it is unclear to what extent they can be seen as encompassed by the generic reference in CA 3 to the ‘judicial guarantees recognized as indispensable’ or read into CA 3 through AP II. However, the ICRC’s customary IHL study suggests that this special protection granted to children, pregnant women, and young mothers applies in any armed conflict via customary law.⁷⁸⁶

4.3.5. The Right to Appeal and Information on Legal Remedies

Article 14(5) of the ICCPR provides that everyone convicted of a crime has the right to have their conviction and sentence reviewed by a higher tribunal. Initial drafts of Article 6 AP II also included such a right of appeal against a penal sentence, probably inspired by the respective provision of the Covenant.⁷⁸⁷ According to one commentator present during the negotiations, the inclusion of this provision was abandoned due to the fact that ‘such a right would oblige the rebels to organize a more complicated

⁷⁸⁵ See e.g. CAT, Consideration of reports submitted by States Parties under Article 19 of the Convention: United States of America (25 July 2006) UN Doc CAT/C/USA/CO/2 [31].

⁷⁸⁶ ICRC Customary IHL Study, Rules 134 and 135.

⁷⁸⁷ ICRC Draft Protocol II, art 10(2), Proposal submitted by Belgium, the Netherlands and New Zealand, Official Records of the Diplomatic Conference, Vol IV, CDDH/I/262.

judicial system than could reasonably be expected’.⁷⁸⁸ The final version of Article 6(3) AP II thus only prescribes that where judicial or other remedies exist, a convicted person must be advised of their existence and of the time-limits within which they may be exercised. However, the limited capacity of rebel groups was certainly not the only reason for the drafters to drop the right to appeal, as such a right was equally omitted from Article 75(4) AP I in the context of IAC. The 1987 ICRC commentary on the Protocols explains that ‘it was not considered realistic in view of the present state of national legislation in various countries to lay down a principle to the effect that everyone has a right of appeal against a sentence pronounced upon him’.⁷⁸⁹

Indeed, even under human rights law, the right to an appeal is a comparatively young development and was not included in older instruments such as Article 6 of the ECHR.⁷⁹⁰ However, the ICRC’s customary IHL study notes that ‘significant developments’ have occurred since [the adoption of the Protocols] and that today, most domestic legal systems provide for a right to appeal.⁷⁹¹ The IACCommHR, for example, has concluded that the right to appeal ‘cannot be justifiably suspended’ and at one occasion also found a violation of that right in a situation that it had characterised as a NIAC.⁷⁹² Similarly, referring to Article 14(5) ICCPR, the ICC Pre-Trial Chamber in *Al-Hassan* mentioned the right to appeal against a judgment as one of the relevant factors to be taken into account in assessing whether the Islamic Tribunal of the Ansar Dine and AQMI in Mali afforded the necessary judicial guarantees under Article

⁷⁸⁸ Bothe, Partsch and Solf (n 236) 747.

⁷⁸⁹ 1987 ICRC AP II Commentary [4611].

⁷⁹⁰ Schabas/Nowak (n 388) 414, [116].

⁷⁹¹ ICRC Customary IHL study, Rule 100.

⁷⁹² IACCommHR, Report on Terrorism and Human Rights, Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, [247]; IACCommHR, *Juan Carlos Abella*, Case 11.137 (Argentina), 18 November 1997 [156] and [435]. In that case, however, Argentina did not claim to have derogated from that right under the Inter-American Convention.

8(2)(c)(iv) of the Rome Statute.⁷⁹³ The HRC, on the other hand, has not made use of various opportunities to clarify whether the right to appeal is derogable or not.⁷⁹⁴ In conclusion, it remains doubtful whether the right to an appeal has become an indispensable guarantee in the sense of CA 3 given its unclear status under customary IHRL, the fact that it was deliberately omitted from the Protocols, and the fact that it can (probably) still be lawfully derogated from under the ICCPR.

4.3.6. The Prohibition Against Double Jeopardy (ne bis in idem)

Finally, Article 14(7) of the ICCPR stipulates that no one may be tried or punished twice for an offence for which they have already been finally convicted or acquitted (*ne bis in idem*). While this well-known principle was replicated in Article 75(4)(h) AP I, it was omitted from Article 6(2) AP II. This guarantee seems to have been deliberately dropped because the drafters found its application in NIAC problematic. Draft Article 9(3) AP II (later to become Article 6) originally contained a prohibition against double jeopardy by stating that ‘no one shall be liable to be prosecuted or punished for an offence for which he has already been finally acquitted or convicted’.⁷⁹⁵ During the negotiations, the Pakistani delegate inquired whether this provision meant that a rebel that had been condemned or acquitted by a rebel court, could no longer be arrested or punished for a breach of the national laws of the country.⁷⁹⁶ The Italian delegate addressed these concerns by noting that, in his view, Article 9(3) could not be

⁷⁹³ *Al-Hassan* (n 13) [384].

⁷⁹⁴ In *Salgar de Montejó v. Colombia*, Comm. no. 64/1979 (24 March 1982), for example, the Committee limited its observations to a statement that Colombia had not filed a formal derogation without commenting on whether the right to appeal is derogable as such.

⁷⁹⁵ Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts Official, Official Records of the Diplomatic Conference, Vol I, art 9(3).

⁷⁹⁶ Official Records of the Diplomatic Conference, Vol VIII, CDDH/1/SR.33 [67].

read as signifying that a double judgement might never occur. To clarify this, he proposed to add the words ‘of the same Party to the conflict’.⁷⁹⁷ In the end, however, the provision was deleted altogether.⁷⁹⁸ Nevertheless, the phrase ‘of the same Party’ was retained in Article 75(4)(h) AP I, which reads: ‘no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure’.

It is not surprising that States did not want the principle of *ne bis in idem* to apply in NIAC as this could have forced States to recognise – and thus legitimize – the judgments of armed groups and their courts. This perception has not changed since the adoption of the Protocols. As noted in the most recent ICRC commentary on CA 3, ‘nothing in the article implies that a State must recognize or give legal effect to the results of a trial or other judicial proceeding conducted by a non-State Party to the conflict’.⁷⁹⁹ In addition, although practically every jurisdiction in the world contains a domestic *ne bis in idem* provision of some kind, there currently exists no equivalent rule under customary international law that would prohibit double trials between different jurisdictions.⁸⁰⁰ If such a rule does not even exist in relations between States, it is even more unlikely that it exists between States and armed groups or between such groups. Indeed there seems to be no State practice indicating that States must take insurgent judgements into account.⁸⁰¹ *E contrario*, an armed group cannot be bound to

⁷⁹⁷ *ibid.*

⁷⁹⁸ Bothe, Partsch and Solf (n 236) 650.

⁷⁹⁹ 2020 ICRC GC III Commentary [731].

⁸⁰⁰ O’Keefe (n 215) 28.

⁸⁰¹ Willms (n 56) 161, fn 61.

give effect to judgments rendered by State authorities or other armed groups they are fighting against.

The remaining question is whether such principles exist under customary IHL for double trials by ‘the same Party’. Pointing towards Article 14(7) of the ICCPR, the ICC-Pre Trial Chamber in *Al-Hassan* listed the principle of *ne bis in idem* as one of the factors that may be taken into account in assessing whether a tribunal has provided the ‘judicial guarantees recognized as indispensable’.⁸⁰² The ICRC’s customary IHL study equally lists the principle of *ne bis in idem* among the guarantees applicable in all types of conflicts but upon closer examination the study includes very little actual practice with regard to NIACs.⁸⁰³ Dinstein notes that ‘[t]he omission of the principle from AP II (owing to the desire to insulate State courts from insurgents’ tribunals) does not denote that double jeopardy should be permitted within the stand-alone structure either of State courts or of insurgent tribunals’.⁸⁰⁴ Such an understanding is also supported by reservations made to Article 14(7) in a State context.⁸⁰⁵ Accordingly, any prohibition of double jeopardy under customary law is arguably limited to double trials by the same party to the conflict.

Finally, even though States as such might not be required to give effect to judgment by armed groups, such trials could nevertheless play a role under the governing instruments of international courts and tribunals. It has been argued, for

⁸⁰² *Al-Hassan* (n 13) [383].

⁸⁰³ ICRC Customary IHL Study, Rule 100. See also Willms (n 56) fn 59.

⁸⁰⁴ Dinstein (n 2) 308.

⁸⁰⁵ The US for example, has expressed its understanding that the prohibition on double jeopardy applies ‘only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause’. By analogy, such distinction would arguably also apply between State courts and armed group courts. See Clooney and Webb (n 587) 15.

example, that the language of Article 20(3) of the ICC Statute is broad enough to encompass prior trials by armed group courts.⁸⁰⁶

4.4. Critical Evaluation and Normative Considerations

4.4.1. Normative Overreach and the Protection of Humanitarian Values

The previous sections have demonstrated that while some uncertainties regarding the exact scope of fair trial guarantees applicable in NIAC remain (in particular with regard to the right to appeal and the principle of *ne bis in idem*), the vast majority of fair trial rights found in Article 14 and 15 ICCPR are reflected in Article 75(4) AP I, Article 6 AP II and customary IHL. Moreover, the preceding analysis of case law and State practice confirms that most of these guarantees can reasonably be understood as constituting the ‘judicial guarantees recognized as indispensable’ in the sense of CA 3 and, therefore, apply to all types of NIAC, including those that do not reach the threshold of AP II. Accordingly, the application of these guarantees through CA 3 makes the scope of applicable fair trial norms independent of any particular level of organisation beyond the minimum threshold required by CA 3. Armed groups that barely meet the organisational requirements of CA 3 will therefore be held to the same standards as those that control territory and have developed sophisticated administrative institutions.

Commentators have thus voiced concerns that these obligations may exceed the capabilities of most armed groups and may only be met by actors that have achieved

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See Alessandro M. Amoroso, ‘Should the ICC assess Complementarity with Respect to Non-state Armed Groups? Hidden Questions in the Second Al-Werfalli Arrest Warrant’ (2018) 18 JICJ 1063. But see more critically Gaiane Nuridzhanian, ‘Ne Bis In Idem in Article 20(3) of the Rome Statute and Non-State Courts’ (2019) 18 LPICT 219.

an organizational level akin to State authorities.⁸⁰⁷ Writing in 2007, Somer noted that 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 CA 3 or AP II.’⁸⁰⁸ In 2015, Doswald-Beck equally argued that while full judicial guarantees are required, these guarantees ‘have yet to be seen by a rebel court’.⁸⁰⁹ This conclusion still holds true today. Even though no international court or quasi-judicial body – apart from the *Al-Hassan case* which is heard before an ICC Trial Chamber at the time of writing – ever had the opportunity to actually measure an armed group court against these criteria, it is not unreasonable to assume that most armed group courts would fall short of the required standards.

It has therefore been suggested that applying the full array of fair trial norms to armed groups constitutes a normative overreach that could harm compliance by imposing unrealistic expectations.⁸¹⁰ Unrealistic rules, so the argument, ‘do not protect anyone but rather tend to undermine the willingness to respect even the realistic rules of IHL’.⁸¹¹ However, it is important to point out that capacity and compliance issues in relation to fair trial norms are not limited to armed groups. Indeed, more than half of all ECHR violations ever established by the ECtHR concerned the right to a fair trial

⁸⁰⁷ Doswald-Beck, for example, concludes that ‘such guarantees could be respected only if a rebel group has sufficient control of territory that it can, and does, behave like a government authority in that area’, Doswald-Beck (n 384) 488-89. See also Sivakumaran (n 30) 503; Ezequiel Heffes, ‘Administration of justice by armed groups: Some legal and practical concerns’ (22 November 2018, *Humanitarian Law & Policy Blog*) available at <<https://blogs.icrc.org/law-and-policy/2018/11/22/administration-of-justice-armed-groups-some-legal-practical-concerns/>> accessed 20 December 2022.

⁸⁰⁸ Somer (n 39) 690.

⁸⁰⁹ Doswald-Beck (n 384) 488.

⁸¹⁰ Sassóli (n 333) 584; Jan Kleffner, ‘A Bird’s-Eye View on Compliance with the Law of Armed Conflict 70 Years After the Adoption of the Geneva Conventions’ (2019) 22 *YIntlHL* 107, 113; Andrew Clapham, ‘The Limits of Human Rights in Times of Armed Conflict or Other Situations of Armed Violence’ in Bardo Fassbender and Knut Traisbach (eds), *The Limits of Human Rights* (OUP 2019) 316.

⁸¹¹ Marco Sassóli and Yuval Shany, ‘Should the obligations of states and armed groups under international humanitarian law really be equal?’ (2011) 93 *IRRC* 425, 427.

and numbers are similar under the Inter-American system.⁸¹² Moreover, out of 2756 individual complaints registered with the HRC by March 2016, over 900 concerned Article 14 or 15 of the ICCPR.⁸¹³ In addition, quantitative studies on the relationship between ICCPR ratifications and the number of actual fair trials taking place in the relevant jurisdiction suggest that ratification of the Covenant had very little effect on State practice with respect to fair trial rights.⁸¹⁴

The case law of human rights courts and treaty bodies demonstrates that violations are particularly frequent in times of armed conflict or similar emergencies, most notably when special or military courts and commissions are involved.⁸¹⁵ The UN Working Group on Arbitrary Detention went as far as to say that while such courts are not generally prohibited, it has ‘found by experience that virtually none of them guarantee the right to a fair trial’.⁸¹⁶ Yet, despite all these shortcomings, nobody seems to suggest that the fair trial rights enshrined in the ICCPR, ECHR or the ACHR and their continued applicability during armed conflict constitute a normative overreach that exceed the capabilities of States.

This is despite the fact that the judicial capabilities of States exist on an equally uneven spectrum as those of armed groups. Indeed, many States suffer from rule of law

⁸¹² Provost (n 40) 308, fn 415. See also ECtHR, ‘Violations by Articles and by States: 1959-2019’, available at <https://www.echr.coe.int/Documents/Stats_violation_1959_2019_ENG.pdf> accessed 20 December 2022.

⁸¹³ OHCHR, ‘Statistical survey of individual complaints dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights’, March 2016, available at <<https://www.ohchr.org/Documents/HRBodies/CCPR/StatisticalSurvey.xls>> accessed 21 November 2021. The number of complaints regarding Article 14 is 15 is derived from a database search of the OHCHR HRC jurisprudence database conducted in November 2021.

⁸¹⁴ See e.g. Beth Simmons, ‘Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights”’ (2009) 16 *IndJGlobLegalStud* 437, 473-47. See also Oona A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 *YaleJIntlL* 1935.

⁸¹⁵ Weissbrodt (n 596) 422.

⁸¹⁶ OHCHR, Report of the Working Group on Arbitrary Detention (15 December 1995) UN Doc E/CN.4/1996/40 [107].

defects so severe that it is arguable that most trials conducted by their judicial authorities would fall short of the ‘indispensable guarantees’ required by CA 3, whether in peace time or during armed conflict. While these shortcomings are often linked to deliberate attempts by autocratic governments to undermine the rule of law, they also frequently stem from much more mundane reasons such as bureaucratic incapacities and a general lack of adequate resources for judicial authorities.⁸¹⁷ Nevertheless, calls for fair trial norms to be downgraded or applied selectively in order to ensure compliance by such inadequately resourced States are virtually unheard of. To the contrary, as demonstrated above, international practice has even further consolidated the right to a fair trial by severely restricting the leeway for derogations under the various IHRL treaties and customary law. Moreover, it should be born in mind that high compliance is the means to an end, not an end in itself. As highlighted by Shany, ‘the overriding *raison d’être* of IHL is not full compliance with its norms but rather the protection of humanitarian values’.⁸¹⁸ Similar considerations apply to human rights law.

4.4.2. The Application of Fair Trial Standards to Armed Groups in Light of the Principle of Belligerent Equality

These conclusions notwithstanding, the question of whether certain standards can and should be relaxed for armed groups merits further attention. First of all, any suggestion to loosen standards should be analysed under the concept of belligerent equality.⁸¹⁹ The

⁸¹⁷ Simmons (n 814) 469.

⁸¹⁸ Sassóli and Shany (n 811) 433.

⁸¹⁹ Ezequiel Heffes, ‘Generating Respect for International Humanitarian Law: The Establishment of Courts by Organized Non-State Armed Groups in Light of the Principle of Equality of Belligerents’ (2015) 18 YIntlHL 181, 187.

principle of belligerent equality – which was already briefly mentioned in **Chapter 3** – stipulates that all parties to a conflict, regardless of their status or the cause of the conflict, enjoy the same rights and obligations under IHL.⁸²⁰ Generally speaking, this principle equally applies to NIACs in the sense that CA 3 and AP II impose the same obligations on both the State and the non-State party to a conflict.⁸²¹

In order to uphold the principle of belligerent equality, any relaxation of standards would thus also have to apply to States. However, a distinction must be drawn between the equal application to non-State actors of IHL and other bodies of international law. The fact that IHL imposes the same obligations onto State and non-State parties does not mean that this principle of reciprocity and equal obligations applies to other bodies of international law, such as human rights law. Indeed, as **Chapter 2** has demonstrated, while armed groups are bound by certain core IHRL obligations, they do not incur the full set of customary law and treaty-based IHRL obligations that are incumbent on states. In that sense, States and non-state Parties to a conflict are not (and will probably never be) equal. Sassòli thus rightly concludes that ‘[t]here is no such thing as a principle of the equality of belligerents in IHRL’.⁸²²

He therefore argues that the fair trial standards under IHL should be interpreted in a more lenient manner for all parties to a NIAC, allowing armed groups to comply, whereas States would still be bound by the unmodified and more protective guarantees under IHRL.⁸²³ These human rights law guarantees would continue to apply in times

⁸²⁰ ‘[T]he provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict’. Preamble, AP I.

⁸²¹ 2020 ICRC GC III Commentary [538]; 1987 ICRC AP II Commentary [4442].

⁸²² Sassòli (n 333) [10.232]. See also Henckaerts and Wiesener (n 164) 202.

⁸²³ Sassòli (n 333) [10.232].

of armed conflict, as almost of all of them are today considered as non-derogable even in times of war. However, as pointed out by Doswald-Beck, the fundamental flaw in this suggestion is that the core IHL treaty obligation applicable to armed groups, namely CA 3, incorporates judicial guarantees considered indispensable by States and are interpreted by reference to human rights law applicable to States.⁸²⁴ In doing so, it imports human rights law into IHL and imposes it on non-State parties. Accordingly, any proposed downgrading of protection would have to occur via human rights law and, consequently, would equally affect the protection expected from States.⁸²⁵

Another suggestion is to simply adjust fair trial standards to the capacity of the armed group on a case-by-case basis. The FMLN in El Salvador, for example, argued that the requirements of Article 6 AP II must be adapted ‘to the conditions and capacity’ of the warring parties.⁸²⁶ Indeed, the idea that armed groups incur a ‘sliding scale of obligations’ based on their compliance capacity has been advocated by some commentators, most notably Sassòli.⁸²⁷ Under such ‘sliding scale of obligations’, negative obligations to abstain from conduct apply instantly, as soon as the prohibited conduct is materially possible (e.g. when the person benefitting from the protection of CA 3 or AP II falls into the hands of the armed group).⁸²⁸ Positive obligations, on the other hand, would only apply at a later stage, namely when the entity in question has

⁸²⁴ Doswald-Beck (n 384) 494.

⁸²⁵ It has been suggested that any interpretation of CA 3 based on IHRL should only be valid for State parties. However, as pointed out by van Steenberghe, this would lead to an asymmetry of the *application* of the interpreted IHL norm, since IHRL used as an interpretive standard would have been incorporated into that norm. See Raphael van Steenberghe, ‘The impacts of human rights law on the regulation of armed conflict: A coherency-based approach to dealing with both the “interpretation” and “application” processes’ (2022) 104 IRRC 1345, 1355.

⁸²⁶ Sivakumaran (n 14) 552-53.

⁸²⁷ Marco Sassòli, ‘Introducing a sliding scale of obligations to address the fundamental inequality between armed groups and states?’ (2011) 93 IRRC 42; Sassòli (n 333) 587 [10.227].

⁸²⁸ Sassòli (n 333) 317-18 [8.224].

developed the capacity to fulfil and implement them.⁸²⁹ To some extent, such a ‘sliding scale of obligations’ is already inherent to IHL applicable in NIAC due to the different organisational thresholds required by CA 3 and AP II for their application.⁸³⁰ Moreover, certain positive obligations within IHL already implicitly follow a ‘sliding scale’ approach as they must only be respected to the extent of the addressees’ capacity.⁸³¹ However, three problems arise with applying the ‘sliding scale’ approach to the conduct of trials and passing of sentences by armed groups:

First, the fair trial provisions in CA 3 and Article 6 AP II do not necessarily constitute positive obligations, even though they are sometimes mistakenly characterised as such.⁸³² While IHL does contain some positive obligations, including under CA 3 (e.g. ‘the wounded and sick shall be collected and cared for’), they remain minimal.⁸³³ The provisions on judicial guarantees, however, are phrased as negative obligations (*‘no sentences shall be passed...except...’*). They require both States and armed groups not to engage in certain conduct (the ‘passing of sentences and carrying out of executions’) unless certain criteria have been met (the existence of a ‘regularly constituted court’ or ‘court offering all the essential guarantees of independence and impartiality’).

The wording of fair trial obligations under the IHL of NIAC thus differs from the one commonly used to outline fair trial rights in IHRL treaties (e.g. Article 14 ICCPR and Article 6 ECHR: ‘...everyone *shall be entitled* to a fair and public hearing

⁸²⁹ Geneva Call (n 669) 20.

⁸³⁰ Sassòli (n 333) [10.232]. However, as demonstrated above, there is little (if any) difference in the judicial guarantees applicable in a conflict under CA 3 and conflicts to which AP II applies.

⁸³¹ See e.g. art. 5(2) AP II: ‘Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, *within the limits of their capabilities*, respect the following provisions relating to such persons.’

⁸³² See e.g. Geneva Call (n 669) 5.

⁸³³ Fortin (n 78) 61.

by a competent, independent and impartial tribunal established by law’ or Article 8 ACHR: ‘every person *has the right to* a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal...’). In essence, these human rights treaty obligations require positive action from States to establish a court system that affords all the fair trial guarantees provided in these Articles.⁸³⁴ IHL, on the other hand, prohibits its addressees from passing sentences or carrying out of executions *unless* they have been pronounced by a court affording all the necessary judicial guarantees. Contrary to the IHRL provisions cited above, they do not require the positive action of setting up of such courts.⁸³⁵ Consequently, if such courts do not exist, the addressee of the norm will simply be barred from passing sentences or carrying out of executions. Compliance is thus always possible as it only requires the armed group not to engage in certain conduct.⁸³⁶ Moreover, as explained in **Chapter 3**, if the IHL rule were phrased to require positive action, this would in fact constitute a strong permission, indicating a certain degree of normative legitimisation, an outcome the drafters of CA3 and AP II arguably wanted to avoid in relation to governance activities of armed groups. For this reason, applying a ‘sliding scale of obligations’ to fair trial obligations armed groups may seem normatively appealing but is conceptually flawed.

⁸³⁴ See Schabas/Nowak (n 388) 361 [14], stating that ‘Art. 14(1) contains an institutional guarantee that requires States parties to take extensive, positive measures to ensure this guarantee. They must set up by law independent, impartial tribunals.’ See also Janneke Gerards, *General Principles of the European Convention on Human Rights* (CUP 2019) 108.

⁸³⁵ Whether CA 3 implicitly requires the establishment of courts due to the fact that it requires armed groups to have the material ability to ensure discipline within their ranks in order to implement its provisions will be discussed in **Chapter 6**.

⁸³⁶ Whether such restraint is practically feasible depends on whether there are legal alternatives to the passing of sentences or carrying out of executions, a question that is also discussed in **Chapter 6**.

Second, if applied only in relation to IHL obligations of the armed group, it is obvious that a sliding scale of obligations would undermine the principle of belligerent equality. Sassòli argues that this might be a risk worth taking and proposes to abandon ‘the fiction of the equality of belligerents and require the government to fully respect customary and conventional rules of IHL while demanding that armed groups respect those rules only according to their respective capacities’.⁸³⁷ However, he also concedes that this proposal might risk a serious compliance issue by providing the better organized party to a conflict with a convenient excuse for rejecting the regime altogether.⁸³⁸ Moreover, as emphasised by Shany, linking capacity with a ‘sliding scale of obligations’ does not necessarily incentivize armed groups to develop capacities in a manner that would improve humanitarian protection.⁸³⁹ To the contrary, parties would likely invest in their military capacities rather than in a competent judiciary, which in turn would subject the group to new legal restrictions.⁸⁴⁰

Finally, Sassòli admits that even under a ‘sliding scale’ approach, obligations must preserve a humanitarian minimum.⁸⁴¹ What provision, irrespective of its nature as a positive or negative obligation, constitutes such minimum if not CA 3, famously described by the ICJ as the ‘minimum yardstick’ of humanitarian protection?⁸⁴² In conclusion, none of the options to alter the standards identified above for armed groups seem appealing, either in light of positive law, or taking into account normative considerations.

⁸³⁷ Sassòli (n 333) 588 [10.230].

⁸³⁸ *ibid.*

⁸³⁹ Shany (n 811) 433.

⁸⁴⁰ *ibid.*

⁸⁴¹ Sassòli (n 333) 587, [10.228]

⁸⁴² *Case concerning Military and Paramilitary Activities in and against Nicaragua* (n 135) [218].

Ultimately, however, even though armed groups may not dispense with the various guarantees identified above this does not mean that their precise content cannot differ according to the circumstances of a particular case and the restrictions imposed by armed conflict. Indeed, as explained by the ECtHR, even though the right to a fair trial is unqualified, ‘a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case’.⁸⁴³ In this regard, as pointed out above, specific requirements such as the structural independence of the judicial body, the qualifications expected from judges or defence counsel or the quality of the substantive law applied can reasonably be interpreted in light of the specific conditions States and armed groups find themselves in during a NIAC.

4.5. Conclusions

This Chapter aimed to clarify the institutional and procedural guarantees expected from courts in armed conflict, in particular the ‘judicial guarantees recognized as indispensable’ under CA 3 as the minimum standard applicable to all armed groups during NIAC. It concluded that these guarantees can be identified either by looking at non-derogable fair trial guarantees under IHRL, or by interpreting CA3 through those guarantees found in Article 6 AP II and Article 75(4) AP I. Ultimately, both routes lead to very similar results and CA 3 requires armed groups to comply with the entirety of judicial guarantees found in Article 75 AP I (with some limitations regarding the prohibition of double jeopardy) and, accordingly, almost all the guarantees found in Articles 14(1) and 15 of the ICCPR. These guarantees must therefore be understood as *indispensable* for any trial during a NIAC.

⁸⁴³ *Ibrahim and ors v UK*, App no 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016) (Grand Chamber) [250].

This Chapter also explained that while the precise content of these guarantees cannot be interpreted without reference to human rights law, it is arguable that some leeway remains to accommodate the special situation armed groups (and States) find themselves in during a NIAC. The institutional requirements of independence and impartiality, for example, may be very difficult to meet for armed groups in practice. Nevertheless it is possible to interpret these requirements in a flexible manner, for example by focussing on the actual independence of armed group courts in relation to the military or political chain of command rather than on State-centric conceptions of the separation of powers.

Despite this leeway, however, many commentators express the concern that if IHL requires that these guarantees be fully met, only very few and well organised armed groups will be capable of compliance. While this concern is justified, it must be seen in a broader context. The right to a fair trial – which is so essential to the implementation of many other rights – sets a very high normative ideal. Indeed, it was demonstrated that full compliance is rare even among States, especially in relation to conflict related trials. Any calls for a relaxation of standards should therefore be met with caution. It was explained that while the application of unrealistic norms may disincentivise armed groups to comply with IHL more generally, looser standards for armed groups would not only undermine the principle of belligerent equality but also affect the willingness of States to comply with their obligations. In addition, it was shown that concepts such as a ‘sliding scale of obligations’ fail to convincingly justify using a different set of fair trial obligations for States and armed groups. Whether the application of the fair trial guarantees identified in this Chapter to armed groups really constitutes normative overreach also depends on the consequences entailed by that non-compliance. In this regard, **Chapter 5** will analyse when a failure to comply with fair

trial guarantees will result in the individual criminal responsibility of those involved. Moreover, the answer equally depends on whether international law not only allows but actually requires armed groups to pass penal sentences, a question that will be examined in **Chapter 6**.

5. Individual Criminal Responsibility for the Denial of Fair Trial Rights

The previous Chapters have analysed fair trial guarantees and their application to armed groups in NIAC from the perspective of IHL and, indirectly, IHRL. **Chapter 3** has explained that armed group courts must be ‘established by law’ in order to qualify as ‘regularly constituted’ under CA 3. Moreover, **Chapter 4** has demonstrated that armed groups are expected to meet an extensive set of judicial guarantees when passing sentences and conducting trials, irrespective of their organisational capabilities. It was also argued that while many armed groups struggle to meet these standards in practice, a similar lack of compliance capacity can be observed among States. Accordingly, it was submitted that high compliance rates are not an end in and of itself and that the high normative standards of humanitarian protection with regard to the passing of sentences required by CA 3 should be maintained. This Chapter will build upon this analysis and assess at what point the failure to provide the necessary judicial guarantees triggers the individual criminal responsibility of those involved.

This assessment is relevant for a number of reasons: First, ICL is one way to enforce the prohibition against the passing of sentences without a regularly constituted court offering the necessary judicial guarantees within armed groups. **Chapter 2** has already noted that it remains difficult to enforce obligations incumbent on the collective entity of an armed group and that the international community has therefore increasingly relied on ICL as a tool to enforce these obligations via their individual members. Second, the question of when the denial of fair trial guarantees becomes criminal can be a vital indicator for the scope of measures a commander is required to

take under the doctrine of command responsibility, an issue that will be analysed in **Chapter 6**. Finally, this Chapter will demonstrate that ICL, as a result of the ‘asymmetry’ identified in **Chapter 3** in relation to the nexus criterion, criminalises acts of rebel governance, including the passing of penal sentences, while the same act may be carried out with impunity by a State authorities.

After a brief historical overview on the criminalisation of the denial of a fair trial during armed conflict, section 1 of this Chapter will begin with an in-depth analysis of Article 8(2)(c)(iv) of the ICC Statute, which criminalises the passing of sentence without the necessary judicial guarantees in NIAC, as well as the Pre-Trial Chambers’ *Al-Hassan* decision. While the ICC Statute remains unratified by a significant number of States, the vast majority of substantive crimes enshrined within are considered reflective of customary law, and the Statute will therefore be used as a reference point.⁸⁴⁴ Section 1 will demonstrate that while failure to provide any ‘indispensable’ guarantee identified in **Chapter 4** constitutes a violation of CA 3 and may trigger the international responsibility of the armed group as a collective, not every such violation entails the individual criminal responsibility of the group’s members.

Section 2 will then look at other war crimes that might be pertinent to the passing of penal sentences, in particular unlawful confinement, as well as cruel and inhuman treatment. Section 3 then continues the critical assessment of the nexus requirement already touched upon in **Chapter 3**. It will demonstrate that the current understanding of the nexus requirement, as applied by international criminal tribunals,

⁸⁴⁴ See e.g. Yudan Tan, *The Rome Statute as Evidence of Customary International Law* (Brill 2021) 132-133. However, this Chapter will also make reference to the modes of liability and grounds excluding criminal responsibility under the Statute, the customary law status of which remains disputed. See *ibid*, 241-311 in relation to indirect co-perpetration and Antonio Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) 10 EJIL 144, 153-57, in relation to grounds for excluding individual criminal responsibility.

leads to the asymmetric criminalisation of rebel governance, including the passing of penal sentences in relation to common crime, in comparison to States.

Finally, section 4 looks at relevant crimes against humanity, which do not require a nexus to an armed conflict and therefore have the potential to even out this imbalance of criminal responsibility for the denial of a fair trial between armed groups and States.

5.1. Failure to Provide Fair Trial Guarantees as a War Crime

5.1.1. Historical Development and Post-World War II cases

Chapter 3 has already briefly outlined the historical development of fair trial guarantees in IHL during the 19th and 20th century. As explained in **Chapter 2**, in order for a violation of IHL to become a war crime, it is necessary that international law also attaches individual criminal responsibility to such breaches.⁸⁴⁵ Until the adoption of the 1949 Geneva Conventions, however, none of the early IHL treaties mentioned in **Chapter 3** criminalised any particular breach, including with regard to the judicial guarantees granted to POWs or spies.⁸⁴⁶ In other words, none of these instruments explicitly imposed criminal responsibility for the violation of fair trial guarantees prescribed by IHL onto individuals.⁸⁴⁷ While prosecutions of IHL violations did take place during the 19th and early 20th century, they were usually based on domestic military law incorporating IHL rules.⁸⁴⁸ Nevertheless, the practice of these domestic

⁸⁴⁵ O’Keefe (n 215) 79; Cassese and Gaeta (n 296) 67.

⁸⁴⁶ *ibid.*

⁸⁴⁷ Miachel Cottier and Matthias Lippold, ‘Article 8’, in Kai Ambos (ed), *The Rome Statute of the International Criminal Court* (4th ed, Hart/Nomos/Beck 2022) 336.

⁸⁴⁸ Michael S. Bryant, *A World History of War Crimes: From Antiquity to the Present* (2nd ed, Bloomsbury 2021) 194; see also O’Keefe (n 223) 124.

tribunals gradually contributed to the idea that individual criminal responsibility for certain violations may derive directly from customary international law.⁸⁴⁹

The practice of prosecuting the denial of a fair trial as a distinct war crime seems to have originated in the jurisprudence of the various post-Second World War military tribunals.⁸⁵⁰ Allied courts, tribunals and military commissions charged German and Japanese suspects for their role in unfair trial proceedings and sentences imposed on civilians and POWs. While the denial of fair rights had already been outlawed with regard to certain categories of individuals, most notably POWs and spies⁸⁵¹, it remained a common practice in war and it was perceived as rather novel to pursue such acts (or omissions) as war crimes in their own right.⁸⁵²

The United Nations War Crimes Commission (UNWCC) reported ten cases, combined in Volume V of its reports, that explicitly dealt with the denial of a fair trial by judges, prosecutors and common soldiers carrying out executions.⁸⁵³ Five additional cases can be found in other volumes, most notably the well-known *Justice* case before the Nuremberg Military Tribunal (NMT).⁸⁵⁴ Lord Wright, Chairman of the UNWCC, noted:

⁸⁴⁹ See e.g. Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties Presented to the Preliminary Peace Conference, 29 March 1919, Annex I, reproduced in (1920) 14 AJIL 95.

⁸⁵⁰ Diletta Marchesi, 'The War Crimes of Denying Judicial Guarantees and the Uncertainties Surrounding their Material Elements' (2021) 54 IsLR 174, 176; Jennifer DePiazza, 'Denial of Fair Trial as an International Crime' (2017) 15 JICJ 257, 258;

⁸⁵¹ See **Chapter 3**, section 3.1.

⁸⁵² DePiazza (n 850) 258.

⁸⁵³ See UNWCC (1948) 5 Law Reports of the Trials of War Criminals (LRTWC).

⁸⁵⁴ *Altstötter et al.* (n 742); *Hans Paul Helmuth Latza et al.*, Supreme Court of Norway, 3 December 1948, reported in (1949) 14 LRTWC 49; *Ernst Flesch*, Supreme Court of Norway, February 1948, reported in (1948) 6 LRTWC 111; *Robert Wagner*, Permanent Military Tribunal at Strasbourg and Cour de Cassation, reported in (1948) 3 LRTWC 23; *Kurt Meyer*, Canadian Military Court, 28 December 1945, reported in (1948) 4 LRTWC 97.

The fundamental principle involved is that the customary law of war requires that before anyone, a combatant or non-combatant, should be executed or otherwise punished as for an offence against the laws of war, he should first be tried and sentenced by a court whose jurisdiction is recognized by international law.⁸⁵⁵

This apparent customary law principle identified by Lord Wright thus goes beyond the scope of the 1929 Geneva Convention and its predecessors by providing protection to any individual, including non-combatants. While the quote above seems to suggest that this kind of protection would only apply to trials and punishments imposed in relation to an offence against the laws of war, the UNWCC made clear that based on the case law distilled in its reports, civilians in occupied territory were entitled to similar protection when being tried for ‘any other kind of offence’.⁸⁵⁶

Nevertheless, the approaches of the Allied military courts and tribunals varied considerably. The US Military Commissions prosecuted the denial of a fair trial as a separate, substantive war crime, while British and Australian military courts accepted evidence of a fair trial as a defence plea to the charge of other war crimes, including the murder of civilians and POWs.⁸⁵⁷ In addition, these military commissions and tribunals did not always deliver reasoned judgments. Even the UNWCC reports contain contradictory conclusions as to whether the denial of a fair trial exists as a separate, substantive war crime or whether evidence of a fair trial simply constitutes a defence in the context of other war crimes.⁸⁵⁸ Nevertheless, both approaches had in common

⁸⁵⁵ Robert Wright, ‘Foreword’ (1948) 5 LRTWC, viii. It is not entirely clear what kind of ‘jurisdiction under international law’ Lord Wright was referring to but it is assumed that he was referring to the laws of war that allowed for jurisdiction over war crimes or those regulating the jurisdiction of an occupying power over the civilian population in occupied territory.

⁸⁵⁶ UNWCC (1949) 15 LRTWC, 162; and (1948) 5 LRTWC 73, fn 3.

⁸⁵⁷ Shannon Ghadiri, ‘The Denial of a Fair Trial as a Crime Against Humanity’ in Philipp Ambach et al. (eds), *The Protection of Non-Combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society* (Brill/Nijhoff 2015) 201.

⁸⁵⁸ As noted by DePiazza, at points, the UNWCC commentary states that a war crime of denial of fair trial was recognized by these courts, whereas at other sections it refers to a mere ‘possibility’ that these courts recognized a distinct war crime of denial of fair trial. See UNWCC

that it needed to be proven that the accused had knowledge of the proceedings and that the proceedings failed to meet fundamental guarantees of a fair trial.⁸⁵⁹

In 1949, a comprehensive obligation to punish certain violations of IHL was introduced through the grave breaches regime of the Geneva Conventions. Most importantly for this Chapter, GC III and GC IV prescribed that the wilful deprivation ‘of the rights of fair and regular trial’ of POWs and protected persons is considered a grave breach of the Conventions.⁸⁶⁰ As such, the Conventions not only imposed criminal liability directly upon individuals responsible for such conduct, States also became obligated to repress violations of fair trial rights during armed conflict with penal sanctions.⁸⁶¹ However, since violations of CA 3 were not included in the grave breaches regime of the Conventions, any criminal liability or duty to prosecute related breaches remained confined to IACs.⁸⁶² Article 85(4) AP I further entrenched the denial of a fair trial as a war crime in IAC, but no corresponding provision on criminal liability was included in AP II.

There are no records indicating that the denial of a fair trial has ever been charged as a separate war crime in IAC (or the conduct of a fair trial pleaded as a defence) in the decades following the end of World War II. More recently, however, two cases have been prosecuted before the Extraordinary Chambers in the Courts in Cambodia (ECCC). In its 2010 Judgment in the *Duch* case, the EEEEC found the

(1948) 6 LRTWC ix-x and UNWCC (1949) 15 LRTWC 99, 113; DePiazza (n 850) 264 and fn 24.

⁸⁵⁹ *ibid.*

⁸⁶⁰ Art 130 GC III, art 147 GC IV.

⁸⁶¹ Edoardo Greppi, ‘The evolution of individual criminal responsibility under international law’ (1999) 81 IRRC 531, 541. For the obligation of States to repress breaches and prosecute war crimes more generally see **Chapter 6**, section 6.2.2.

⁸⁶² Art 49 GC I, art 50 GC II, art 129 GC III and art 146 GC IV, art 85 AP/I; ICRC 2020 GC III Commentary [917]. See also **Chapter 6**, section 6.2.2.

defendant guilty of ‘depriving a prisoner of war or other protected person of the rights of fair and regular trial’ by having executed Vietnamese POWs and civilians without any preceding trial.⁸⁶³ Two other Khmer Rouge leaders were found guilty on similar charges in 2018.⁸⁶⁴

The criminalisation of the denial of a fair trial in NIACs, on the other hand, developed in line with the more general extensions of war crimes to NIACs, in particular the acceptance of individual criminal responsibility for serious violations of CA 3 under customary law.⁸⁶⁵ When, in 1995, the ICTY Appeals Chamber held that customary international law imposes such responsibility onto individuals, this automatically paved the way for extending criminal liability in NIACs to the ‘passing of sentences and carrying out of executions without a regularly constituted court’.⁸⁶⁶ The crime had also been included in the Statute of the newly established ICTR a year before.⁸⁶⁷ It was subsequently incorporated in the ILC’s 1996 Draft Code of Crimes against Peace and the Security of Mankind⁸⁶⁸, as well as the governing instruments of the Special Court for Sierra Leone (SCSL) and the Kosovo Specialist Chambers (KSC).⁸⁶⁹ Most importantly, the denial of a fair trial and the passing of sentences without a regularly constituted court, respectively, were codified as war crimes during IAC and NIAC in the 1998 Rome Statute of the ICC.

⁸⁶³ *Duch case* (Trial Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) [458]-[463].

⁸⁶⁴ *Nuon Chea and Khieu Samphan* (Trial Judgment) 002/19-09-2007/ECCC/TC (16 November 2018) [2630] and [4008].

⁸⁶⁵ See **Chapter 6** and more generally Eva La Haye, *War Crimes in Internal Armed Conflict* (CUP 2009) 133.

⁸⁶⁶ *Tadic*, Interlocutory Appeal Challenging Jurisdiction (n 145) [134].

⁸⁶⁷ Art 4(g) ICTR Statute, UNSC Resolution 955 (8 November 1994) UN Doc S/Res/955.

⁸⁶⁸ Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries (n 405) arts. 20(a)(vi) and 20(f)(vii).

⁸⁶⁹ Art 3(g) SCSL Statute; art. 14(c)(iv) Kosovo Law No.05/L-053 of 3 August 2015 on Specialist Chambers and Specialist Prosecutor’s Office.

5.1.2. Article 8(2)(c)(iv) of the ICC Statute

Article 8(2)(a)(vi) of the ICC Statute criminalises ‘depriving a prisoner of war or other protected person of the rights of fair and regular trial’ as a grave breach of the 1949 Conventions in IAC. More relevant for the purpose of this Chapter, however, Article 8(2)(c)(iv) of the Statute reproduces CA 3 verbatim and declares as criminal:

[T]he 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.

Until very recently, this war crime, as defined in Article 8(2)(iv), had not been charged in relation to a NIAC by any international criminal tribunal, including the ICC.⁸⁷⁰ In 2019, however, Pre-Trial Chamber I confirmed charges under Article 8(2)(c)(iv) for corporal punishments imposed by an Islamic tribunal in the case of *Al-Hassan* concerning the situation in Mali.⁸⁷¹ In addition, several other instances of penal sentences based on flawed trials by armed groups are currently the subject of investigations by the ICC Prosecutor, including in relation to the situations in Palestine⁸⁷² and Ukraine⁸⁷³.

⁸⁷⁰ William Schabas, *The International Criminal Court: A Commentary to the Rome Statute* (OUP 2016) 271.

⁸⁷¹ *Al-Hassan* (n 13) [515].

⁸⁷² See *Situation in Palestine* (n 54) [94].

⁸⁷³ See OTP, Report on Preliminary Examinations (n 55) [91].

5.1.2.1. *No Previous Judgment Pronounced by a Court*

Turning towards the analysis of the material elements of Article 8(2)(c)(iv), the Elements of Crimes, which have already been mentioned in **Chapter 3**, specify that there must have been:

[N]o 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.⁸⁷⁴

A denial of fair trial under the ICCSt can, therefore, take three forms. The first form occurs when a victim is sentenced without having been tried in any kind of judicial proceeding at all. In this scenario, it is the complete absence of a trial that constitutes the violation of the provision.⁸⁷⁵ In the case of a death sentence pronounced and executed without a preceding trial, it is thus often difficult to draw the line between the war crime of ‘passing sentences without a regularly constituted court’ and outright murder. A good example illustrating the blurry line between the two crimes is the Warrant of Arrest in the *Al-Werfalli* case.⁸⁷⁶ Among other incidents, *Al-Werfalli* was charged with murder as a war crime under Article 8(2)(c)(i) of the ICC Statute for having ordered the execution of 18 persons wearing orange jumpsuits and black hoods, with their hands tied behind their backs, kneeling barefoot on the ground.⁸⁷⁷ In a video submitted by the OTP, Al-Werfalli is seen before commencing the execution, holding ‘a white document from which he reads’ and which he describes as a ‘Decree decision’

⁸⁷⁴ ‘Elements of Crimes’, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court (New York, 3–10 September 2002), ICC-ASP/1/3/Add.1 (Vol II) 147 (Elements of Crime) Article 8(2)(c)(iv), Element 4.

⁸⁷⁵ DePiazza (n 850) 259.

⁸⁷⁶ *Al-Werfalli* (Warrant of Arrest) ICC-01/11-01/17 (15 August 2017).

⁸⁷⁷ *ibid* [17].

which ‘shall be executed today 17/07/2017’.⁸⁷⁸ DePiazza thus correctly observed that based on the facts laid out in the arrest warrant, the OTP could have equally decided to charge Al-Werfalli with the carrying out of executions without previous judgement pronounced by a regularly constituted court under Article 8(2)(c)(iv).⁸⁷⁹

The distinguishing factor seems to be that prior to the execution a ‘sentence’ was ‘passed’ either orally or in written form.⁸⁸⁰ Since the term ‘sentence’ is usually defined as ‘the punishment imposed on a criminal wrongdoer’⁸⁸¹, it is clear that that it must be pronounced in response to some sort of prior offence or transgression allegedly committed by the victim. However, it is not always possible to escape the charge of murder by simply declaring the victim liable to execution. In the *Al-Hassan* case, the ICC Pre-Trial Chamber noted that the sentence must have been passed by ‘an authority established by the system in place, at the relevant time, to pass sentences’.⁸⁸² Accordingly, the sentence must have been pronounced by whatever authority within the armed group was empowered to do so, be it a court, an executive body or even an individual commander. Indeed, in the *Duch* case, albeit in the context of an IAC, the ECCC noted that ‘[w]hile no judicial system existed during the DK [Khmer Rouge] period, S-21 [the prison facility supervised by the accused] functioned as a State institution with the power to detain, interrogate and execute persons’.⁸⁸³ This

⁸⁷⁸ *ibid.*

⁸⁷⁹ Jennifer DePiazza, ‘The Al-Werfalli Arrest Warrant: Denial of Fair Trial as an Additional Allegation and a Hint at a Possible Defence’ (*EJIL:Talk!*, 23 August 2017) available at <<https://www.ejiltalk.org/the-al-werfalli-icc-arrest-warrant-denial-of-fair-trial-as-an-additional-allegation-and-a-hint-at-a-possible-defence/>> accessed 20 December 2022.

⁸⁸⁰ *Al-Hassan* (n 13) [364].

⁸⁸¹ Bryan A. Garner (ed.), *Black’s Law Dictionary* (11th ed, Reuters 2019) 1636.

⁸⁸² In the original French text: ‘[p]rononcée par une autorité habilitée par le système en place’, see *Al-Hassan* (n 13) [363]. So far, no official translation exists of the Pre-Trial Chamber’s decision. The present and subsequent quotations from this decisions have therefore been translated by the author

⁸⁸³ *Duch* (n 863) [462].

understanding would exclude, for example, ‘sentences’ pronounced by an individual soldier who did not have the authority to do so. As a result, the first step in determining whether certain conduct amounts to a war crime under Article 8(2)(c)(iv) is an assessment of whether a sentence has been pronounced – either written or orally – by an authority empowered by the ‘system in place’. In other words, a sentence must have been passed by a body or individual authorized to do so by the armed group or its civilian or political wing.⁸⁸⁴

**5.1.2.2. *Regular Constitution and the Guarantees of Independence
and Impartiality under the Rome Statute***

The second and more complex form of violating Article 8(2)(c)(iv) occurs when a sentence was passed following a trial, but where the proceedings did not afford the necessary institutional or procedural guarantees. It was already pointed out in **Chapter 3** that although Article 8(2)(c)(vi) adopts the language of CA 3 verbatim by requiring ‘a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable’, the Elements of Crimes specify that the term ‘regularly constituted is to be interpreted as affording ‘essential guarantees of independence and impartiality’.⁸⁸⁵ It was also mentioned that this has led some commentators to refer to the Elements of Crimes as evidence that the term ‘regularly constituted’ under CA 3 must be interpreted as ‘affording essential guarantees of independence and impartiality’.⁸⁸⁶ Moreover, it was argued that this approach is flawed as the scope of a particular war crime might be narrower than the scope of its underlying IHL rule, and

⁸⁸⁴ See **Chapter 2**, section 2.3.

⁸⁸⁵ Elements of Crimes, Article 8(2)(c)(iv), Element 4.

⁸⁸⁶ Dörmann (n 386) 413.

that the meaning of ‘regular constitution’ under CA 3 is best understood as a reference to requirement that a court or tribunal must be ‘established by law’.

Indeed, the *travaux* of Article 8(2)(c)(iv) and their interpretation by the *Al-Hassan* Pre-Trial Chamber suggest that the drafters made a deliberate choice to make the scope of individual criminal responsibility under Article 8(2)(c)(iv) narrower than for an ordinary violation of CA 3. In particular, it appears that a conscious decision was made not to include the lack of ‘regular constitution’ (in its IHL meaning) as a separate means of committing the crime where due process standards and institutional guarantees have otherwise been complied with.⁸⁸⁷ An initial proposal introduced by Belgium to include ‘regular constitution’ as a separate element of the crime was rejected.⁸⁸⁸ The *Al-Hassan* Pre-Trial Chamber interpreted this as a deliberate departure from CA 3:

The drafters departed from Article 3 common to the four Geneva Conventions and did not retain the proposal by Belgium for the drafting of the Elements of Crimes in relation to Article 8(2)(c)(iv) of the Statute, a proposal which established the absence of a regularly constituted court as a third possibility to characterize the crime, independently of the respect for the principles of independence or impartiality by the court, or of the respect for the judicial guarantees generally recognized in international law.⁸⁸⁹

Therefore, the element of ‘regular constitution’ in Article 8(2)(c)(iv) – irrespective of its interpretation under CA 3 – is not concerned with whether a court is ‘established by law’ for the purposes of establishing individual criminal responsibility under the ICCSt. Indeed, the Pre-Trial Chamber went on to explain that:

This interpretation therefore puts emphasis on the ability of the court to conduct a fair

⁸⁸⁷ Consider also Somer (n 39) 675.

⁸⁸⁸ See Proposal by Belgium concerning article 8, paragraph 2 (c) (iv), PCNICC/1999/WGEC/DP.13, 28 July 1999.

⁸⁸⁹ *Al-Hassan* (n 13) [377] (translated by the author, emphasis added).

trial rather than how it is established. In other words, the characteristics of independence and impartiality are the characteristics required for a tribunal to be considered “regularly constituted” *within the meaning of the Statute*.⁸⁹⁰

From a normative perspective and in terms of individual culpability, the exclusion of the requirement of regular constitution in the sense that a court must be ‘established by law’ is not unreasonable. As later subsections will explain, the most likely perpetrators of Article 8(2)(c)(iv) are individuals carrying out death sentences or those acting as judges. Judges have the power to direct trials in a way that conforms with the necessary procedural guarantees and to resist bias or outside influence to the best of their abilities. However, it is usually not in the power of a judge to influence the ‘legal basis’ of a court, that is, its composition or jurisdictional powers. Similarly, individuals carrying out executions might be able to identify a sham trial but not necessarily be capable of assessing of whether a court was adequately established by law.

As pointed out by Robinson, while it is understandable to assume that norms have the same scope as they have in their original domain, one should be careful in directly transplanting rules from IHL or IHRL into ICL, “without pausing to reflect that those rules were not originally penal provisions”.⁸⁹¹ Provost, on the other hand, has criticised the more limited scope of Article 8(2)(c)(iv) as an undesirable “drifting apart” of IHL and ICL.⁸⁹² However, his critique is not particularly convincing since it is well recognised that not all IHL violations entail individual criminal

⁸⁹⁰ *ibid* (translated by the author, emphasis added).

⁸⁹¹ Darryl Robinson, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law* (OUP 2020) 40.

⁸⁹² René Provost, “Rebel Courts” Book Symposium – Author Response to Contributors’ (*Armed Groups and International Law Blog*, 10 June 2022) available at <<https://www.armedgroups-internationallaw.org/2022/06/10/rebel-courts-book-symposium-author-response-to-contributors/>> accessed 20 December 2022.

responsibility.⁸⁹³ This difference in scope of liability is further reflected in the decision of the drafters to focus on the cumulative effect of the denial of fair trial guarantees, which will be discussed in subsection 5.1.2.4.

At a later part of the decision, the *Al-Hassan* Pre-Trial Chamber returns to the question of whether ‘the judgments were rendered by a regularly constituted court’ and notes that ‘the Islamic Tribunal did not systematically apply the laws duly promulgated in accordance with the constitution of the state in question’.⁸⁹⁴ The Chamber then proceeds to state that analysing this issue is neither relevant nor necessary ‘in light of the applicable law’.⁸⁹⁵ The footnote following this last sentence then refers back to the initial assessment of the requirement of ‘regular constitution’ for the purpose of the ICC Statute and the departure of the drafters from CA 3 in this regard. This passage implies once again that the Chamber recognised that the concept of a regularly constituted court would normally encompass the requirement that such institution must be established by law. However, the precise wording of this passage (‘apply the laws’) also indicates some sort of conflation between substantive penal law applied and the institutional legal basis of the tribunal in question.

Finally, the Pre-Trial Chamber concluded that, apart from a.) the absence of a judgment, the crime can be committed when the sentence was passed by a tribunal that is b.) not independent and impartial (read ‘regularly constituted’ for the purpose of the ICC Statute), or c.) failed to afford the necessary due process guarantees.⁸⁹⁶ Accordingly, it made a clear distinction between ‘institutional guarantees’ and

⁸⁹³ O’Keefe (n 215); *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [94].

⁸⁹⁴ *Al-Hassan* (n 13) [482].

⁸⁹⁵ *ibid.*

⁸⁹⁶ *ibid* [358]-[59].

‘procedural guarantees’.⁸⁹⁷ Moreover, it held that if any of the above scenarios is met, pronouncing the sentence will be sufficient to commit the crime, even when the execution of the sentences is subsequently suspended or never executed.⁸⁹⁸

Once a tribunal that passed the relevant sentence is found to have not been independent or impartial, this will be sufficient to satisfy the material elements of the crime and no analysis of the other judicial guarantees will be necessary.⁸⁹⁹ Indeed, the use of the disjunctive ‘or’ in Element 4 of the Elements of Crime cited above makes clear that the failure of a court to meet the institutional guarantees of independence or impartiality is sufficient for individual criminal responsibility to arise under Article 8(2)(c)(iv). The contents of these two guarantees, and its application by the *Al-Hassan* Pre-Trial Chamber, have already been explained in **Chapter 4**.

5.1.2.3. Denial of other Fundamental Judicial Guarantees

The third alternative means of committing a war crime under Article 8(2)(c)(iv) – provided that a sentence has been passed by a court or tribunal deemed sufficiently independent and impartial – is by denying the victim fundamental procedural guarantees. The Elements of Crimes do not specify which procedural guarantees are generally recognized to be necessary for a fair trial. The drafters made the deliberate decision not to include a list of guarantees as some delegations feared that even an illustrative list could suggest that any right omitted was dispensable.⁹⁰⁰ Several commentators therefore suggest that Article 6(2) AP II should be taken as a

⁸⁹⁷ *ibid.*

⁸⁹⁸ *ibid* [365].

⁸⁹⁹ *ibid* [381].

⁹⁰⁰ Dörmann (n 386) 409. Such a list had initially been proposed by Switzerland, Hungary and Costa Rica, see ICC PrepComm, PCNICC/1999/WGEC/DP.10 (19 July 1999).

guideline.⁹⁰¹ Indeed, as demonstrated in **Chapter 4**, the individual guarantees listed in Article 6 AP II can reasonably be considered as ‘indispensable’ in the sense of CA 3. Moreover, the preparatory materials indicate that the drafters of Article 8(2)(c)(iv) were heavily influenced by Article 6 AP II.⁹⁰² This approach was also adopted by the Pre-Trial Chamber in *Al-Hassan*, which – based on Article 21(1)(b) of the ICC Statute – explicitly referred to Article 6 AP II and Article 75 AP I in determining the content of the necessary judicial guarantees.⁹⁰³

The Pre-Trial Chamber also invoked human rights law under Article 21(3) of the ICC Statute, in particular the ICCPR, ECHR, ACHR and AfChHPR.⁹⁰⁴ Based on these instruments, the Chamber then produced a list of judicial guarantees to be taken into account as determining factors⁹⁰⁵, all of which are either explicitly listed in Article 6 AP II, or implicitly enshrined as part of the ‘the necessary rights and means of defence’. However, this list contains two notable exceptions.

The first one is the principle of *ne bis in idem*. **Chapter 4** has already explained that the drafters of AP II deliberately dropped the *ne bis in idem* principle in order to prevent immunity of rebels from punishment under domestic laws of the State.⁹⁰⁶ While it was demonstrated that a prohibition against double trials may have nevertheless found its way into customary IHL and could arguably constitute an indispensable judicial guarantee, it is most likely limited to double trials *by the same party* to the

⁹⁰¹ Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (4th ed, OUP 2020) 452 [1211]; Andreas Zimmermann and Robert Geiß, ‘Article 8(2)(c)(iv)’ in Ambos (n 204) 555.

⁹⁰² Dörmann (n 386) 408; Carolin Abahuni, *Willkürverfahren als Kriegsverbrechen* (Nomos 2015) 304.

⁹⁰³ *Al-Hassan* (n 13) [383].

⁹⁰⁴ *ibid.*

⁹⁰⁵ *ibid* [384] (footnotes omitted).

⁹⁰⁶ See **Chapter 4**, section 4.3.6.

conflict. The fact that an armed group may try an individual for conduct he or she had already been tried for by State authorities should therefore not be a relevant factor in determining criminal responsibility under Article 8(2)(c)(iv).

The second is the right to appeal a judgment before a higher court or tribunal. It was pointed out in **Chapter 4** that a right to appeal was deliberately dropped not only from Article 6 AP II but also Article 75 AP I.⁹⁰⁷ Moreover, its customary law status under IHRL remains disputed.⁹⁰⁸ Accordingly, the fact that an individual was not granted a right to appeal should equally not be used to the detriment of a defendant charged under Article 8(2)(c)(iv).

Whereas, as explained above, the scope of criminal liability may be narrower than that of the underlying rule of IHL, it cannot be broader. In other words, every war crime must be based on a violation of a rule of IHL (applicable via treaty law or custom) and cannot go beyond the confines of such rule. Moreover, Article 22(2) of the ICC Statute prescribes that the definition of a crime shall be construed strictly. In case of ambiguity, the definition shall be interpreted in favour of the person being prosecuted. However, this does not rule out the possibility that providing additional rights to the defendant – for example, granting a right to appeal or other non-essential guarantees – be taken into account in the assessment of whether, as part of the cumulative assessment discussed below, the victim in question received a fair trial (i.e. as exonerating evidence).

Finally, it is important to highlight the Pre-Trial Chamber's (non-)assessment of the *nulla poena sine lege* principle. The Pre-Trial Chamber completely avoided discussing the issue of legality or the capacity of the armed groups operating in Mali

⁹⁰⁷ See **Chapter 4**, section 4.3.5.

⁹⁰⁸ *ibid.*

(Ansar Dine and AQMI) to impose their own laws. It did so by noting that the failure to provide other necessary judicial guarantees – together with a lack of independence and impartiality of the court – was already sufficient to establish a violation of Article 8(2)(c)(iv).⁹⁰⁹ This explanation is rather unconvincing since at the same time the Chamber had no problem in discussing other procedural guarantees in detail, despite the fact that it had already found that the Islamic Tribunal was neither impartial nor independent.

5.1.2.4. *The Cumulative Effect of Due Process Guarantees*

Element 4 of the Elements of Crime of Article 8(2)(c)(iv) is followed by a footnote that specifies that ‘the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial’.⁹¹⁰ This footnote was apparently added to accommodate the concern of a group of States, which during the negotiations took the view that a violation of a single guarantee should not automatically amount to a war crime.⁹¹¹ Indeed, a US proposal expressed the opinion that: ‘[f]or non-international armed conflicts, the elements of the offence are only met when the combined violations of penal provisions rise to the level of denying indispensable judicial guarantees recognized by all civilized peoples’.⁹¹²

However, this does not seem to preclude the possibility that the denial of a single guarantee can entail criminal responsibility if that guarantee is sufficiently

⁹⁰⁹ *Al-Hassan* (n 13) [483].

⁹¹⁰ Elements of Crimes, Article 8(2)(c)(iv), Element 4, fn 59.

⁹¹¹ Dörman (n 386) 409. See also Schabas (n 870) 271.

⁹¹² Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Proposal regarding an annex on definitional elements for part 2 crimes (19 June 1998) A/CONF.183/C.1/L.10.

important.⁹¹³ This is also the view taken by the Pre-Trial Chamber in *Al-Hassan*.⁹¹⁴ Interestingly, no similar clause regarding the overall cumulative effect of individual fair trial guarantees was included in the Elements of Crime for the denial of fair trial rights in IAC under Article 8(2)(a)(vi), despite the supportive practice of the post-World War II tribunals in that regard.⁹¹⁵ However, while sometimes interpreted as a mere oversight⁹¹⁶, the US proposal referred to above is a strong indication that this omission was in fact deliberate.

Ultimately, this addition to the Elements of Crime to Article 8(2)(c)(iv) thus provides the Court with a certain amount of discretion in deciding whether a fair trial has taken place. Accordingly, Article 8(2)(c)(iv) has the potential to cushion any potential normative overreach of CA 3 noted in **Chapter 4**, by not only dispensing with the requirement of a regularly constitute court, but also by linking criminal responsibility to the cumulative effect of a denial of fair trial guarantees rather than the violation of (every) individual guarantee. This nuanced approach, while maintaining incentives for armed group members to comply with the necessary judicial guarantees, may prevent individuals from being penalized for not meeting standards considered unrealistic in the context of a non-State entity engaged in armed conflict.

5.1.2.5. *Required Mental Elements*

In addition to the material elements analysed above, Element 5 of the Elements of Crimes of Article 8(2)(c)(iv) contains an important mental element. It specifies that the

⁹¹³ *ibid.*

⁹¹⁴ *Al-Hassan* (n 13) [386].

⁹¹⁵ See UNWCC (1949) 15 LRTWC, 166, noting that there is ‘a striking uniformity’ among the jurisprudence surveyed in the sense that the tribunals would look at the culminative effect of the judicial guarantees denied.

⁹¹⁶ *Marchesi* (n 850) 188.

perpetrator must have been ‘aware of the absence of a previous judgement or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial’. Accordingly, if a perpetrator involved in a trial considers an objectively insufficient hearing of the defendant to be sufficient, they will not be responsible for a war crime under Article 8(2)(a)(vi) of the ICC Statute.⁹¹⁷ It has been pointed out that the essential or indispensable nature of a specific guarantee is a question of law and not of fact.⁹¹⁸ As such, absence of knowledge as to the legal significance of certain judicial guarantees in such a scenario could negate the mental element necessary and, therefore, constitute the defense of ‘mistake of law’ under Article 32(2) of the ICC Statute.⁹¹⁹

5.1.2.6. *Modes of Liability and Personal Scope of the Crime*

Finally, it is necessary to clarify the personal scope of Article 8(2)(c)(iv). With regard to potential victims, the Elements of Crimes make clear that the sentence must have been pronounced against individuals *hors de combat*, civilians or medical and religious personnel not taking active part in hostilities.⁹²⁰ **Chapter 3** has already demonstrated that the term *hors de combat* can extend to members of armed groups in the hand of an adversary and that this definition could also encompass members of the group pronouncing the sentence, most notably in cases where their allegiance is put into question.⁹²¹

⁹¹⁷ Werle and Jeßberger (n 901) 288.

⁹¹⁸ See Peter Rowe, *The Permanent International Criminal Court: Legal and Policy Issues* (Hart 2004) 227.

⁹¹⁹ See Werle and Jeßberger (n 901) 290. See also Antonio Coco, *The Defence of Mistake of Law in International Criminal Law* (OUP 2022) 171. In 2020, Al-Hassan’s defence team notified the Trial Chamber of their client’s intention to raise the defense of mistake of law, see *Al-Hassan* (Notice of Affirmative Defences) ICC-01/12-01/18 (13 July 2020) [7].

⁹²⁰ *Al-Hassan* (n 13) [361].

⁹²¹ See **Chapter 3**, section 3.1.1.

The more problematic issue is the personal scope of Article 8(2)(c)(iv) in relation to potential perpetrators. In other words, which individuals involved in the process of trial, sentencing and carrying out a sentence, ultimately, incur criminal responsibility in case the necessary judicial guarantees have not been complied with? Under IHL, this issue does not generally really arise since the prohibition against the passing of sentences without a regularly constituted court affording all the necessary judicial guarantees in CA 3 binds the armed group as a collective. Accordingly, in order for the group to have violated that provision, it is irrelevant which individual passes the sentence or carries it out, as long as the relevant actions can be attributed to the group.⁹²² For the purpose of determining individual criminal responsibility, however, the question about the personal scope of the crime is of great relevance.

To begin with, it is necessary to determine who might be liable for ‘committing’ the crime as a principal under Article 25(3)(a) of the ICC Statute. According to the post-World War II jurisprudence collected by the UNWCC, the crime of denying a fair trial can be committed both by those **in** involved in the passing of a sentence (i.e. judges and prosecutors) as well as those carrying out death sentences (executioners).⁹²³ However, it does not seem to cover individuals carrying out or supervising non-capital sentences (e.g. prison guards).⁹²⁴ Indeed, almost all the defendants ultimately convicted for the denial of a fair trial in the post-World War II cases fell into one of the three categories mentioned above (judges, prosecutors and individuals carrying out death sentences), with the majority being judges.⁹²⁵ The UNWCC also noted that the Allied

⁹²² However, it needs to be mentioned that the legal framework governing the attribution of acts to armed groups is still underdeveloped. See **Chapter 2**, section 2.3.

⁹²³ UNWCC, ‘Digest of Laws and Cases’ (1949) 15 LRTWC 60-61.

⁹²⁴ These groups of individuals might nevertheless be liable for the crime against humanity of unlawful imprisonment, see section 5.4.2.

⁹²⁵ UNWCC, ‘Digest of Laws and Cases’ (1949) 5 LRTWC 70.

courts and military commissions were less willing to punish prosecutors, probably because they do not incur a duty to be impartial but rather to do their best, albeit within certain limits, to secure a conviction.⁹²⁶ At least one individual charged but found not guilty was a Japanese interpreter who participated in a summary trial and also the subsequent execution.⁹²⁷

Some of the accused, especially in the *Justice case*, did not themselves act as judges or prosecutors but occupied high ranking positions in the Ministry of Justice or similar departments which allowed them to influence the outcome of proceedings.⁹²⁸ In such cases, criminal liability may arise either through the defendant's role in ordering or soliciting the commission of the crime, or on the basis of command responsibility.⁹²⁹ It was mentioned already in **Chapter 2** that individual superiors may be held criminally responsible in relation to crimes committed by their subordinates when they fail to prevent their commission or punish the perpetrators involved.⁹³⁰ This mode of liability is commonly known as 'command responsibility' or 'superior responsibility' and was shaped significantly through the jurisprudence of the post-World-War II military tribunals.⁹³¹ Later, the Rome Statute incorporated command responsibility as a mode of liability in Article 28(a)(ii) for any person effectively acting as a military commander, as long as they exercise effective authority and control and 'failed to take all necessary and reasonable measures within their power to prevent or repress their commission or to submit the matter to the competent authorities for

⁹²⁶ *ibid.*

⁹²⁷ *ibid.* 80.

⁹²⁸ See *Trial of Isayama et al.*, US Military Commission Shanghai, 25 July 1946 (1949) 5 LRTWC 60, 63; *Altstötter et al.* (n 742).

⁹²⁹ See art 28(b) ICC Statute.

⁹³⁰ O'Keefe (n 215) 201.

⁹³¹ See e.g. *Yamashita*, US Military Commission Manila, 7th December 1945 (1948) 4 LRTWC 1; *Von Leeb et al.*, 28 October 1948 (1949) 12 LRTWC 72 (*High Command Trial*).

investigation and prosecution’. This mode of liability applies irrespective of the type of armed conflict at issue. Furthermore, the ICTY Appeals Chamber confirmed that wherever customary international law recognizes that a war crime can be committed in NIAC, it also recognizes command responsibility in respect of such crimes.⁹³²

In the aftermath of World War II, two Japanese generals were found guilty by US Military Commissions on the basis of command responsibility in relation to unfair trials conducted against Allied personnel.⁹³³ However, certain peculiarities arise when a superior is held responsible for unfair trials conducted by their subordinates. It was already pointed out in **Chapter 4** that the independence of a court or tribunal requires protection from outside interference, especially from the executive leadership and superiors in the same chain of command. This could expose superiors to a dilemma: while exerting influence to interfere in a potentially unfair trial may prevent them from incurring criminal liability under the doctrine of command responsibility, it may simultaneously also put into question the independence of the relevant court or tribunal.

Indeed, the ICC Appeals Chamber has noted that when a commander establishes a judicial process, the respective institution must be left to freely fulfil its mandate.⁹³⁴ The commander may only be faulted for the shortcomings of such judicial process if: (i) the shortcomings were sufficiently serious; (ii) the commander was aware of the shortcomings; (iii) it was materially possible to correct the shortcomings; and (iv) the shortcomings fell within his or her authority to remedy.⁹³⁵ While the ICC set out these criteria in order to determine when a superior incurs criminal liability for

⁹³² *Hadžihasanovic* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) IT-01-47-AR72 (16 July 2003) [18].

⁹³³ UNWCC, ‘Digest of Laws and Cases’ (1949) 5 LRTWC 79.

⁹³⁴ *Bemba*, Appeals Judgment (n 52) [180]. See also **Chapter 6**, section 6.3.3.

⁹³⁵ *ibid.*

failure to punish subordinates and to submit them to competent authorities for prosecution, it is arguable that the same criteria should apply by analogy when holding a superior responsible for not preventing the conduct of an unfair trial by their subordinates.

The question of the personal scope of Article 8(2)(c)(iv) ICCSt also arose in the *Al-Hassan* case, in which the Defence argued that only individuals who have benefitted from legal training could be held criminally responsible. This restrictive approach was explicitly rejected by the Pre-Trial Chamber as not having any basis in the Elements of Crimes.⁹³⁶ However, as explained above, unawareness about the essential or indispensable nature of a certain judicial guarantee may in certain cases negate the mental element necessary to commit the crime.

The scope of potential perpetrators of violations of Article 8(2)(c)(iv) is, therefore, not principally restricted to members of the legal profession. Indeed, Mr Al-Hassan was neither a judge, nor a prosecutor, but was instead member of the ‘Islamic Police’. In the post-World War II cases, members of the police have only been held criminally liable for the denial of a fair trial in cases where they had personally carried out death sentences.⁹³⁷ Mr Al-Hassan’s involvement in the Islamic Tribunal, however, was limited to the pre-trial phase, mainly the investigation of alleged crimes, the undertaking of arrests and interrogations, and the writing of reports on the facts of each case, some of which were later cited by the Islamic Tribunal as evidence.⁹³⁸ Some of these reports contained recommendations as to the penalty to be imposed, but the Pre-Trial Chamber could not establish whether these recommendations actually influenced

⁹³⁶ *Al-Hassan* (n 13) [876].

⁹³⁷ See *Oscar Hans*, Supreme Court of Norway, August 1947 (1948) 5 LRTWC 82.

⁹³⁸ *Al-Hassan* (n 13) [877]-[886].

the Tribunals' decisions.⁹³⁹ Accordingly, the Pre-Trial Chamber noted that writing these reports did not amount to ordering, soliciting or inducing the commission of the crime under Article 25(3)(b) of the ICC Statute.⁹⁴⁰

Nevertheless, it found that these acts could amount to aid or other forms of assistance for the purpose of facilitating the commission of a crime under Article 25(3)(c), as well as under Article 25(3)(d).⁹⁴¹ This conclusion should be viewed critically as it greatly expands the personal scope of Article 8(2)(c)(iv) when compared to its historical precedents. In essence, the liability of Mr Hassan was engaged by his role in carrying out regular police functions. There is no indication that he did so in bad faith or that the reports written by him and transmitted to the Tribunal were somehow fraudulent or inaccurate. The approach of the Pre-Trial Chamber essentially exposes every individual who engages in any way with a court or tribunal not meeting the necessary standards to criminal liability. It is arguable that this constitutes a normative and jurisdictional overreach. While an act of assistance or contribution to a crime must not necessarily be causal for the crime to be committed under Article 25(3) ICCSt, it must nevertheless have a 'substantial effect'.⁹⁴² A better approach would thus be to only hold individuals who are not directly involved in the conduct of a trial or the carrying out of executions liable when they actively facilitate the denial of fair trial guarantees, for example by giving false testimony, bribing judges, fabricating evidence or otherwise acting in bad faith to the detriment of the victim.

⁹³⁹ *ibid* [888].

⁹⁴⁰ *ibid* [887], [890] and [892].

⁹⁴¹ *ibid* [928]-[929] and [975].

⁹⁴² Ambos (n 228) 1222-1223, [32]. See also *Tadić* (Trial Judgment) IT-94-1-T (7 May 1997) [674]. See also *Mbarushimana* (Confirmation of Charges) ICC-01/04-01/10-465-Red (16 December 2011) [277] recognising the problem of ostensibly 'neutral acts' in the context of art 25(3)(d) of the ICCSt.

5.2. The Denial of Fair Trial as Elements of Other War Crimes

5.2.1. *Unlawful Confinement in NIAC*

The denial of fair trial guarantees and sentences imposed without a fair trial in NIAC may also be covered by war crimes other than Article 8(2)(c)(iv). It has been suggested, for example, that imprisonment imposed by an armed group court could amount to the war crime of unlawful confinement.⁹⁴³ However, it remains unclear whether the war crime of unlawful confinement exists in NIACs. The prohibition of unlawful confinement is part of the grave breaches regime of the 1949 Conventions and, as such, only applicable in IAC.⁹⁴⁴ During the Rome Conference, unlawful confinement was included as a war crime in Article 8(2)(a)(vii) ICCSt but without a corresponding provision under Article 8(2)(e).

However, it is theoretically possible that unlawful confinement or imprisonment exists as a war crime under customary international law without having been included in the Rome Statute. Based on the ICTY's test as to whether specific conduct amounts to a war crime, the act in question must a.) infringe upon an IHL rule under treaty or customary law; b.) the breach must be serious in the sense that it violates a rule that protects important values; and c.) the breach must entail the individual criminal responsibility of the person breaching the rule.⁹⁴⁵

⁹⁴³ Manuel J. Ventura, 'Automatic Criminal Liability for Unlawful Confinement (Imprisonment) as a War Crime? A Potential Consequence of Denying Non-State Armed Groups the Power to Detain in NIACs' in Heffes, Kotlik and Ventura (n 164) 149-67; See also Clapham (n 548) 37.

⁹⁴⁴ Art 147 GC IV.

⁹⁴⁵ *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [94].

Regarding the first requirement, Article 5 AP II regulates the conditions for detention in NIAC but remains silent on permissible grounds for detention as such. However, according to the ICRC's customary IHL study, the prohibition against arbitrary detention is an established rule not only under customary IHRL, but also under customary IHL applicable in NIACs.⁹⁴⁶ In particular, the study notes that this customary rule also 'aim[s] to prevent arbitrary detention by specifying the grounds for detention'.⁹⁴⁷ It was noted in **Chapter 3** that under IHRL, a penal sentence imposed after a fair trial is generally accepted as a legitimate ground for the restriction of personal liberty.⁹⁴⁸ Conversely, while not every violation of specific procedural guarantees results in arbitrary detention, imprisonment after a manifestly unfair trial is generally considered arbitrary.⁹⁴⁹ Accordingly, imprisonment based on a manifestly unfair trial also has the potential to breach the prohibition against arbitrary detention under customary IHL.

In relation to the second requirement (the seriousness of the breach), it has been argued that the fact that unlawful confinement was included as a 'grave breach' of the Geneva Conventions is strong evidence that its breach affects 'important values' as specified in the above-mentioned *Tadić* criteria.⁹⁵⁰ However, the inclusion of unlawful confinement as a grave breach must be seen in the context of the explicit powers to take 'measures of control and security' granted by the 1949 Conventions.⁹⁵¹ In light of these extensive powers, it has been argued that the protective scope of the war crime

⁹⁴⁶ ICRC Customary IHL Study, Rule 99.

⁹⁴⁷ *ibid.*

⁹⁴⁸ See **Chapter 3**, section 3.3.2.

⁹⁴⁹ HRC, General Comment No. 35 (n 554) [17]; *Sineiro Fernández v. Spain* (n 554) [6.3]

⁹⁵⁰ Ventura (n 943) 156.

⁹⁵¹ Arts 42-43 and art 78 GC IV grant far-reaching powers to detain enemy nationals or aliens on the territory of the State party, as well as inhabitants of occupied territory.

of unlawful confinement is rather limited.⁹⁵² Only where internment occurred with ‘no particular reason, especially in occupied territory, could it come within the definition of this breach’.⁹⁵³ The ‘gravity’ of the violation therefore seems to stem from the fact that such confinements must occur in a completely arbitrary manner and without a legitimate security interest⁹⁵⁴, for example collective internment based on ethnic or religious affiliation⁹⁵⁵ or by essentially taking individuals hostage⁹⁵⁶. Apart from such extreme case, it remains doubtful whether imprisonment based on an unfair trial for an otherwise legitimate reason (for example the detention of individuals posing a security threat) would constitute a violation that is serious enough to constitute a war crime.

Finally, in relation to the third requirement, namely the individual criminal responsibility under treaty or customary law, it is noteworthy that the ICRC claims in its customary IHL study that more than 70 States have criminalised the unlawful deprivation of liberty during armed conflict and that ‘most of this legislation applies the prohibition of unlawful deprivation of liberty to both international and non-international armed conflicts’.⁹⁵⁷ However, a closer look at the State practice surveyed reveals that – while not directly excluding NIACs as such – many instances refers back to the grave breaches regime, the Rome Statute, or only mention the detention of ‘civilians’.⁹⁵⁸ It is therefore unlikely that this practice could be invoked to conclude that any form of unlawful or arbitrary detention in NIAC – especially in relation to a

⁹⁵² Jean S. Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Vol. 4: Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 599, noting that ‘the illegal nature of confinement would be very difficult to prove’.

⁹⁵³ *ibid.*

⁹⁵⁴ States retain a very wide margin of discretion in determining whether such internment is necessary. See e.g. *Delalic*, Trial Judgment (n 619) [574].

⁹⁵⁵ See also Clapham (n 548) 37.

⁹⁵⁶ See e.g. *Kordić & Čerkez* (Trial Judgment) IT-95-14/2-T (26 February 2001) [312].

⁹⁵⁷ ICRC Customary IHL Study, Rule 99, 347.

⁹⁵⁸ ICRC Customary IHL Study, vol II, Practice relating to Rule 99 [2229]-[2238].

group's own members or enemy fighters – carries individual criminal responsibility under customary law. Indeed, even advocates for the extension of the war crime of unlawful confinement to NIACs seem to admit that such crime has yet to be established.⁹⁵⁹

5.2.2. *Cruel and Inhumane Treatment*

CA 3 prohibits acts amounting to cruel treatment against individuals not taking part in hostilities, including fighters *hors de combat*. A serious violation of this prohibition against cruel treatment carries individual criminal responsibility under Article 8(2)(c)(i) of the ICCSt. In this regard, it is important to note that the ICTY has found that cruel treatment under CA 3 carries the same meaning as the term 'inhumane treatment'.⁹⁶⁰ Moreover, the Preparatory Commission drafting the Elements of Crimes also confirmed that 'inhumane treatment' in Article 8(2)(a)(ii) has the same meaning as 'cruel treatment' under Article 8(2)(c)(i).⁹⁶¹

It has been suggested that arbitrary deprivation of liberty is incompatible with this requirement of treating civilians and individuals *hors de combat* humanely, and, accordingly could be prosecuted as a serious violation of CA 3.⁹⁶² However, it is debated if and when arbitrary detention amounts to inhumane treatment. In the *Limaj* case, for example, an ICTY Trial Chamber held that unlawful detention even for prolonged periods of time does not in and of itself amount to cruel treatment under CA 3.⁹⁶³ While personal liberty does constitute an important value, it seems that the

⁹⁵⁹ Jelena Plamenac, *Unravelling Unlawful Confinement in Contemporary Armed Conflicts* (Brill/Nijhoff 2022) 239.

⁹⁶⁰ *Delalić*, Trial Judgment (n 619) [443].

⁹⁶¹ Dörmann (n 386) 398.

⁹⁶² ICRC Customary IHL Study, Rule 99, 344.

⁹⁶³ *Limaj* (n 632) [232]. See also art 3 ICTY Statute.

unlawful nature of detention – as opposed to certain conditions of detention – was simply not considered sufficient by the Trial Chamber to constitute a violation of CA 3.⁹⁶⁴

In contrast, human rights courts and treaty bodies have consistently held that trials that involve the death penalty but do not respect fundamental judicial guarantees amount to ‘inhuman treatment’.⁹⁶⁵ However, as noted in the previous subsection, where an unfair trial has been held and a (death) sentence passed, Article 8(2)(c)(iv) ICCSt will always be the more pertinent crime.

In conclusion, neither the war crime of unlawful confinement (which is unlikely to exist in NIAC in the first place), nor the crime of cruel and inhumane treatment seem to have any meaningful complementary role to Article 8(2)(c)(iv) in cases where a victim has been denied fair trial rights.

5.3. The Nexus Requirement and the Criminalisation of Rebel Governance

Chapter 3 has already discussed that IHL does not apply to every act occurring during armed conflict. Rather, its application requires a link between the relevant conduct and the armed conflict. It was also explained that this concept of a ‘nexus’ has been developed significantly through the jurisprudence of the ICTY and, to a lesser extent, the ICC.⁹⁶⁶ Within the realm of ICL, the existence of a nexus between the crime and the armed conflict allows war crimes to be distinguished from ordinary crimes, as well

⁹⁶⁴ *Limaj* (n 632) [231]; *Delalić*, Trial Judgment (n 619) [551].

⁹⁶⁵ See e.g. *Larrañaga v The Philippines* (n 592) [7.11]; *Öcalan v Turkey* (n 592) [175].

⁹⁶⁶ See *Tadić*, Trial Judgment (n 942) [572]; *Delalić*, Trial Judgment (n 619) [193]; *Kunarac* (Appeals Judgment) IT-96-23&23/1-A (12 June 2002) [58]; *Ntaganda*, Trial Judgment (n 362) [731]. See also *Akayesu*, Appeals Judgment (n 333) [444].

as from other international crimes such as crimes against humanity.⁹⁶⁷ The problem, however, is that the emphasis placed in contemporary jurisprudence and scholarship on the control of territory as a consequence of the armed conflict renders certain conduct criminal under international law when performed by an armed group, but not if the exact same conduct is performed by a State.⁹⁶⁸ This also applies to Article 8(2)(c)(iv) ICCSt.

In the words of the ICTY Appeals Chamber in *Kunarac*, if it can be established that ‘the perpetrator acted *in furtherance* of or *under the guise* of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict’.⁹⁶⁹ It was already mentioned in **Chapter 3** that the exercise of power over an individual by virtue of the armed conflict is usually interpreted as meeting this criterion. In *Al-Hassan*, for example, the defence team argued that the punishment of *shari’a* based crimes established by Ansar Dine and AQMI in Timbuktu did not entail the required nexus to a NIAC.⁹⁷⁰ For the ICC Pre-Trial Chamber, however, the fact that the sentences were pronounced in a region controlled by the armed groups in question was sufficient to demonstrate the necessary link to the armed conflict.⁹⁷¹ The Trial Chamber in *Al-Mahdi* adopted a similar approach and essentially held that all acts by Ansar Dine and AQMI carried out as part of their administration of Timbuktu must

⁹⁶⁷ *Boškoski and Tarčulovski* (Trial Judgment) IT-04-82-T (10 July 2008) [293]; see Spadaro (n 363) 12.

⁹⁶⁸ See Katharine Fortin, ‘The Procedural Right to a Remedy When the State has Left the Building? A Reflection on Armed Groups, Courts and Domestic Law’ (2022) 14 *Journal of Human Rights Practice* 387, 408. See also William Schabas, ‘“Rebel Courts” Book Symposium: Rebel Justice Can Be Music to My Ears’ (*Armed Groups and International Law Blog*, 3 June 2022) available at <<https://www.armedgroups-internationallaw.org/2022/06/03/rebel-courts-book-symposium-rebel-justice-can-be-music-to-my-ears/>> accessed 20 December 2022. See also Spadaro (n 967) 15.

⁹⁶⁹ *Kunarac* (n 966) [58] (emphasis added).

⁹⁷⁰ *Al-Hassan* (n 13) [486].

⁹⁷¹ *ibid.*

qualify as ‘associated with the armed conflict’.⁹⁷² Under this view, any flawed trial over a common thief constitutes a war crime if carried out by an armed group in territory under its control (at least when this control was achieved through current armed conflict), whereas the same trial carried out by a State would lack the necessary link to the armed conflict.⁹⁷³

It was pointed out in **Chapter 3** that this overly broad and unequal approach to the nexus requirement should be viewed critically. As noted by Schabas, ‘the fact that power has been seized during an ongoing civil war should not in and of itself be sufficient to constitute the nexus required for prosecution as war crimes with respect to the efforts of the rebel group to govern the territory that it holds’.⁹⁷⁴ Indeed, this focus on the seizure of territorial control seems to import the concept of ‘occupation’ into NIAC, which, as **Chapter 4** has demonstrated, cannot simply be transposed. Moreover, **Chapter 3** has explained that international law takes a neutral position towards rebellion, which is evidenced by the fact that armed groups enjoy a weak permission to undertake certain acts of rebel governance, in particular the passing of penal sentences under specific conditions. However, this neutrality is at least partially undermined by criminalising (flawed) acts of rebel governance while States may carry out the same acts with impunity. ICL thus further amplifies the consequences of the asymmetric nexus interpretation explained in **Chapter 3**, disincentivises acts of rebel governance, and undermines the principle of belligerent equality.

Instead, as noted by Cassese and Gaeta, the nexus test could focus on whether the crime ‘has been committed to pursue the aims of the conflict or, alternatively, [...]

⁹⁷² *Al-Mahdi* (Trial Chamber) ICC-01/12-01/15 (27 September 2016) [49]-[51].

⁹⁷³ See also Fortin (n 968) 408.

⁹⁷⁴ Schabas (n 349) 98.

with a view to somehow contributing to attaining the ultimate goals of a military campaign or, at a minimum, in unison with the military campaign'.⁹⁷⁵ This interpretation would retain some leeway to criminalize unfair trials conducted in furtherance of the military goal of the armed group (arguably including the *shari'a* based 'offences' mentioned above to the extent that the introduction of a *shari'a* based public order was the ultimate goal of Ansar Dine/AQMI) while putting States and armed groups on an equal footing with regard to penal sanctions imposed for the purpose of maintaining basic public order (e.g. the punishment of theft, murder etc.).

5.4. Failure to Provide Fair Trial Guarantees as a Crime Against Humanity

The previous section has demonstrated that an unfair trial may engage the individual criminal responsibility of those involved when conducted in territory controlled by an armed group, but not necessarily when carried out State authorities absent a nexus that would otherwise link the trial to the armed conflict. However, criminal responsibility for the denial of fair trial guarantees is not limited to serious violations of IHL. **Chapter 2** has already explained that crimes against humanity, contrary to war crimes, are based on the extension of individual criminal responsibility to the widespread and systematic violation of international human rights.⁹⁷⁶ As this section will demonstrate, when fair trial guarantees are denied in such widespread and systematic fashion, such conduct might be punishable as the crime of unlawful imprisonment or constitute a material element of other crimes against humanity. Most importantly, crimes against humanity

⁹⁷⁵ Cassese and Gaeta (n 296) 78. See also Spadaro (n 967) 17.

⁹⁷⁶ See **Chapter 2**, section 2.2.3; and Ambos (n 204) 165.

do not require a link to an armed conflict and could, therefore, potentially cushion the imbalance produced by the nexus criterion.⁹⁷⁷

5.4.1. *The Denial of a Fair Trial as a Distinct Crime Against Humanity*

The denial of a fair trial guarantees has, so far, not been prosecuted as a distinct crime against humanity. Contrary to the war crimes under Articles 8(2)(a)(vi) and 8(2)(c)(iv), the ICC Statute does not include an equivalent crime against humanity of ‘wilful denial of a fair trial’ or the ‘passing of sentences’ without the necessary judicial guarantees. In the *Justice* case, the US Military Tribunal at Nuremberg did not prosecute the denial of a fair trial as a distinct crime against humanity but rather accepted evidence of a fair trial as a defence against charges of other crimes against humanity, including extermination, persecution and illegal imprisonment.⁹⁷⁸ Similarly, in 2017, four former judges were tried for crimes against humanity in Argentina for their failure to investigate petitions of *habeas corpus* filed by relatives of dissidents who disappeared during the 1976-1983 dictatorship.⁹⁷⁹ They were convicted on the basis of their participation in the crimes of murder, kidnapping and torture; not a distinct crime against humanity based on the denial of fair trial as such. Indeed, where individuals have been executed without preceding trial in a widespread and systematic manner, the elements for the crime against humanity of murder are met.⁹⁸⁰

In addition, where only specific groups of individuals have been denied a fair trial based on their affiliation with certain political, racial, national, ethnic, cultural or

⁹⁷⁷ *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [141].

⁹⁷⁸ *Justice Trial* (n 742) Indictment [20]; See also Ghadiri (n 857) 201.

⁹⁷⁹ ‘Argentina sentences 4 ex-judges for dictatorship-era crimes’ (*CTV News*, 26 July 2017) available at <<https://www.ctvnews.ca/world/argentina-sentences-4-ex-judges-for-dictatorship-era-crimes-1.3520894>> accessed 20 December 2022.

⁹⁸⁰ See also section 5.1.2.3.

religious groups, such conduct can constitute an act of persecution. In the *Brđanin* case, for example, the ICTY prosecuted the denial of a judicial process, carried out with discriminatory intent, as an act of persecution.⁹⁸¹ The Trial Chamber found that Bosnian Muslims and Croats had been arbitrarily arrested and detained in camps without being informed of any charges or given access to a court.⁹⁸² However, in establishing that the crime of persecution had been committed, the Trial Chamber looked at the cumulative denial of fundamental rights – including the freedom of movement and right to medical care – and not just the lack of judicial guarantees in isolation.

5.4.2. Imprisonment in Violation of Fundamental Rules of International Law

While the denial of a fair trial has never been charged as a crime against humanity in its own right, the most likely contender to cover the same rationale is the crime of unlawful imprisonment. This crime was included as ‘imprisonment’ in both the ICTY and ICTR Statute, and as ‘arbitrary imprisonment’ in the 1996 Draft Code of Crimes against Peace and Security of Mankind.⁹⁸³ Most importantly, Article 7(1)(e) of the ICC Statute criminalizes ‘imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law’ as an act that may constitute a crime against humanity. As pointed out by Stahn, this provision of the ICCSt is inevitably linked and should be read in connection with Article (8)(2)(c)(vi), the prohibition

⁹⁸¹ *Brđanin* (Trial Judgement) IT-99-36 (1 September 2004) [1029], [1045] and [1049]. The conviction was affirmed by the Appeals Chamber, IT-99-36-A (3 April 2007) [298]-[303].

⁹⁸² *Brđanin*, Trial Judgement (n 981) [1044].

⁹⁸³ Art 5(e) ICTY Statute, art 3(e) ICTR Statute and art 18(h) 1996 Draft Code on Crimes Against Peace and Security of Mankind (n 405).

against the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court.⁹⁸⁴ A widespread and systematic failure to provide a fair trial when imposing prison sentences might therefore render individuals liable for crimes against humanity. Indeed, the ICTY Appeals Chamber also emphasised the connection to ‘due process’ and defined the crime as follows:

[I]mprisonment ... should be understood as contemplating arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population.⁹⁸⁵

The drafting history of Article 7(1)(e) reveals that the crime of imprisonment was included – not without controversy – in order to address situations where an abusive justice system imprisons individuals, even when in accordance with its own (domestic) laws.⁹⁸⁶ However, in *Ntagerura*, the ICTR noted that ‘it is not every minor infringement of liberty that forms the material element of imprisonment as a crime against humanity’ and that ‘the deprivation of liberty must be of similar gravity and seriousness as other crimes enumerated as crimes against humanity enumerated in Article 3(a) to (i)’ [of the ICTR Statute].⁹⁸⁷ Moreover, as pointed out above, while imprisonment after a manifestly unfair trial is certainly arbitrary, not every violation of the specific procedural guarantees for criminal defendants in Article 14 ICCPR amounts to arbitrary imprisonment.⁹⁸⁸

⁹⁸⁴ Carsten Stahn, ‘Article 7(1)(e)’ in Ambos (n 204) 196, [69].

⁹⁸⁵ *Kordić and Čerkez* (Appeals Judgement) IT-95-14/2-A (17 December 2004) [116].

⁹⁸⁶ Schabas (n 870) 180.

⁹⁸⁷ *Ntagerura* (Trial Judgement) ICTR-99-46-T (25 February 2004) [702].

⁹⁸⁸ HRC, General Comment No. 35 (n 554) [17]; *Sineiro Fernández v. Spain* (n 554) [6.3]

This mirrors the conclusion with regard to Article 8(2)(c)(iv) reached above, namely that not every failure to provide the judicial guarantees required by CA 3 results in the individual criminal responsibility of those involved. Moreover, in relation to unlawful confinement as a war crime, the ICTY Appeals held that in order to *commit* this offence, mere participation in a system of arbitrary detention is not sufficient:

Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers over the place of detention, accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable ground for their detention exist, or that any such reasons have ceased to exist.⁹⁸⁹

In *Krnojelac*, the Trial Chamber subsequently transposed this finding to the crime against humanity of imprisonment.⁹⁹⁰ The Chamber had to determine to what extent a prison warden who was not involved in the initial detention and had no authority to actually release prisoners incurred criminal responsibility for unlawful imprisonment.⁹⁹¹ Ultimately, the Chamber found that the warden could only be responsible for aiding and abetting a joint criminal enterprise by accepting unlawfully detained civilians into his prison.⁹⁹²

5.4.3. Unfair Trials as ‘Other Inhumane Acts’

Finally, even though there is no distinct crime against humanity for the denial of fair trial rights, such conduct may nevertheless fall under the category of ‘other inhumane

⁹⁸⁹ *Delalić*, Appeals Judgment (n 316) [342].

⁹⁹⁰ *Krnojelack* (Trial Judgment) IT-97-25-T (15 March 2002) [125]-[126].

⁹⁹¹ *ibid* [126].

⁹⁹² *ibid* [126]-[127].

acts’ under Article 7(1)(k) of the ICCSt. Both the ICTY and ICTR held that ‘other inhumane acts’ must be of ‘similar gravity and seriousness’ than those acts explicitly enumerated in their respective Statutes.⁹⁹³ In particular, the act or omission must cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.⁹⁹⁴

It has been argued that the harm emanating from an unfair trial is psychological in nature and distinct to the harm emanating from the imprisonment or punishment based on such a trial.⁹⁹⁵ Moreover, exposure to a sham trial can reasonably be said to constitute an attack on human dignity, especially when combined with the intent to publicly humiliate the victim.⁹⁹⁶ The OHCHR, for example, reported that individuals tried in sham proceedings before judges of the self-declared republics in Eastern Ukraine were scolded and verbally abused during their trials for expressing pro-Ukrainian sentiments or were treated like convicts or traitors even before the ‘verdicts’ were announced. Such conduct could reasonably be interpreted as a serious attack on the dignity of the victims.⁹⁹⁷ It is, therefore, arguable that at least the flagrant denial of a fair trial is of sufficient gravity to result in individual criminal responsibility separate from responsibility for any related sentence or punishment.⁹⁹⁸

⁹⁹³ *Naletilić and Martinović* (n 462) [247]; *Kordić and Čerkez*, Appeals Judgment (n 985) [117].

⁹⁹⁴ *Krnojelack* (n 990) [130].

⁹⁹⁵ Ghadiri (n 857) 223.

⁹⁹⁶ *ibid* 218.

⁹⁹⁷ OHCHR, ‘Human rights in the administration of justice in conflict-related criminal cases in Ukraine (April 2014 – April 2020)’ (17 September 2020) UN Doc A/HRC/45/CRP.9 [129].

⁹⁹⁸ Ghadiri (n 857) 223.

5.4.4. *The Contextual Elements of Crimes Against Humanity*

The previous subsections have explored several avenues how the denial of a fair trial may be prosecuted as a crime against humanity. It was explained that this type of international crime does not require a nexus to an armed conflict and, consequently, applies to the passing of penal sanctions by armed groups and States alike. However, due to the contextual elements of crimes against humanity, not every sentence passed in violation of the respective fair trial rights, even if sufficiently severe, will trigger the individual criminal responsibility of those involved.

First, the requirement of an ‘attack directed against a civilian population’ emphasizes the collective nature of such crimes, thus excluding attacks against individuals and isolated occurrences of unfair trials.⁹⁹⁹ It is important to note that the term ‘civilian population’ in this context can include members of military forces or fighters of armed groups *hors de combat* irrespective of their allegiance to the perpetrator.¹⁰⁰⁰ Accordingly, imprisonment as punishment pronounced without a fair trial may therefore amount to a crime against humanity not only with regard to civilians and captured enemy fighters but also members of the group itself.

The second contextual element is that in order for individual criminal responsibility to arise, the ‘attack’ in question must be sufficiently widespread and systematic. While ‘widespread’ once again indicates a quantitative element, the term ‘systematic’ requires a certain degree of organization and planning.¹⁰⁰¹ These two

⁹⁹⁹ Werle and Jeßberger (n 901) 380.

¹⁰⁰⁰ See Rachel Killean, Eithne Dowds and Amanda Kramer, ‘Soldiers as Victims at the ECCC: Exploring the Concept of ‘Civilian’ in Crimes against Humanity’ (2016) 30 LJIL 685, 702; Werle and Jeßberger (n 901) 381-383.

¹⁰⁰¹ See e.g. *Katanga* (Trial Judgment) ICC-01/04-01/07 (7 March 2014) [123]; *Kunarac* (Trial Judgment) IT-96-23-T& IT-96-23/1-T (11 February 2011) [42].

criteria need not be present cumulatively (even though they often overlap in practice).¹⁰⁰²

Third, Article 7(2)(a) of the ICC Statute requires that the attack on a civilian population be carried out ‘pursuant to or in furtherance of a State or organizational policy to commit such attack’.¹⁰⁰³ While such a policy need not be expressly declared, its aim must nevertheless be an attack on a civilian population.¹⁰⁰⁴ In the absence of such organizational policy to deprive parts of the civilian population of their fair trial rights in relation to the prosecution of common crimes, a mere lack of capacity to conduct proper trials on behalf of the State cannot be prosecuted as a crime against humanity. While the same applies to armed groups¹⁰⁰⁵, the focus of the nexus requirement on territorial control exercised as a result of the armed conflict leads to the fact that armed group members may still be prosecuted for the war crime of passing sentences without a regularly constituted court affording all the necessary judicial guarantees recognised as indispensable for the exact same conduct. As a result, the potential of crimes against humanity to address the unequal treatment of rebel governance under ICL remains limited.

5.5. Conclusions

It was the aim of this Chapter to explain how the conclusions of **Chapter 3** and **Chapter 4** interact with the field of ICL. It explained how ICL, through the imposition

¹⁰⁰² Werle and Jeßberger (n 901) 386. See also *Blaškić*, Trial Judgment (n 491) [207].

¹⁰⁰³ To what extent this requirement exists under customary law, however, remains disputed. See *Karadžić* (Trial Chamber) IT-95-5/18-T (24 March 2016) [477]; *Kunarac*, Appeals Judgment (n 966) [94]-[104]. See also Werle and Jeßberger (n 901) 387.

¹⁰⁰⁴ *Katanga*, Trial Judgment (n 1001) [1108].

¹⁰⁰⁵ *Bemba* (Confirmation of Charges) ICC-01/05-01/08 (15 June 2009) [81]; *Katanga* (Confirmation of Charges) ICC-01/04-01/07 (30 September 2008) [396]; *Tadić*, Trial Judgment (n 942) [654].

of individual criminal responsibility, allows for the enforcement of CA 3 vis-à-vis members of armed groups. In the case of the prohibition of the passing of penal sentences, however, the scope of acts entailing such individual responsibility is narrower than for the collective responsibility of the group under CA 3.

First, the drafters of Article 8(2)(c)(iv) ICCSt seem to have deliberately excluded a lack of regular constitution, in the sense that a court must be established by law, as a possible means by which the crime can be committed. While this discrepancy between the crime under ICL and its underlying basis in IHL has drawn some criticism from commentators, it was submitted that this gap might be normatively desirable so as to avoid extending criminal responsibility over individuals who hold no influence over the legal basis of the court in question. Indeed, in line with the jurisprudence of the post-World War II tribunals, the prime suspect of this type of crime are either judges or those carrying out death sentences.

Second, this Chapter has explained that ICL focusses on the cumulative effect created by a lack of individual judicial guarantees, and whether, considered as a whole, this lack of guarantees deprived the victim of a fair trial. **Chapter 4** has demonstrated that CA 3 imports very exacting fair trial guarantees from IHRL and imposes them on armed groups irrespective of their organisational capabilities. As a consequence, many armed groups will find themselves in breach of the required judicial guarantees when they conduct trials and pass penal sentences. Moreover, **Chapter 4** has argued that any proposed downgrading of these fair trial standards is neither legally justifiable nor normatively desirable. ICL, however, cushions the potential normative overreach of CA 3 by not only dispensing with the requirement of a regularly constituted court as a court ‘established by law’, but also by linking criminal responsibility to the cumulative effect of fair trial guarantees rather than the violation of individual guarantees.

Finally, this Chapter has supplemented the critical analysis of nexus criterion identified in **Chapter 3** in relation to acts of rebel governance, in particular the prosecution of common crimes in territories under the control of the armed group. The focus of the nexus criterion on the control of territory as a result of the armed conflict exposes flawed trials by armed groups to criminal prosecution for war crimes whereas, in many cases, States engaging in the same conduct would only commit an ‘ordinary’ IHRL violation without a sufficient link to the armed conflict. It was also demonstrated that crimes against humanity, which extend criminal responsibility to the widespread and systematic violation of IHRL, could reduce this asymmetry. However, this potential is limited due the need for crimes against humanity to be ‘widespread or systematic’, as well as carried out in furtherance of some sort of organisational policy. As a result, it was suggested that the interpretation of the nexus criterion, under both IHL and ICL, should place greater emphasis on whether the trial in question has been committed to pursue the aims of the conflict or ultimate goals of a military campaign. Indeed, this would place armed groups and State authorities on a more equal footing.

6. Military Discipline and Accountability Within Armed Groups

Chapters 3 and **4** have identified fair trial obligations under IHL and IHRL, explained how they apply to armed groups, and demonstrated that while not prohibiting the passing of penal sentences *per se*, these rules significantly restrict their legal capacity to do so. In addition, **Chapter 5** has explained the circumstances under which a violation of these judicial guarantees entails individual criminal responsibility. The present Chapter explores a different angle by analysing international legal obligations that do not restrict but potentially *require* the use of penal sanctions. More specifically, this Chapter inquires whether there are rules that mandate the use of penal sanctions by armed groups in order to ensure discipline and accountability for IHL violations.

Section 1 of this Chapter analyses to what extent disciplinary systems and the use of courts or penal sanctions form part of the organisational threshold under IHL, that is, the criteria to be met for a collective of individuals to become a party to a NIAC. It will demonstrate that, despite frequent assertions to the contrary, the existence of a disciplinary system capable of sanctioning transgressing subordinates is not an indispensable criterion to meet the minimum level of organisation required under CA 3. Moreover, it will demonstrate that while the heightened organisational threshold of AP II requires disciplinary systems, these systems do not necessarily have to be based on penal sanctions that would require the existence of a regularly constituted court and related judicial guarantees.

Section 2 will then look at the substantive obligation to respect and ensure respect for IHL, as well as the obligation to investigate and prosecute IHL violations

and compare its application to States and armed groups. It will demonstrate that an obligation for armed groups to use penal sanctions cannot be deduced from the obligation to respect and ensure respect for IHL, even if this obligation were to apply to armed groups under customary law in NIACs. Moreover, it will show that the customary law obligation to investigate and prosecute serious violations of IHL in NIACs remains confined to States. This conclusion notwithstanding, the Chapter will demonstrate that there is an increasing amount of State practice requiring armed groups to take some accountability measures in response to violations of IHL, which may (but does not necessarily have to) involve the use of courts and penal sanctions. Finally, this section will examine how this difference in obligations impacts upon the equality of belligerents in NIACs.

Section 3 then analyses the necessity of penal sanctions from the perspective of the doctrine of command responsibility under ICL. In particular, it will demonstrate that courts of armed groups can constitute a ‘competent authority’ to which commanders are expected to refer transgressing subordinates under certain circumstances. However, this section will also explain why this conclusion does not imply a positive duty to establish judicial mechanisms on behalf of the commander or the armed group as such.

Subsequently, section 4 will explore alternatives to courts and penal sanctions passed by armed groups, such as administrative detention or the transfer of the perpetrator to a third State or international court for trial. It will conclude that while certain alternatives to the prosecution of war crimes by armed groups themselves exist, their practical relevance remains limited.

Finally, section 5 will discuss potential avenues to incentivise the use of armed group courts and penal sanctions to generate IHL compliance. It will explore potential

avenues such as capacity building efforts, selective enforcement and the introduction of limited immunity from domestic prosecution for individuals involved in accountability measures.

6.1. Organisational Requirements and Internal Disciplinary Systems of Armed Groups

6.1.1. The Ability to Ensure Discipline and Respect for IHL

To begin with, it is necessary to reiterate what was already mentioned in **Chapter 2**, namely that any armed group must meet certain organizational criteria in order to qualify as a party to a NIAC and become a bearer of obligations under IHL.¹⁰⁰⁶ One of the factors usually assessed in this regard is the capacity of a group to maintain discipline among its members in order to comply with basic IHL obligations.¹⁰⁰⁷ The ICTY Trial Chamber in *Boškoski and Tarčulovski*, for example, noted that ‘[t]he leadership of the group must, as a minimum, have the ability to exercise some control over its members so that the basic obligations of Common Article 3 of the Geneva Conventions may be implemented’.¹⁰⁰⁸ However, it is arguable that such level of ‘control’ does not necessarily imply the existence of a disciplinary system, let alone the capacity to impose penal sanctions. Indeed, the Trial Chamber noted that there are several factors which may demonstrate the ability to implement the basic obligations

¹⁰⁰⁶ Dinstein (n 2) 61-62; Rodenhäuser (n 157) 87.

¹⁰⁰⁷ *ibid.* Discipline and IHL compliance are inherently interlinked, see e.g. Andrew J. Carswell, ‘Classifying the Conflict: A Soldier’s Dilemma’ (2009) 91 IRRC 143, 158.

¹⁰⁰⁸ *Boškoski and Tarčulovski*, Trial Judgment (n 967) [196].

of CA 3, none of which ‘are, in themselves, essential to establish whether the ‘organization’ criterion is fulfilled”¹⁰⁰⁹. The Chamber continued to state that:

[F]actors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3 have been considered, *such as* the establishment of disciplinary rules and mechanisms; proper training; and the existence of internal regulations and whether these are effectively disseminated to members.¹⁰¹⁰

The phrase ‘such as’ suggests that the existence of a disciplinary system is only one way for an armed group to implement IHL, alongside proper training and the dissemination of internal regulations. This understanding is supported by the *Limaj* case, in which another ICTY Trial Chamber dismissed the defence submission that armed groups must possess a method of sanctioning breaches of CA 3.¹⁰¹¹ Finally, in *Haradinaj*, the Court reiterated that the existence of disciplinary rules and mechanisms is merely a non-essential indicator of organisation.¹⁰¹² In summary, it can be said that the ICTY did not put much emphasis on the ability to impose discipline or generate respect for IHL, let alone treat the existence of a disciplinary system as an essential factor for an entity to reach the organisation threshold.¹⁰¹³

This trend has been further reinforced by the jurisprudence of the ICC. In determining whether an entity constitutes an organised armed group, Trial Chambers in the *Lubanga*, *Katanga*, *Bemba* and *Ntaganda* cases have taken the capacity to impose discipline into account – among other aspects such as the existence of a functioning command structure, hierarchy and internal rules – but have consistently

¹⁰⁰⁹ *ibid* [198].

¹⁰¹⁰ *ibid* [202] (emphasis added).

¹⁰¹¹ *Limaj* (n 632) [89] and *Boškoski and Tarčulovski*, Trial Judgment (n 967) [196]. See also ILA, Final Report on the Meaning of Armed Conflict in International Law (2010), 20 and 29. But see critically Rodenhäuser (n 157) 64, fn 26; and Sivakumaran (n 14) 178-179.

¹⁰¹² *Haradinaj*, Trial Judgment (n 153) [60].

¹⁰¹³ Sivakumaran (n 14) 178-179.

emphasised that none of these factors are individually determinative.¹⁰¹⁴ There has been some debate in the past about whether the ICC Statute, in particular Article 8(2)(f), contains a different threshold for the existence of a NIAC than that enshrined in CA 3 or customary law.¹⁰¹⁵ However, the prevailing view is that the Statute embodies a uniform concept of the NIAC threshold, and that this threshold is equivalent to that of CA 3 and customary law.¹⁰¹⁶ This view has meanwhile been reaffirmed by several decisions.¹⁰¹⁷ Therefore, the ICC Trial Chamber Judgments referred to above can be regarded as a judicial interpretation of the organization requirement under CA 3 and reinforce the approach taken by the ICTY.

In light of the case law analyzed above, it is doubtful whether the existence of disciplinary mechanisms or the ability to sanction violations of IHL constitute indispensable requirements for an armed group to meet the basic organizational threshold under CA 3 and become a party to a NIAC. Bartels reaches a similar conclusion when he notes that ‘consequently, not all [indicative] factors need to be fulfilled and the lack of an internal disciplinary system would thus not immediately mean that the organizational criterion (for the existence of an armed conflict) is not met’.¹⁰¹⁸ Others have argued that, in certain cases, the lack of disciplinary mechanisms

¹⁰¹⁴ *Bemba*, Trial Judgment (n 52) [134]-[136]; *Lubanga*, Trial Judgment (n 154) [536]; *Katanga*, Trial Judgment (n 1001) [1185]-[1186]; *Ntaganda*, Trial Judgment (n 362) [704].

¹⁰¹⁵ See e.g. Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?: Vol I* (ICRC 2006) 110, arguing in favour of a separate threshold; but see also Anthony Cullen, ‘The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)’ (2008) 12 JC&SL 419; and Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 AJIL 239, 260.

¹⁰¹⁶ Rogier Bartels, ‘The Classification of Armed Conflicts by International Criminal Courts and Tribunals’ (2020) 20 ICLR 595, 620; Robert Heinsch, ‘Conflict Classification in Ukraine: The Return of the “Proxy War”?’ (2015) 91 ILS 323, 336; Sassòli (n 333) 184-185, [6.41].

¹⁰¹⁷ *Bemba*, Trial Judgment (n 52) [132]-[133]; *Ntaganda*, Trial Judgment (n 362) [701].

¹⁰¹⁸ Rogier Bartels, ‘The organisational requirement for the threshold of non-international armed conflict applied to the Syrian opposition’ (Armed Groups and International Law Blog, 9 August 2012) available at <<https://www.armedgroups-internationalallaw.org/2012/08/09/the->

may be an organizational defect, but one which could be offset by the ability to engage in comparatively complex and intense military operations.¹⁰¹⁹ As noted by Rodenhäuser, this trend of focusing more on the ability to engage in sufficiently intense violence than on the ability to implement basic rules of IHL has also received support in recent non-judicial practice, in particular within the evaluative framework of UN CoIs.¹⁰²⁰ This approach is also consistent with the limited purpose of the organisational threshold under CA 3, which has traditionally been understood as distinguishing ‘a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection’.¹⁰²¹

Nevertheless, some commentators have been critical of this trend. Gaggioli and Kilibarda, in particular, maintain that the existence of some accountability mechanism is required for a group to meet the basic organizational threshold under CA 3.¹⁰²² However, not only is this position difficult to reconcile with the case law identified above, its normative value can also be questioned. The requirement of an accountability mechanism would set the threshold for the application of IHL rather high and exclude groups that are otherwise capable of engaging in sufficiently intense military operations. In other words, IHL would not apply to situations where its protection is

organisational-requirement-for-the-threshold-of-non-international-armed-conflict-applied-to-the-syrian-opposition/> accessed 20 December 2022.

¹⁰¹⁹ See e.g. Laurie R. Blank and Geoffrey S. Corn, ‘Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition’ (2013) 46 *VandJTransnatlL* 693.

¹⁰²⁰ Rodenhäuser (n 157) 66. Examples are the CoIs on Syria and Libya, which classified situations as NIACs even though little to no evidence on the internal structures of the armed groups in questions was available. See UNHRC, Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya (1 June 2011) UN Doc A/HRC/17/44 [57]; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 15 August 2012, A/HRC/21/50, Annex III. See also the slightly older *Abella* case (n 792) [152], in which the Commission found that it suffices for armed groups to be “relatively organised”.

¹⁰²¹ *Tadic*, Trial Judgment (n 942) [562]; *Rutaganda* (Trial Judgment) ICTR-96-3-T (6 December 1999) [92]; 2020 ICRC GC III Commentary [453].

¹⁰²² Gloria Gaggioli and Pavle Kilibarda, ‘Counterterrorism and the risk of over-classification of situations of violence’ (2022) 103 *IRRC* 203, 214.

most warranted. While there might indeed be an obligation incumbent on armed groups to ensure accountability (see below section 6.2.2.), this is a substantive obligation and not a threshold requirement.

6.1.2. Disciplinary Systems: Penal vs Administrative Sanctions

Even if the existence of a disciplinary system to sanction transgressing behaviour was required for a group to meet the basic organisational threshold under CA 3 and customary law, it is doubtful whether such a system must necessarily be based on penal sanctions. Some commentators, in particular Klamberg, assume that respect for IHL within an armed group must be enforced through the imposition of penal sanctions, the exercise of which would then be limited by the requirement of a ‘regularly constituted court’ and the various judicial guarantees outlined in **Chapter 4**.¹⁰²³ Provost’s argumentation follows a similar line when he notes that a disciplinary regime to sanction violations ‘demands a process that meets the requirements of fundamental justice’.¹⁰²⁴ Obviously, these claims implicitly presuppose the applicability of CA 3 and its customary law equivalent to sentences passed over members of the armed group.¹⁰²⁵ Klamberg further argues that this leads to an ‘inherent contradiction’ in CA 3, namely that the requirement of a ‘regularly constituted court’, if interpreted strictly, would prevent armed groups from meeting this requirement.¹⁰²⁶ His reasoning was also adopted by the Stockholm District Court in the *Sakhanh* case.¹⁰²⁷

¹⁰²³ Klamberg (n 56) 256.

¹⁰²⁴ Provost (n 40) 157.

¹⁰²⁵ See **Chapter 3**, section 3.1.1.

¹⁰²⁶ Klamberg (n 13) 256.

¹⁰²⁷ *Sakhanh* (n 46) [29]

However, in the absence of regularly constituted courts, armed groups would still be free to resort to administrative or disciplinary sanctions. Generally speaking, the term ‘disciplinary sanctions’ refers to punishments imposed by a superior for breaching an internal rule in groups with a certain hierarchical structure.¹⁰²⁸ These administrative, non-penal sanctions are not subject to the constraints posed by the judicial guarantees of CA 3 and AP II.¹⁰²⁹ Indeed, as pointed out in **Chapter 4**, Article 6 (1) AP II makes clear that its protection only applies to the ‘prosecution and punishment of penal sanctions’. While CA 3 does not include such explicit limitation, the use of the term ‘sentences’ equally implies a restriction to penal sanctions.¹⁰³⁰

While it is often difficult to determine the exact boundary between disciplinary and penal sanctions, some guidance can be found in the ECtHR’s criteria introduced in *Engel and Others v The Netherlands*.¹⁰³¹ Albeit in a State context, the Court looked at whether the definition of the offence in question can be found in a disciplinary regulation or a penal code, and whether the legal rule was one governing the operation of armed forces.¹⁰³² Transposed to armed groups, this could be either a code of conduct for its military wing or laws promulgated in the territory it controls. Finally and most importantly, the Court took into account the severity of the penalties attached to such a rule.¹⁰³³ Applying these criteria, the ECtHR noted that while the deprivation of liberty

¹⁰²⁸ Marco Sassòli, ‘Disciplinary Sanctions’, How Does Law Protect in War? ICRC Online Casebook, available at <<https://casebook.icrc.org/glossary/disciplinary-sanctions>> accessed 20 December 2022.

¹⁰²⁹ ICRC 2020 GC III Commentary [712].

¹⁰³⁰ As pointed out in the ICRC’s most recent commentary, a “[S]entence” is defined as “[t]he judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer”, 2020 ICRC GC III Commentary [712]. An initial draft of CA3 explicitly referred to penal sanctions, see Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, Vol II-A, 779.

¹⁰³¹ *Engel and ors v The Netherlands*, App No 5100/71 (ECtHR, 8 June 1967) [82]-[84].

¹⁰³² *ibid* [82].

¹⁰³³ *ibid*.

usually belongs to the ‘penal sphere’, short-term detention within the framework of military life may also be classified as a disciplinary sanction.¹⁰³⁴ Discharge from the armed forces, a promotion ban or a salary cut imposed for disciplinary reasons also do not amount to penal sanctions.¹⁰³⁵ Other types of disciplinary measures frequently used by armed groups that are likely to fall under this category are demotion, assignment of extra duty or the withdrawal of weapon and uniform.¹⁰³⁶

While the types of sanctions available to armed groups without having to provide the judicial guarantees under IHL are thus limited, these measures often have a significant deterrent effect as they focus on the status of the person concerned within the hierarchy of the group.¹⁰³⁷ Moreover, the implementation of disciplinary measures constitutes a signal to other group members that prohibited conduct will not be tolerated, which in turn prevents further violations from being committed in the future.¹⁰³⁸ For these reasons, it has been recognized that disciplinary sanctions within military formations make a clear contribution to compliance with IHL through education and dissuasion.¹⁰³⁹ The argument that discipline may only be achieved through penal sanctions is therefore unconvincing.

¹⁰³⁴ *ibid* [85]. However, it is important to note that although such forms of disciplinary detention are not subject to the judicial guarantees required by CA 3, they may nevertheless be regulated by certain procedural safeguards and the prohibition of arbitrary detention. See Heffes (n 282) 236-237. See also section 6.4.1. below.

¹⁰³⁵ *Suküt v. Turkey*, App No 59773/00 (ECtHR, 11 September 2007) [3]; *R.S. v. Germany*, App No 19600/15 (ECtHR, 28 March 2017) [33].

¹⁰³⁶ La Rosa and Wuerzner (n 39) 334. See also Sandesh Sivakumaran, ‘Command Responsibility in Irregular Groups’ (2012) 10 JICJ 1129, 1143-1144.

¹⁰³⁷ La Rosa And Würzner (n 39) 334.

¹⁰³⁸ *ibid*. Already Che Guevara noted that these types of sanctions often have more impact on the individual fighter than prolonged periods of detention. See Che Guevara, *Guerilla Warfare* (Penguin 1969) 117-118.

¹⁰³⁹ Céline Renaut, ‘The impact of military disciplinary sanctions on compliance with international humanitarian law’ (2008) 90 IRRC 319, 323. See also ICRC, *Roots of Restraint in War* (2018) 29, noting that the threat of punishment under internal military rules or transgression of ‘army values’ often has a much greater influence on compliance than punishment under ‘IHL’ per se.

The jurisprudence of the ICTY corroborates this conclusion. In the *Limaj* case, for example, the ICTY accepted the existence of disciplinary rules alongside early steps to introduce a military police enforcing these rules as sufficient evidence that the KLA functioned as a ‘disciplined’ military force.¹⁰⁴⁰ These regulations envisaged some of the disciplinary sanctions described above, including the assignment of extra duty, removal of the soldiers’ weapons or uniform, or removal from duty in case of repeated mistakes.¹⁰⁴¹ Moreover, although the KLA established a military court at some point, the evidence presented in several cases suggested that this did not take place until the end of 1998,¹⁰⁴² about half a year later than the date at which multiple ICTY Chambers were satisfied that the KLA had met the organisational criteria for the existence of a NIAC.¹⁰⁴³ In addition, in the *Haradinaj* case, the Trial Chamber was satisfied that the organisational criteria had been met even before the KLA military police was established.¹⁰⁴⁴

These decisions provide additional support for the position that disciplinary systems are not essential in relation to the organisational threshold. More importantly, however, they also indicate that even *if* disciplinary mechanisms were considered essential for the organized character of an armed group, no particular relevance is given to a group’s ability to employ penal sanctions as opposed to mere disciplinary or

¹⁰⁴⁰ *Limaj*, Trial Judgment (n 632) [110]-[117] and [171].

¹⁰⁴¹ *ibid* [116] fn 403.

¹⁰⁴² *Haradinaj*, Retrial Judgment (n 360) [40]; *Djordjević* (Trial Judgment) IT-05-87/1-T (23 February 2011) [1573]; *Milutinović* (Trial Judgment) IT-05-87-T (26 February 2009) [831].

¹⁰⁴³ *Limaj*, Trial Judgment (n 632) [134]; *Haradinaj*, Trial Judgment (n 153) [89]; *Milutinović*, Trial Judgment (n 1042) [840]; *Haradinaj*, Retrial Judgment (n 360) [411]; *Djordjević*, Trial Judgment (n 1042) [1579].

¹⁰⁴⁴ *Haradinaj*, Trial Judgment (n 153) [89].

administrative sanctions.¹⁰⁴⁵ This is further supported by the fact that both the ICTY and ICC found that armed groups which had not disposed over any type of court at the relevant time nevertheless met the basic organisational threshold for becoming a party to a NIAC. It follows that even if the existence of a disciplinary system was an indispensable organisational requirement for an armed group, it does not presuppose the use of penal sanctions as this would require the existence of regularly constituted courts affording all the necessary fair trial guarantees. It would be illogical to suggest that behaviour that does not respect IHL (the imposition of penal sanctions without a regularly constituted court) must be employed to ‘ensure respect’ for IHL. As put by the ICRC in the context of reprisals, ‘[v]iolations of common Article 3 are not a legitimate way to ensure respect for humanitarian law’.¹⁰⁴⁶ This of course presupposes that the protection of CA 3 extends to members of the armed group. As **Chapter 3** has shown, although such extension raises systemic difficulties in relation to the scope and purpose of the two regimes of IHL and IHRL, it was accepted explicitly by the ICC Appeals Chamber and, implicitly, by the ICTY.¹⁰⁴⁷

In conclusion, the existence of courts and the related capacity to impose penal sanctions cannot constitute a necessary criterion for an armed group to cross the basic organisational threshold for becoming a party to a NIAC under CA 3. Moreover, requiring the existence of regularly constituted courts as part of the organizational threshold should also be rejected from a normative perspective. As **Chapters 3 and 4** have demonstrated, even under a lenient interpretation of the term ‘regularly constituted’ and the related judicial guarantees, a large majority of existing armed

¹⁰⁴⁵ See also Rodenhäuser (n 157) 88, arguing that ‘[i]f a group has sufficient structures to require its members to respect a simple code of conduct, or if the group operates under strict unwritten rules, this should be sufficient proof of its ability to also implement basic IHL’

¹⁰⁴⁶ ICRC 2020 GC III Commentary [698].

¹⁰⁴⁷ See **Chapter 3**, section 3.1.1.

groups would struggle to implement these requirements. This is because CA 3 incorporates very exacting fair trials standards and imposes them on every armed group that meets the basic organizational threshold. If the existence of courts capable of complying with these guarantees was considered indispensable for the organizational requirement of discipline and capacity to implement basic norms of IHL, most armed groups would not qualify as a party to the NIAC in the first place. In other words, they would not be bound by IHL at all. Such approach would lead to a dangerous conflation between the necessary threshold for IHL to apply and the substantive protection offered by its rules.¹⁰⁴⁸

6.1.3. Responsible Command

A different question is whether the conclusion reached above in relation to armed conflicts governed by CA 3 also holds true for those meeting the higher threshold under AP II. AP II, through its applicability threshold in Article 1, presupposes a higher degree of organization of the armed group than CA 3. In particular, it requires the armed group to exercise territorial control and, more importantly, be under ‘responsible command’ so as to enable it to implement the Protocol. However, it is debated whether the notion of ‘responsible command’ captures the same basic organizational requirements as CA 3 or implies a higher degree of internal disciplinary capabilities and responsibilities. According to the ICRC’s 1973 commentary on the initial draft of AP II, the term ‘responsible command’ was meant to refer to a commanding authority ‘whose leadership is recognized by subordinates and who is able to assume responsibility’, as well as ‘sufficiently firm discipline’ that will ensure respect for the

¹⁰⁴⁸

See also Moir (n 591) 108.

provisions of the Protocol.¹⁰⁴⁹ The 1987 commentary on the final Protocol notes that responsible command requires a degree of organization capable ‘of planning and carrying out sustained and concerted military operations, and [...] of imposing discipline in the name of a *de facto* authority.’¹⁰⁵⁰ The same formula was later adopted by the ICTR in the *Akayesu* case.¹⁰⁵¹ According to the Pre-Trial Chambers in *Bemba* and *Lubanga*, the notion of responsible command ‘entails some degree of organization of those armed groups, including the possibility to impose discipline’.¹⁰⁵² Therefore, contrary to CA 3, AP II and the notion of ‘responsible command’ should be understood as requiring an armed group to operate a disciplinary system.

In this context, it is sometimes argued that the concept of ‘responsible command’ is already implicitly enshrined in CA 3 and therefore also applies to all armed groups meeting its lower organizational threshold. In *Hadžihasanović*, for example, the ICTY Appeals Chamber held that responsible command is in fact an ‘integral notion’ of CA 3.¹⁰⁵³ The Pre-Trial Chamber in *Bemba* equally held that organized armed groups ‘must be under responsible command’.¹⁰⁵⁴ However, the Trial-Chambers in *Lubanga* and *Katanga* explicitly dismissed responsible command as envisaged by AP II as an organizational requirement for an armed group under Article 8(2)(f) of the Rome Statute.¹⁰⁵⁵ Moreover, the Trial Chamber in *Bemba* essentially confirmed that ‘responsible command’ – in the sense that it requires the possibility to

¹⁰⁴⁹ Commentary to the Draft Additional Protocols (n 332) 132.

¹⁰⁵⁰ 1987 ICRC AP II Commentary [4463].

¹⁰⁵¹ *Akayesu*, Trial Judgment (n 109) [626].

¹⁰⁵² *Bemba*, Confirmation of Charges (n 1005) [234]; *Lubanga* (Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) [232].

¹⁰⁵³ *Hadžihasanović*, Interlocutory Appeal (n 932) [17].

¹⁰⁵⁴ *Bemba*, Confirmation of Charges (n 1005) [234]

¹⁰⁵⁵ *Lubanga*, Trial Judgment (n 154) [536]-[37]; *Katanga*, Trial Judgment (n 1001) [1186].

impose discipline – is merely an additional indicator on the non-exhaustive list of factors to be taken into account.¹⁰⁵⁶ This reinforces the conclusion made above that the existence of a disciplinary system is not an indispensable element for the organizational threshold under CA 3.¹⁰⁵⁷ Indeed, already Pictet referred to the individual elements that constitute responsible command as ‘in no way obligatory’ for an armed group to become party to a NIAC.¹⁰⁵⁸

As Rodenhäuser points out, these different approaches towards the necessity of responsible command as an organizational requirement probably derive from the consequences such responsible command entails.¹⁰⁵⁹ In *Hadžihasanović*, the ICTY equated responsible command with the concept of command responsibility, which was already briefly discussed in **Chapter 5**.¹⁰⁶⁰ However, the question of whether IHL requires a group to operate a disciplinary system in order to meet a certain organizational threshold may be linked to but is not necessarily the same as the question of whether an individual commander incurs criminal responsibility for their failure to prevent crimes or punish a transgressing subordinate.

Finally, while it is undisputed that under the higher organisational threshold of AP II armed groups must be under responsible command – which includes the operation of a disciplinary system – this does (once again) not mean that such a system must be based on penal sanctions. The previous subsections have already explained why disciplinary or administrative sanctions can be regarded as sufficient to meet this

¹⁰⁵⁶ *Bemba*, Trial Judgment (n 52) [136].

¹⁰⁵⁷ Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP 2010) 157.

¹⁰⁵⁸ Pictet (n 952) 35-36. See also Lindsay Moir, ‘The Concept of Non-International Armed Conflict’ in Clapham, Gaeta and Sassóli (n 138) 407.

¹⁰⁵⁹ Rodenhäuser (n 157) 86.

¹⁰⁶⁰ *Hadžihasanović*, Interlocutory Appeal (n 932) [22].

criterion. Bothe seems to be the only commentator to explicitly claim that ‘it is understood that they [rebel groups] are obliged to have at their disposal an organization of the judiciary which corresponds to the requirements of Art. 6 [of AP II]’.¹⁰⁶¹ However, neither the treaty text, nor the drafting history or subsequent practice support such an understanding of Article 6 AP II. Indeed, as noted by Rodenhäuser, it is ‘unlikely that the ICRC expected a sophisticated judicial system when it stated in the 1987 commentary that the article 1(1) threshold requires some “minimum infrastructure” to implement the Protocol’.¹⁰⁶² The idea that the capacity to pass penal sanctions, and accordingly the operation of regularly constituted courts, is somehow inherent to the organizational criteria of CA 3 or AP II must therefore be rejected.

6.2. Substantive Obligations to Ensure Accountability for War Crimes and other IHL Violations

The previous section has discussed whether the existence of a disciplinary system and the ability to impose penal sanctions forms part of the organisational requirements that armed groups must meet to become a party to a NIAC. The section concluded that while the existence of disciplinary mechanisms (including courts) capable of sanctioning IHL violations is certainly an indicator of sufficient organisation¹⁰⁶³, it is not an indispensable requirement for a group to reach the necessary threshold for becoming a party to a NIAC under CA 3. It also noted that the applicability of AP II depends on stricter conditions, including the requirement of responsible command, which in turn cannot be met without some kind of disciplinary mechanism to sanction

¹⁰⁶¹ Bothe, Partsch Solf (n 236) 746.

¹⁰⁶² Rodenhäuser (n 157) 53.

¹⁰⁶³ See, for example, *Djordjević*, Trial Judgment (n 1042) [1574]-[1575], noting the existence of a military court within the KLA as an element demonstrating the organised nature of the group.

transgressing behaviour. However, it was argued that non-penal disciplinary sanctions should be considered sufficient to meet this criterion.

The present section will inquire whether penal sanctions and courts might nevertheless be necessary, not as part of the organisational thresholds under CA 3 or AP II, but as part of the substantive obligations to respect IHL, repress violations or to punish war crimes. While the threshold requirement merely sets some minimum criteria for a collective of individuals to incur obligations under IHL as an armed group in the first place, substantive obligations require the group, once bound by IHL, to take certain action in response to violations. If these obligations are not implemented, this may trigger the international responsibility of the group for a violation of IHL¹⁰⁶⁴ but does not negate the group's organizational character. Furthermore, a distinction should be drawn between the material ability to undertake certain actions, such as disciplining transgressing behavior, and actual compliance. The mere ability of a group to impose discipline is usually considered sufficient to meet a certain threshold, ~~for example the requirement of responsible command under AP II,~~ even if such disciplinary measures are not actually used to sanction violations of IHL. Indeed, one 'cannot merely infer a lack of organization of the armed group by reason of the fact that international humanitarian law was frequently violated by its members'.¹⁰⁶⁵ As explained by Dinstein, a policy of actively resorting to or tolerating unlawful means and methods of hostilities does not negate the organized character of an armed group.¹⁰⁶⁶ At the same time, the non-use of sanctions might violate substantive obligations of the group to ensure respect for IHL, repress violations, or potentially even to prosecute war crimes.

¹⁰⁶⁴ But recall **Chapter 2**, section 2.3.1. regarding the problematic question of attribution in the context of armed groups.

¹⁰⁶⁵ *Boškoski and Tarčulovski*, Trial Judgment (n 1010) [205]. See also Rodenhäuser (n 157) 69.

¹⁰⁶⁶ Dinstein (n 2) 62.

6.2.1. *The Substantive Obligation to Ensure Respect for IHL*

Some commentators have argued that an obligation of armed groups to establish a judicial system capable of imposing penal sanctions can be derived from the duty to ensure respect for IHL found in Article 1 common to the 1949 Conventions (CA 1).¹⁰⁶⁷ Provost, in particular, claims that this obligation ‘implies a disciplinary regime to sanction violations, which in turn demands a process that meets the requirements of fundamental justice’.¹⁰⁶⁸ Moreover, he concludes that such obligation would also extend to private actors, such as civilians living under the control of the armed group.¹⁰⁶⁹ In order to assess the merits of this argument, it is first necessary to deconstruct the content of the obligation to ‘respect and ensure respect’ incumbent on States under CA 1. The second step is then to determine if and to what extent this obligation applies to armed groups in a NIAC via its customary law equivalent.

The treaty provision of CA 1 obliges the High Contracting Parties to ‘respect and to ensure respect for the present Convention in all circumstances’. The obligation to ‘respect’, the first limb of CA 1, simply mandates a State party to act in conformity with its obligations under the Conventions. Any breach of the Conventions attributable to this party will thus also constitute a violation of CA 1. As such, it is merely a redundant expression of the more general principle of *pacta sunt servanda*.¹⁰⁷⁰ A more concrete function of this limb, especially in connection with the phrase ‘in all circumstances’, might have been to avoid any doubt that the Conventions would apply

¹⁰⁶⁷ Provost (n 40) 157; Zegveld (n 225) 67.

¹⁰⁶⁸ Provost (n 40) 157.

¹⁰⁶⁹ *ibid.*

¹⁰⁷⁰ Robin Geiß, ‘The Obligation to Ensure Respect and to Ensure Respect for the Conventions’ in Clapham, Gaeta and Sassòli (n 138) 117; 2020 ICRC GC III Commentary [176].

irrespective of whether all parties to an armed conflict were contracting Parties.¹⁰⁷¹ Due to the universal ratification of the Conventions, this aspect no longer serves any practical purpose.

The obligation to ‘ensure respect’, on the other hand, is broader and is often said to contain both an ‘internal’ and an ‘external’ dimension.¹⁰⁷² The existence and scope of an external dimension, which would oblige a State to take certain measures to enforce IHL even in relation to conflicts to which it is not a party, has been intensely debated over at least the past two decades.¹⁰⁷³ It is, however, of limited relevance for the present inquiry.

The internal dimension is usually interpreted as a positive obligation to stop and prevent violations, not only by a State’s own organs but also by private actors under the State’s authority.¹⁰⁷⁴ As confirmed by Kalshoven in his in-depth study on the drafting history of CA 1, one rationale for the inclusion of the ‘to ensure respect’ clause was indeed to secure an undertaking by the High Contracting Parties that they would

¹⁰⁷¹ Older IHL treaties often contained a so-called ‘*si omnes*’ clause, which provided that if only one party to a conflict had not acceded to the treaty, none of the parties to the conflict would be bound by its provisions. As Kalshoven demonstrates, it is likely that the ‘respect in all circumstances’ limb was an insignificant by-product of the debate to abolish the *si omnes* clause. See Frits Kalshoven, ‘The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit’ (1999) 2 YIntHL 3, 7-10. See also Theodor Meron, ‘The Geneva Conventions and Public International Law’ (2009) 91 IRRC 619, 621.

¹⁰⁷² Geiß (n 1070) 117 and 120; 2020 ICRC GC III Commentary [186].

¹⁰⁷³ See e.g. Verity Robson, ‘The Common Approach to Article 1: The Scope of Each State’s Obligation to Ensure Respect for the Geneva Conventions’ (2020) 25 JC&SL 101; Michael Schmitt and Sean Watts, ‘Common Article 1 and the Duty to “Ensure Respect”’ (2020) 96 ILS 674; Oona A. Hathaway et. al., ‘Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors’ (2017) 95 Texas Law Review 539.

¹⁰⁷⁴ Geiß (n 1070) 119. Indeed, as pointed out by ITLOS, albeit in a different context, ‘the term “ensure” is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a state liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the state under international law’, see *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion [2011] ITLOS Rep 9 [112]. See also Marco Longobardo, ‘The Relevance of the Concept of Due Diligence for International Humanitarian Law’ (2019) 37 WisIntLJ 44, 57-58, applying this dictum to the duty to ensure respect for IHL.

guarantee respect for the Conventions not only by their own organs, but also by their populations as a whole.¹⁰⁷⁵ While States bear a general duty to comply with their legal obligations (encompassed by the maxim of *pacta sunt servanda*), international law does not generally require a State to ensure the respect of international law by entities or individuals whose conduct is not legally attributable to that State.¹⁰⁷⁶ Therefore, CA 1's added value appears to lie in the extension of the scope of liability of a High Contracting Party from violations committed by its own armed forces to private actors under its control.¹⁰⁷⁷

This leaves the question of whether CA 1 prescribes any specific measures to be taken to 'ensure respect', either by a State's organs or with respect to the civilian population. Neither the *travaux préparatoires* of the 1949 Conventions, nor the 1952 Pictet commentary indicate that this is the case.¹⁰⁷⁸ The ICRC's 1987 commentary on Article 1(1) AP I, which repeats the 'respect and ensure respect' clause, notes that the provision requires:

[n]ot only that preparatory measures must be taken to permit the implementation of the Protocol, but also that such implementation should be supervised. In this respect,

¹⁰⁷⁵ Kalshoven (n 1071) 16.

¹⁰⁷⁶ Schmitt and Watts (n 1073) 683 and 704.

¹⁰⁷⁷ Schmitt and Watts (n 1073) 683, fn 27, argue that the ICJ confirmed this understanding of the duty to 'ensure respect' in the *Armed Activities case*, when it found that Uganda had breached its international obligations by not taking measures to ensure respect for IHL by armed groups whose actions were not attributable to it, but which operated in the territory Uganda had occupied. However, the Court never invoked CA 1 in that regard but rather relied on the more specific obligation of an occupying power to ensure public order and safety, enshrined in Article 43 of the 1907 Hague Regulations. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) [2005] ICJ Rep 168 [178]. Nevertheless, it is arguable that a similar obligation can be derived from the duty to 'ensure respect' under CA 1, which would then go beyond situations of occupation and include respect for IHL by private actors within the High Contracting Party's own population.

¹⁰⁷⁸ See 1952 ICRC GC I Commentary 25, noting only that '[i]t would not, for example, be enough for a State to give orders or directives to a few civilian or military authorities, leaving it to them to arrange as they pleased for the details of their execution. It is for the State to supervise their execution'.

the phrase "to ensure respect" essentially anticipates the measures for execution and supervision laid down in Article 80 ('Measures for execution').

The cited Article 80 ('Measures for execution'), however, is equally vague. It prescribes that the Parties 'shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol' and that they 'shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution'. The ICRC's commentary on Article 80 indicates that this refers to measures such as introducing relevant parts of the Protocol into the legal order of each Contracting Party, as well as preparatory steps for implementation to be taken upon ratification of the Protocol.¹⁰⁷⁹ The commentary then goes on to list a number of specific provisions of the Protocol that may require such preparatory action.¹⁰⁸⁰ The ICRC's commentary on Article 1(1) AP I thus leaves the impression that the duty to 'ensure respect' is limited to ensuring that certain preparatory steps in relation to other, more specific obligations under the Conventions or the Protocol are taken before the outbreak of an armed conflict. This interpretation is also in line with the conclusions of Kalshoven's study on the drafting history of CA 1.¹⁰⁸¹ Therefore, as summarized by Geiß, the obligation to ensure respect, in its internal compliance dimension, 'contains a positive obligation to put a stop to and to take proactive steps to prevent violations, not only by private actors under a state's authority but also by a state's own organs'.¹⁰⁸² The precise content of those 'proactive' steps, however, seems to be

¹⁰⁷⁹ 1987 ICRC AP I Commentary [3288]-[3296].

¹⁰⁸⁰ *ibid* [3297].

¹⁰⁸¹ Kalshoven (n 1071) 32.

¹⁰⁸² Geiß (n 1070) 119.

determined by other, more specific obligations under the 1949 Conventions and the Protocols.

This understanding of the internal dimension of CA 1 is arguably confirmed by the ICRC's updated commentaries on the 1949 Conventions.¹⁰⁸³ The commentaries stipulate that the duty to 'ensure respect' requires that High Contracting Parties 'must – starting in peacetime – take all measures necessary to ensure respect for the Conventions' and that this 'presupposes that preparations have been made in advance'.¹⁰⁸⁴ This means 'States are thus required to take appropriate measures to prevent violations from happening in the first place'.¹⁰⁸⁵ The text goes on to note that States retain some leeway in choosing measures by which to ensure respect for the Conventions.¹⁰⁸⁶ This leeway is limited, however, where the Conventions explicitly oblige States to take more specific measures, such as instructing their armed forces, providing for legal advisers, or investigating and prosecuting grave breaches.¹⁰⁸⁷ These more explicit provisions are thus often depicted as concrete implementation requirements for the internal compliance dimension of the obligation to ensure respect contained in CA 1.¹⁰⁸⁸ In relation to penal sanctions, two of these specific obligations are particularly relevant. First, the obligation to prosecute perpetrators of grave breaches and, second, the obligation

¹⁰⁸³ With regard to a potential external aspect of the duty to ensure respect, however, the updated commentaries take a broader and more controversial approach. See 2020 ICRC GC III Commentary [186]-[216].

¹⁰⁸⁴ 2020 ICRC GC III Commentary [178].

¹⁰⁸⁵ *ibid.*

¹⁰⁸⁶ 2020 ICRC GC III Commentary [179]. However, the commentary also specifies that the measures should be 'adequate to ensure the desired result'.

¹⁰⁸⁷ *ibid.* See also arts 47 GC I, 48 GC II, 127 GC III, and 144 GC IV, art 82 API (on the availability of legal advisers) and arts 49 GC I, 50 GC II, 129 GC III and 146 GC IV (on the duty to investigate and prosecute grave breaches as well as the suppression of other violations).

¹⁰⁸⁸ See Sassòli (n 333) 126 [5.146].

to take measures necessary for the suppression of all other acts contrary to the provisions of the Conventions.¹⁰⁸⁹

In relation to this second obligation to suppress violations not amounting to grave breaches, the ICRC's commentary notes that it is left to the State Parties to 'determine the best way to fulfil these obligations, for example by instituting judicial *or disciplinary proceedings* for violations of the Conventions other than grave breaches, *or by taking a range of administrative or other regulatory measures* or issuing instructions to subordinates'.¹⁰⁹⁰ Under this interpretation, the duty to suppress, therefore, does not require the use of penal sanctions. Indeed, the provision must be read in its context¹⁰⁹¹, namely the fact that it forms part of Articles 47 GC I, 48 GC II, 127 GC III, and 144 GC IV, which, as explained in **Chapter 5**, include a separate duty to prosecute (or 'bring before its courts') only for a narrowly defined set of violations known as 'grave breaches'.

In conclusion, in relation to its internal dimension, CA 1 does not require States to take any specific measures 'to ensure respect' for IHL other than those already prescribed by other, more specific provisions of the Conventions or AP I. CA 1 is only concerned with the question of 'when' and by 'whom' (rather than 'how') the provisions of the Convention have to be respected. That is, it requires that preparatory measures be taken before violations actually occur and that these measures also cover private actors under the State's control in addition to its own organs. An obligation to use penal sanctions, and, by extension establish some sort of judicial institution, can therefore not be deduced from CA 1.¹⁰⁹²

¹⁰⁸⁹ Arts 49 GC I, 50 GC II, 129 GC III and 146 GC IV.

¹⁰⁹⁰ 2020 ICRC GC III Commentary [5162] (emphasis added).

¹⁰⁹¹ See art 31(1) VCLT and its customary law equivalent.

¹⁰⁹² See also the ICTY Appeals Chamber in *Tadic*, which mentioned that the duty to ensure respect for IHL *may* (as opposed to '*must*') be implemented through the use of penal sanctions to

All these conclusions apply with respect to the treaty rule of CA 1. Contrary to CA 3, CA 1 addresses the *High Contracting Parties* and does not bind armed groups.¹⁰⁹³ While Article 1(1) AP I reproduces CA 1 verbatim, no such provision was included in AP II. However, the ICRC's CIL study concluded that the duty to 'respect' and 'ensure respect' forms part of customary law in both IAC and NIAC.¹⁰⁹⁴ When it comes to this corresponding customary law rule, three questions arise: Does it apply to armed groups? If so, is it restricted to the groups' own 'organs' or does it equally cover private actors over which the group exercises authority, most notably the civilian population? And finally, what are the measure that need to be employed by the group to 'ensure respect' for IHL?

In relation to the first question, the ICRC's CIL study specifically noted that '*each party to the conflict must respect and ensure respect*' for IHL.¹⁰⁹⁵ This position is supported by several commentators, usually with a reference back to the ICRC's study.¹⁰⁹⁶ However, a closer look at the practice surveyed by the ICRC reveals that almost all of the invoked instances of State practice only demand that armed groups 'respect' or 'abide by the applicable rules' of IHL.¹⁰⁹⁷ As such, they are merely affirmations of the fact that armed groups are bound by IHL. Apart from the practice of the ICRC itself, only two UNSC Presidential Statements referred to in the study implicitly invoke a duty by armed groups to do more than comply with rules of IHL,

repress violations. See *Tadic*, Interlocutory Appeal on Jurisdiction (n 145) [71] (emphasis added).

¹⁰⁹³ 2020 ICRC GC III Commentary [164]. However, the ICRC argues that a similar obligation for armed groups is somehow inherent to CA 3.

¹⁰⁹⁴ ICRC Customary IHL study, Rule 139.

¹⁰⁹⁵ *ibid.*

¹⁰⁹⁶ Provost (n 1024) 156; Geiß (n 1070) 116-17. See also Zegveld (n 225) 67.

¹⁰⁹⁷ See ICRC Customary IHL study, Practice relating to Rule 139.

and to also ‘ensure respect’ for such rules.¹⁰⁹⁸ This lack of evidence in relation to the application of the ‘ensure respect’ limb to armed groups was criticized by Somer in 2006.¹⁰⁹⁹ An in-text search of all UNSC and UNGA resolutions passed between 2004 and 2022 reveals that a handful of resolutions have since explicitly invoked the obligation to ‘ensure respect’ in relation to armed groups, or at least invoked it in a context that may lead to the conclusion that the Security Council or the General Assembly considered armed groups to be bound by such an obligation.¹¹⁰⁰ In addition, the OHCHR has at times called upon ‘all parties’ to a NIAC to ‘respect and ensure respect for IHL’.¹¹⁰¹ However, there are also instances of practice by UN bodies where the duty ‘to ensure respect’ was recalled only in relation to the State party to the conflict.¹¹⁰² In conclusion, while the claim that armed groups are ‘frequently urged to

¹⁰⁹⁸ UNSC, Statement by the President (8 June 1993) UN Doc S/25899 and UNSC, Statement by the President (9 June 1993) UN Doc. S/25918. See also ICRC Customary IHL Study, vol II, 3169, [84]-[85].

¹⁰⁹⁹ Somer (n 39) 684, describing the evidence for extending the customary law duty to ensure respect to armed groups as ‘not convincing’.

¹¹⁰⁰ See UNGA Resolution 127/76 (17 December 2021) UN Doc A/RES/76/127, recalling ‘the obligation of *parties to armed conflict* to respect and ensure respect for international humanitarian law’ (emphasis added); UNSC Resolution 2417 (24 May 2018) UN Doc S/Res/2417, recalling the obligation of High Contracting Parties [To the 1949 Geneva Conventions] and *parties to armed conflict* to respect and ensure respect for international humanitarian law in all circumstances (emphasis added); UNSC Resolution 2175 (29 August 2014) UN Doc S/Res/2175, recalling ‘the obligation of *parties to armed conflict* to respect and ensure respect for international humanitarian law in all circumstances’ (emphasis added); UNSC Resolution 2139 (22 February 2014) S/RES/2139 [3], which first demands that that *all parties* immediately cease all attacks against civilians and then ‘recalls in this regard the obligation to respect and ensure respect for international humanitarian law in all circumstances’ (emphasis added); UNSC Resolution 1565 (1 October 2004) UN Doc S/Res/1565, which demands that ‘*all parties* and Governments concerned in the region ensure respect for human rights and international humanitarian law’ (emphasis added).

¹¹⁰¹ See e.g. UNHRC, Report on the Human Rights Situation in Yemen (4 August 2016) UN Doc A/HRC/33/38 [71].

¹¹⁰² The 2022 Commission of Inquiry report on the human rights situation in Israel and the Palestinian Territories, for example, highlighted that norms of IHL must be respected by ‘all parties, including Palestinian armed groups’ and then continued by noting that ‘[a]dditionally, all *State parties* to the Geneva Conventions have a duty not only to respect the Conventions, but also to ensure respect for them’, see UNHRC, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (9 May 2022) UN Doc A/HRC/50/21 [18]-[19]. See also UNSC Resolution 2121 (10 October 2013) UN Doc S/Res/2121 which, in the context of the NIAC in the Central African

ensure respect for IHL, including by the Security Council'¹¹⁰³ appears to be an overstatement, the application of a related customary law duty to armed groups can, at least today, draw on a certain amount practice.

To what extent this practice can be considered sufficient to establish a positive obligation under customary law for armed groups to 'ensure respect' for IHL (as opposed to a mere reaffirmation of the binding force of IHL on such groups) also depends on the content that is attributed to such a potential obligation. Is it limited to a positive obligation to ensure respect among its own members or would it also extend to the civilian population living in territory under the control of the armed group? Based on an analysis of the relevant practice mentioned above, it appears that if a customary law obligation to 'ensure respect' exists for armed groups, it is most likely limited to ensuring respect for IHL among the group's own members. Indeed, many of the resolutions and statements discussed above either specifically refer to the duty to 'ensure respect' in relation to the groups own fighters or it is clear from the context that such calls were a direct response to violations committed by the groups own members.¹¹⁰⁴ This is not surprising. As demonstrated in **Chapter 2**, States have always been careful not to endorse any obligation that could be interpreted as legitimizing acts of rebel governance, including law enforcement activities among the civilian population, let alone some sort of legislative activity, despite such actions being potentially beneficial for IHL compliance.

Republic, recalled the obligation to 'ensure respect' only in relation to the governmental authorities.

¹¹⁰³ See e.g. Joshua J. Niyo, 'The Rebel with the Magnifying Glass: Armed Non-State Actors, the Right to Life and the Requirement to Investigate in Armed Conflict' (2019) *YIntlHL* 63, 66, citing, however, only a single resolution as support for this claim.

¹¹⁰⁴ See e.g. UNSC Resolution 2139 (22 February 2014) S/RES/2139 [3]; UNSC, Statement by the President (8 June 1993) UN Doc. S/25899; UNSC, Statement by the President (9 June 1993) UN Doc S/25918.

However, even if we presume the existence of a limited positive obligation for armed groups to ensure ‘respect’ for IHL by their own members, it would be rather difficult to deduce from it a corollary to obligation to employ penal measures in response to IHL violations. As demonstrated above in relation to its treaty-based version, the content of CA 1 is shaped fundamentally by the more specific enforcement obligations found in other provisions of the 1949 Conventions and AP I. This includes the duty to disseminate IHL, implement it via domestic legislation, issue standing orders, and most importantly the obligation to investigate and prosecute grave breaches. CA 1 merely reinforces these obligations, ensures that preparatory steps are taken already in peace time¹¹⁰⁵, and extends the required supervision to private actors whose conduct would otherwise not be attributable to the State. A duty to prosecute violations of IHL, which in turn would require the existence of competent judicial authorities capable of complying with the necessary fair trial guarantees, can therefore not simply be deduced from the rather empty ‘shell’ that is CA 1. The same logic would apply to CA 1’s customary law equivalent.¹¹⁰⁶ Provost’s conclusion that the ‘duty to respect’ translates into a ‘duty to administer justice’ has therefore rightly been criticized.¹¹⁰⁷ Indeed, the existence of a duty to prosecute and punish serious violations of IHL with penal sanctions would require proof of a specific customary law obligation to that effect.

¹¹⁰⁵ This aspect of the ‘the duty to ensure respect’ is rather meaningless in the case of armed groups. As demonstrated in **Chapter 2**, within the field of IHL, the existence of armed group as a collective entity that is distinct from its members is dependent on the existence of an armed conflict. In other words, there is no legal entity that could be bound by any preparatory obligation before an armed conflict has arisen.

¹¹⁰⁶ See also Somer (n 39) 684.

¹¹⁰⁷ Spadaro (n 64) 375.

6.2.2. *A Customary Law Duty to Prosecute Serious Violations of IHL?*

It was explained above that States retain some leeway regarding the tools to be used to ensure respect for IHL, except for cases in which the Conventions provide more specific obligations. Most notably, the 1949 Conventions and AP I obligate States to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.¹¹⁰⁸ In its conventional form, this obligation is limited to the grave breaches regime of the 1949 Conventions and AP I and thus only applies in IAC. Indeed, no related obligation can be found in CA 3 or AP II.¹¹⁰⁹ While the 1949 Conventions mandate that grave breaches be ‘repressed’ by penal sanctions, other violations, including of CA 3 in NIAC¹¹¹⁰, must merely be ‘suppressed’.¹¹¹¹ ‘Suppression’ can be effected by less intense means, including administrative measures or disciplinary sanctions imposed by a competent executive authority.¹¹¹² As a matter of treaty law, States thus have no obligation under the 1949 Conventions or the Protocols to prosecute alleged perpetrators of serious violations of CA 3 (i.e. war crimes) in NIAC.¹¹¹³ This is not surprising because at the time CA 3 and the AP II were drafted, the concept of individual criminal responsibility was confined to grave breaches in IAC. Accordingly, States could not be required to repress violations of IHL in NIAC with penal sanctions.

This limitation of criminal responsibility to violations committed in IAC remained in place until the ICTY rendered its seminal interlocutory appeals judgment

¹¹⁰⁸ Art 49 GC I, art 50 GC II, art 129 GC III and art 146 GC IV, art 85 AP I.

¹¹⁰⁹ ICRC 2020 GC III Commentary [917].

¹¹¹⁰ Durward Johnson and Michael N. Schmitt, ‘The Duty to Investigate War Crimes’ (*Articles of War*, 22 December 2020) available at <<https://lieber.westpoint.edu/duty-investigate-war-crimes/>> accessed 20 December 2022.

¹¹¹¹ See ICRC 2020 GC III Commentary [5162]; Bothe, Partsch and Solf (n 236) 594-595.

¹¹¹² *ibid.*

¹¹¹³ ICRC 2020 GC III Commentary [917].

in the *Tadić* case.¹¹¹⁴ The decision unprecedentedly shaped the development of international custom and expanded individual criminal responsibility for serious violations of IHL — that is, war crimes — to NIACs.¹¹¹⁵ A decade later, the ICRC's customary IHL study identified a customary law obligation for States to search for and prosecute war criminals, which extends to serious violations of CA 3 and other violations of the laws and customs of war carrying individual criminal responsibility.¹¹¹⁶ While there has been considerable debate to what extent this obligation also covers the prosecution of war crimes by third States in exercise of universal jurisdiction, the existence of a customary law duty to prosecute war crimes in NIAC committed on that State's territory or by its nationals finds some support in practice¹¹¹⁷ and among commentators.¹¹¹⁸

It is highly doubtful, however, whether armed groups incur a similar obligation. Since no duty to prosecute or repress violations was incorporated into AP II, treaty law cannot be the source for such obligation. However, it needs to be mentioned that the duty to prosecute grave breaches under the 1949 Conventions and AP I extends to a small sub-group of armed groups, namely national liberation movements under Article

¹¹¹⁴ *Tadić*, Decision on Interlocutory Appeal Challenging Jurisdiction (n 145) [134].

¹¹¹⁵ La Haye (n 865) 133.

¹¹¹⁶ ICRC Customary IHL Study, Rule 158.

¹¹¹⁷ See e.g. UNSC Resolutions 1612 (26 July 2005) UN Doc S/Res/1612, 1379 (20 November 2001) UN Doc S/Res/1379, 1366 (30 August 2001) UN Doc S/Res/1366, 1325 (31 October 2000) UN Doc S/Res/1325, 1314 (11 August 2000) UN Doc S/Res/1314 and 1265 (17 September 1999) UN Doc S/Res/1265, and, affirming the responsibility of all states to put an end to impunity and prosecute those responsible for war crimes. Consider also the Preamble of the ICCSt which recognizes 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' and that 'their effective prosecution must be ensured by taking measures at the national level'.

¹¹¹⁸ See e.g. Sassòli (n 333) [5.207]; Werle and Jeßberger (n 901) 104; Kai Ambos, *Treatise on International Criminal Law: Vol 1* (2nd ed, OUP 2021) 515-516; Provost doubts the existence of such customary obligation, see Provost (n 1024) 155-56. However, the sources he cites in support merely reject the existence of an obligation to prosecute war crimes on the basis of universal jurisdiction, without any traditional link such as nationality or territoriality.

1(4) of AP I.¹¹¹⁹ While this does obviously not imply that armed groups incur a similar obligation to prosecute serious violations in NIAC, it demonstrates that the idea of armed groups using penal sanctions and judicial institutions to enforce IHL was at least implicitly accepted by the drafters of AP I, even if only for a very specific subset of such groups.¹¹²⁰

The remaining question is, therefore, whether contemporary State practice and *opinio juris* allows for the extension of the customary law duty to investigate and prosecute war crimes in NIACs, as identified by the ICRC in relation to States, to armed groups. In the past, States often denounced efforts of armed groups to prosecute IHL violations, both in relation to the groups' own members and to captured government forces. For example, when the FLMN in El Salvador announced that it would prosecute several of its own members for the murder of American servicemen in 1991, the US Assistant Secretary of State for Inter-American Affairs announced that 'the FMLN lacks the legal authority to carry out a proper investigation, prosecution or appellate process that would deserve recognition or legitimacy under international law or the law of any sovereign state'.¹¹²¹ Commentators have thus been critical towards extending the customary law obligation to prosecute war crimes to armed groups. Writing in 2002, Zegveld concluded that 'international practice provides little support for the obligation of armed opposition groups to prosecute violators of humanitarian standards'.¹¹²² Fleck equally supports the view that the customary law obligation

¹¹¹⁹ Art 1(4) AP I extends the application of the 1949 Convention and the Protocol to armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. Moreover, art 86 AP I, which requires the repression of grave breaches, specifically refers to both the 'High Contracting Parties', as well as the 'Parties to the conflict'. See also Provost (n 1024) 155.

¹¹²⁰ See Bothe, Partsch and Solf (n 236) 594.

¹¹²¹ Quoted in 'Application of Humanitarian Law in Non-International Armed Conflicts: Remarks by Theodor Meron' (1991) 85 ASIL Proceedings 83, 83-84.

¹¹²² Zegveld (n 225) 67-68.

identified by the ICRC remains confined to States.¹¹²³ Provost, while initially describing the suggestion as reasonable¹¹²⁴, more recently and upon further reflection, denounced the claim that armed groups incur such a duty as ‘rather fanciful’.¹¹²⁵ Only Willms is somewhat cautiously optimistic, noting the indication of ‘a trend towards an obligation to investigate and prosecute for well-consolidated armed groups that control territory’, while simultaneously admitting that the limited available practice does not allow for any definitive position as to whether or not such obligation to investigate and prosecute exists.¹¹²⁶ Indeed, the observation that the obligation to prosecute war crimes remains confined to States still seems to be an accurate reflection of the *lex lata*. The only exception is the above-mentioned treaty-based duty for national liberation movements to prosecute grave breaches under Articles 85-86 of AP I.

This conclusion notwithstanding, it is important to recognise recent developments in State practice which increasingly require armed groups to investigate IHL violations and to ‘ensure accountability’ or ‘hold perpetrators accountable’ in NIACs. In 2003, for example, after Jean Pierre Bemba’s Movement for the Liberation of the Congo (MLC) had tried some of its soldiers in the Democratic Republic of the Congo (DRC) and the Central African Republic, the United States did not denounce the trials as such but expressed their disappointment in the fact that the MLC courts did not charge the accused with war crimes and crimes against humanity, and that the sentences handed down were not adequate in relations to the severe nature of the crimes committed:

¹¹²³ Dieter Fleck, ‘Comment – Perspectives on Courts Established by Armed Opposition Groups’, in Krieger (n 56) 182.

¹¹²⁴ Provost (n 56) 427-428

¹¹²⁵ Provost (n 40) 156.

¹¹²⁶ Willms (n 56) 158-59.

The United States Government is very disappointed at the inadequate manner with which the MLC handled the trials of those suspected of committing atrocities in Mambasa. ... We are concerned about ... the callous disregard for the serious nature of the crimes, as reflected in the light sentences handed down and in the failure to charge anyone with crimes against humanity or war crimes. The failures of those proceedings will not end the culture of impunity; sadly, those failures perpetuate that culture of impunity.¹¹²⁷

Another example of States welcoming accountability measures carried out by armed groups is the following Joint-Statement by France, the UK and the US in response to the ICC's Arrest Warrant for Major Mahmoud al-Werfalli, a commander of the LNA in Libya suspected of having committed war crimes:

The governments of France, the United Kingdom, and the United States welcome the announcement on August 17 by the Libya National Army (LNA) that it will investigate reports of unlawful killings in Benghazi. ... We call on the LNA to ensure that the investigation is carried out fully and fairly; and those responsible for the unlawful killings are held to account. ... Those suspected of committing, ordering, or failing to prevent unlawful killings and torture on all sides must be fully investigated and held accountable, as appropriate.¹¹²⁸

More recently, the French Foreign Minister even mentioned that French nationals who had fought for Islamic State in Iraq and Syria (ISIS) in Syria could be tried by either the local Kurdish authorities or other opposition forces:

[Foreign Minister] Jean-Yves Le Drian added that these French nationals would be “tried by the local judicial authorities”, adding that in Syria, these authorities “are not automatically the Kurds, but also the Syrian Democratic Forces”¹¹²⁹

¹¹²⁷ Statement by Mr. Williamson (USA), UNSC 4784th Meeting, 7 July 2003, UN Doc S/PV.4784 [19].

¹¹²⁸ UK Foreign & Commonwealth Office, Joint Statement by the Governments of France, the United Kingdom, and the United States of America, ‘ICC Arrest Warrant for Major Mahmoud Al-Werfalli in Libya’, 19 August 2017, available at <<https://www.gov.uk/government/news/icc-arrest-warrant-for-major-mahmoud-al-werfalli-in-libya-joint-statement-on-libya-by-the-governments-of-france-the-united-kingdom-and-the-united-s>> accessed 20 December 2022.

¹¹²⁹ ‘Une centaine de jihadistes français sont détenus en Syrie, selon Le Drian’, *France 24*, 7 February 2018, available at <<https://www.france24.com/fr/20180207-jihadistes-francais-centaine-detenus-syrie-le-drian-irak-familles-rapatriement-justice>> accessed 20 December 2022 (translated by the author).

Other States, while not actively calling for trials, seem to have at least implicitly acquiesced to the possibility of their nationals being tried for war crimes by NES courts in Syria.¹¹³⁰

These statements represent a shift away from the traditional practice of categorically rejecting trials and prosecutions conducted by armed groups. The language used in these examples indicates that the respective States not only accept that accountability procedures, including investigations and potential prosecutions, may be carried out by armed groups, but also hints at some form of political and potentially even legal expectation to do so.

This trend can also be observed in the practice of UN bodies, special mandate holders and CoIs. The 2009 Commission of Inquiry into the Gaza conflict, hinting at the Hamas authorities, held that the responsibility to investigate and prosecute violations of humanitarian law is a duty incumbent on both States and ‘*State-like entities*’.¹¹³¹ In addition, the Group of Eminent Experts on Yemen recommended that all parties to the conflict ‘ensure accountability for the perpetrators’ and specifically requested the Houthi rebels to list all steps that had been taken to investigate and prosecute sexual and gender-based violence.¹¹³² The HRC has equally urged *all parties*

¹¹³⁰ When the NES in Northern Syria announced in 2020 that it would begin to try European foreign fighters, including UK nationals, the Foreign Office only remarked that these individuals ‘should wherever possible face justice for their crimes in the most appropriate jurisdiction, which will often be in the region where their offences have been committed’ and that ‘any internationally supported justice mechanism must respect human rights and the rule of law as well as ensure fair trials and due process’. See Dan Sabbagh, ‘Syrian Kurds to put Isis fighters from dozens of countries on trial’, *The Guardian*, 6 February 2020.

¹¹³¹ UNHRC, Report of the United Nations Fact-Finding Mission on the Gaza Conflict (n 171) [1962]-[1963].

¹¹³² UNHRC, Situation of human rights in Yemen, including violations and abuses since September 2014, Report of the Group of Eminent International and Regional Experts as submitted to the United Nations High Commissioner for Human Rights (9 August 2019) UN Doc A/HRC/42/17 [98(g)] and List of Issues addressed to the Houthi/Ansar Allah by the Group of Eminent Experts

to the armed conflict in Yemen to ensure effective investigations into alleged violations of IHL, ‘with a view to ending impunity’.¹¹³³ The UN Mission in Afghanistan has consistently called upon the Taliban (long before their takeover of the country in 2021) to ‘hold accountable’ those who deliberately target civilians and civilian objects.¹¹³⁴ Even the Security Council has indicated that it expects sufficiently organized armed groups to ‘take immediate steps to ensure an end to impunity’ or requested ‘all parties’ to a NIAC to introduce steps to ‘bring to justice’ those who are responsible for violations of IHL.¹¹³⁵ More recently, no less than 40 UN Special Rapporteurs agreed in a joint document that armed groups must ‘ensure proper and genuine accountability within their ranks’.¹¹³⁶ Moreover, agreements concluded between the UN and armed groups occasionally include an undertaking by the group to impose specific sanctions for certain violations, for example against perpetrators of sexual violence or grave violations against children.¹¹³⁷

Although **Chapter 2** has explained that it remains disputed to what extent armed group practice should be taken into account in identifying a norm of customary IHL¹¹³⁸, it is worth noting that armed groups frequently include a duty to investigate

on Yemen established pursuant to Human Rights Council resolution A/HRC/RES/36/31 [23] and [25].

¹¹³³ See UNHRC Resolution 39/16 (28 September 2018) A/HRC/RES/39/16 [11].

¹¹³⁴ UNAMA, ‘Afghanistan: Annual Report on Protection of Civilians in Armed Conflict 2019’, February 2020, 13; ‘Afghanistan: Annual Report on Protection of Civilians in Armed Conflict 2018’, February 2019, 6; ‘Afghanistan: Annual Report on Protection of Civilians in Armed Conflict 2017’, February 2018, 6.

¹¹³⁵ See e.g. UNSC Resolution 1565 (1 October 2004) UN Doc S/RES/1565; UNSC, Statement by the President, 23 July 2002, UN Doc S/PRST/2002/22 [4].

¹¹³⁶ OHCHR, Joint Statement by independent United Nations human rights experts (n 170).

¹¹³⁷ See e.g. Art 4(1)(4), Procédures disciplinaires et de responsabilité, Plan d’action entre la CMA et l’Equipe Spéciale Pays des Nations Unies, cited in Geneva Academy/Geneva Call (eds), ‘From Words to Deeds: A Research Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian Law and Human Rights Norms: The National Movement for the Liberation of Azawad’ (2021) 39-40.

¹¹³⁸ See **Chapter 2**, section 2.2.4. See also Sassòli (n 333) 49-50 [4.41].

and prosecute serious violations in their own codes of conduct.¹¹³⁹ Even if these codes of conduct might not be creative or expressive of customary law as such, the reaction of States – for example the joint-statement by the US, UK and France cited above – to such conduct is.¹¹⁴⁰

While most of the statements referred to above do not necessarily invoke a legal obligation for armed groups to prosecute violations and impose penal sanctions, they nevertheless indicate an expectation that armed groups take certain accountability measures. While it might be premature to conclude that such an obligation has already manifested as a matter of positive law, it could be argued that that a customary law ‘duty to ensure accountability’ is in the process of forming.¹¹⁴¹ Determining the precise contours of such an emerging obligation is, of course, rather difficult. However, it could be argued that it comprises taking at least basic accountability measures, including the use of disciplinary sanctions as well as conducting investigations into IHL violations.¹¹⁴²

Moreover, it is important to reiterate that although armed groups are not *required* under the current state of the law to punish serious violations with penal sanctions, they may nevertheless do so if they operate a judicial system capable of meeting the necessary fair trial guarantees. In other words, the use of penal sanctions

¹¹³⁹ E.g. the National Transitional Council in Libya, the New People’s Army in the Philippines, or the FARC and NLA in Colombia. See ICRC, ‘A Collection of Codes of Conduct Issued by Armed Groups’, (2011) 93 IRRC 489, 493 and 501. See also arts 58 and 61 of the ‘Texte organique pour l’organisation et la réglementation de l’Organisation pour la Mouvement national de libération de l’Azawad (MNLA)’ cited in Geneva Call (n 1137).

¹¹⁴⁰ See **Chapter 2**, section 2.2.4.

¹¹⁴¹ See also Hannes Jöbstl, ‘Bridging the Accountability Gap: Armed Non-state Actors and the Investigation and Prosecution of War Crimes’ (2020) 18 JICJ 567, 596.

¹¹⁴² See Niyo (n 1103) 101; ICRC/Geneva Academy, ‘Guidelines on Investigating Violations of International Humanitarian Law’, September 2019, fn 3.

is a valid but not indispensable tool for armed groups to ensure accountability, as well to comply with any potential customary law duty to ensure respect for IHL.

6.2.3. *The Duty to Prosecute and the Equality of Belligerents*

The previous subsection has demonstrated that, while armed groups might be obliged to take *some* accountability measures, they are not subject to the same customary law duty to prosecute war crimes incumbent on States. This limitation of the obligation to prosecute States is sometimes invoked as evidence that the principle of belligerent equality does not really exist in NIAC.¹¹⁴³ Indeed, if we accept that this obligation only applies to States, we must also accept that the equality of belligerents in NIAC is, at the very least, not absolute. This, in turn, may undermine the IHL compliance of States.¹¹⁴⁴ Indeed, it was argued already in **Chapter 4** that watering down the equality of belligerents, in the sense of subjecting States to a larger and more exacting set of obligations than armed groups, provides States with a convenient excuse to reject the regime of IHL in NIACs altogether. However, two points should be noted that may nuance this observation.

First, even for States, the obligation to prosecute war crimes is not absolute. States may also discharge this obligation by handing over perpetrators to other High Contracting Parties for trial¹¹⁴⁵, or potentially to an international criminal tribunal¹¹⁴⁶.

¹¹⁴³ See e.g. Somer (n 39) 684.

¹¹⁴⁴ *ibid*, noting that ‘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’.

¹¹⁴⁵ See art 49 GC I, art 50 GC II, art 129 GC III and art 146 GC IV: ‘It [The High Contracting Party] may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned’.

¹¹⁴⁶ The ILC has observed that ‘[w]ith the establishment of the International Criminal Court and various ad hoc international criminal tribunals, there is now the possibility that a State faced with an obligation to extradite or prosecute an accused person might have recourse to a third alternative — that of surrendering the suspect to a competent international criminal tribunal’. See ILC, Final Report of the Working Group on the obligation to extradite or prosecute (*aut*

Although not explicitly spelled out in the customary IHL rule identified by the ICRC's study, there is no reason why this alternative should not also be available in relation to the obligation to prosecute war crimes in NIAC.

Second, the non-extension of the customary law obligation to prosecute war crimes to armed groups is arguably based not on any concerns regarding the potentially inadequate compliance capacities of such groups, but rather reflects the reluctance of States to endorse or legitimize any sort of rebel governance. Therefore, this inequality should not be seen as having been imposed on States, but rather as an intentional legislative preference. This makes it more difficult for States to invoke it as a justification for non-compliance with their own more exacting obligations. The 'damage' done to the principle of equality, as well as to incentives for compliance, is, therefore, rather minimal.

6.3. Penal Sanctions as Part of Command Responsibility

Even if a duty to prosecute war criminals for armed groups as a collective does not currently exist under treaty or customary law, it is necessary to examine whether such an obligation could instead be incumbent on the individual insurgent commander. **Chapter 5** has already outlined the basic concept of the doctrine of command responsibility in relation to the criminal responsibility of superiors for unfair trials conducted by their subordinates.¹¹⁴⁷ It was explained that under ICL, individual superiors may be held criminally responsible in relation to crimes committed by their subordinates when they fail to prevent their commission or punish the perpetrators

dedere aut judicare) (5 June 2014) UN doc. A/CN.4/L.844 [27]. See also Claus Kreß, 'Reflections on the *Iudicare* Limb of the Grave Breaches Regime' (2009) 7 JICJ 789, 799, arguing that the grave breaches regime has undergone an evolution via subsequent practice in this regard.

¹¹⁴⁷ See **Chapter 5**, section 5.1.2.6.

involved.¹¹⁴⁸ The present section is concerned with the second limb, the ‘failure to punish’. In particular, it has been suggested that this limb of the doctrine could result in an obligation of armed groups and their commanders to establish courts and impose penal sanctions.¹¹⁴⁹

6.3.1. Command Responsibility in Armed Groups

In the context of armed groups, the term ‘military commander’ in Article 28(a) of the Rome Statute ‘extends to individuals appointed as military commanders in non-governmental irregular forces, in accordance with their internal practices or regulations, whether written or unwritten.’¹¹⁵⁰ It is debated, however, if all ‘military commanders’ in armed groups automatically incur individual criminal responsibility for the acts of their subordinates. Section 6.1.3. has already briefly touched upon the controversial relationship between ‘responsible command’ and ‘command responsibility’. To reiterate, the ICTY Appeals Chamber in *Hadžihasanovic* considered the two concepts as inherently linked.¹¹⁵¹ In addition, it held that responsible command is an ‘integral notion’ of CA3.¹¹⁵² If that were the case, it would follow that every military commander of an armed group that meets the basic organisational criteria of CA3 in principle incurs individual criminal liability for the failure to prevent or punish transgressing subordinates.¹¹⁵³

¹¹⁴⁸ O’Keefe (n 215) 201.

¹¹⁴⁹ See e.g. Willms (n 56) 159-60; Murray (n 60) 221.

¹¹⁵⁰ *Bemba*, Trial Judgment (n 52) [176].

¹¹⁵¹ See *Hadžihasanovic*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (n 932) [22] stating that ‘[t]he elements of command responsibility are derived from the elements of responsible command’.

¹¹⁵² *ibid* [17].

¹¹⁵³ Moir (n 1058) 407. See also Rodenhäuser (n 157) 86.

However, it was demonstrated in section 6.3 that this approach is misguided and that responsible command does not constitute an indispensable requirement for a collective of individuals to meet the basic organisational threshold under CA 3 and become a party to a NIAC. Indeed, as emphasised by the ICTY Trial Chambers in the *Limaj* and *Mrkšić* cases ‘[w]hile some degree of organisation by the parties will suffice to establish the existence of an armed conflict, this degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation’.¹¹⁵⁴ Therefore, just because a group meets the basic organisational requirements to qualify as a party to a NIAC under CA 3, this does not mean it also meets the structural requirements necessary for military commanders or group leaders to incur command responsibility.¹¹⁵⁵

However, the *Hadžihasanović* decision is correct in the sense that the concepts of responsible command and command responsibility are inherently linked. Both are enforcement mechanisms for IHL and command responsibility can be described as a penal derivative of the more general concept of responsible command.¹¹⁵⁶ Nevertheless, their overlap is not complete. As noted by Mettraux, ‘whilst every conduct that entails the individual criminal responsibility of the commander will, to some degree, fall short of the standard of responsible command, not every breach of that standard will have criminal consequences for a commander’.¹¹⁵⁷ Command responsibility requires effective control over a subordinate, ‘in the sense of a material

¹¹⁵⁴ *Mrkšić et al.* (Trial Judgment) IT-95-13/1-T (27 September 2007) [407]; *Limaj*, Trial Judgment (n 632) [89].

¹¹⁵⁵ Rodenhäuser (n 157) 86.

¹¹⁵⁶ Guénaél Mettraux, *The Law of Command Responsibility* (OUP 2009) 54-55.

¹¹⁵⁷ *ibid* 56.

ability to prevent and punish criminal conduct'.¹¹⁵⁸ While there is some debate about the precise factors that establish such effective control¹¹⁵⁹, the more relevant question for the purpose of this Chapter is what actions a commander must undertake once the necessary level of control is established.

6.3.2. Necessary and Reasonable Measures to Punish their Forces...

Once it is established that an armed group commander or other superior exercises effective control, they are subject to the obligation to take all 'necessary and reasonable' measures within their power to prevent or repress the commission of crimes by their subordinates or to submit the matter to the competent authorities for investigation and prosecution. This so-called 'duty to repress' consists of two separate obligations. First, it obliges a commander to stop ongoing crimes from being committed.¹¹⁶⁰ Second, it encompasses an obligation to punish forces after the commission of crimes.¹¹⁶¹ This duty to punish can be carried out 'either by the superior himself taking the necessary and reasonable measures to punish his forces, or, if they do not have the ability to do so, by referring the matter to the competent authorities'.¹¹⁶²

This raises the question of what constitutes 'necessary and reasonable measures to punish' in the context of superiors in armed groups. The ICC Pre-Trial Chamber in

¹¹⁵⁸ *Delalić*, Appeals Judgment (n 316) [256]; *Bagilishema* (Appeals Judgment) ICTR-95-1A-A (3 July 2002) [51].

¹¹⁵⁹ The ICC Pre-Trial Chamber in the *Bemba* case set out a list of (non-exhaustive) indicators, derived from the case law of various international criminal tribunals, including *inter alia* their ability to ensure compliance with orders, the power to remove or discipline forces or the authority to send and withdraw forces from locations where hostilities take place. See *Bemba*, Confirmation of Charges (n 1005) [188]. However, it has been suggested that these criteria should be interpreted more flexibly in the case of irregular armies or rebel groups. See *Brima* (Trial Judgment) SCSL-04-16-T (20 June 2007) [787]-[789]. See also Miles Jackson and Roberta Arnold, 'Article 28' in *Ambos* (n 204) 1295-1296.

¹¹⁶⁰ *Bemba*, Confirmation of Charges (n 1005) [439].

¹¹⁶¹ *ibid.*

¹¹⁶² *Ibid* [440].

the *Bemba* case noted that ‘the power of a superior, and thus the punitive measures available to him, will vary according to the circumstances of the case and, in particular, to his position in the chain of command’.¹¹⁶³ Indeed, commanders must only take steps that are ‘feasible’ and ‘in their power’.¹¹⁶⁴ A military commander is usually only competent to impose disciplinary sanctions. Some commentators have argued that disciplinary sanctions will always be insufficient in relation to crimes outlawed by the Rome Statute.¹¹⁶⁵ However, this position is not reflected in the relevant case law. In *Hadžihasanović*, for example, the ICTY found that a disciplinary sanction of a suspended sentence of two to six months imprisonment was appropriate to punish the war crime of plunder.¹¹⁶⁶ In contrast, the Appeals Chamber held that a disciplinary sanction of 60 days detention was not sufficient compared to the gravity of the crimes for which the subordinate was being sanctioned, in particular murder and cruel treatment.¹¹⁶⁷ The Appeals Chamber thus rightly concluded that ‘whether the measures taken were solely of a disciplinary nature’ cannot ‘in itself be determinative of whether a superior discharged his duty to prevent or punish’.¹¹⁶⁸

Nevertheless, many crimes will require the imposition of penal sanctions in light of their gravity.¹¹⁶⁹ Yet, a commander cannot singlehandedly impose penal sanctions onto his subordinates without violating the prohibition against the ‘passing of sentences and the carrying out of executions without previous judgment pronounced

¹¹⁶³ *ibid* [441].

¹¹⁶⁴ ICRC 1987 AP I Commentary [3548].

¹¹⁶⁵ Otto Triffterer and Roberta Arnold, ‘Article 28’ in Kai Ambos and Otto Triffterer (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., C.H. Beck, 2016) 1100, [119]. However, this position is no longer represented in the updated 4th edition of this commentary.

¹¹⁶⁶ *Hadžihasanović*, Trial Judgment (n 491) [2056]-[2058].

¹¹⁶⁷ *Hadžihasanović* (Appeals Judgment) IT-01-47-A (22 April 2008) [152].

¹¹⁶⁸ *ibid* [33].

¹¹⁶⁹ Arnold and Jackson, ‘Article 28’ in Ambos (n 204) 1315 [72].

by a regularly constituted court'.¹¹⁷⁰ This may lead to a paradoxical situation whereby a commander may either be criminally liable for failing to punish the crimes of their subordinates, or liable for engaging in such punishment without providing the necessary judicial guarantees.¹¹⁷¹

While it is logical that commanders can only be expected to take actions that are materially possible for them, there is some controversy as to whether a commanders' legal capacity should be a relevant factor in the application of command responsibility. In the *Delalic* and *Kayishema* cases, for example, the ICTY and ICTR, respectively, dismissed legal capacity to act as a relevant condition to determine whether a measure is 'necessary and reasonable'.¹¹⁷² In doing so, they explicitly rejected the ILC's view on the matter, which in its Draft Code on Crimes Against Peace and Security of Mankind required consideration of both 'the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures'.¹¹⁷³ In *Hadžihasanovic*, however, the ICTY implicitly accepted some limitations based on legal capacity by noting that the internal laws and regulations of the respective party to the conflict would be taken into account when determining the scope of measures a superior is expected to take.¹¹⁷⁴ A similar approach was taken in the *Blaskić* case.¹¹⁷⁵

¹¹⁷⁰ See art 8(2)(c)(iv) ICCSt.

¹¹⁷¹ See Alessandra Spadaro, 'Punish or be Punished? The Paradox of Command Responsibility in Armed Groups' (2020) 18 JICJ 1.

¹¹⁷² *Delalić*, Trial Judgment (n 619) [395]; *Kayishema and Ruzindana* (Trial Judgment) ICTR-95-1-T (21 May 1999) [229]-[230]; *Fofana* (Trial Judgment) SCSL-04-14-T (2 August 2007) [246].

¹¹⁷³ ILC Draft Code of Crimes against the Peace and Security of Mankind with commentaries, UN Doc A/CN.4/L.532, YILC 1996, vol II/2, 38-39.

¹¹⁷⁴ *Hadžihasanović*, Trial Judgment (n 491) [139]-[141].

¹¹⁷⁵ *Blaskić*, Trial Judgment (n 491) [488].

Both Mettraux and Spadaro therefore argue, that, at the very least, the standard of legality required from a commander should be that their actions do not amount to another crime or IHL violation under customary international law.¹¹⁷⁶ This suggestion seems reasonable. Indeed, the law can hardly require a commander to commit a war crime in order to avoid criminal responsibility for another war crime. After all, the duty to submit a matter to an investigative authority and to refer it for prosecution is aimed at ‘ensuring that offenders are brought to justice, *in order to avoid impunity and to prevent future crimes*’.¹¹⁷⁷ Spadaro thus rightfully notes that ‘if the measures at the disposal of the commander of an armed group are either too mild to be deemed effective in suppressing the crimes or such that taking them would in itself result in the commission of a crime or serious human rights violation, the commander should not be found responsible for not punishing their subordinates’.¹¹⁷⁸ This approach also finds support in the decision of the Extraordinary African Chamber in the *Habré* case, which held that the summary execution of two subordinates did not relieve the accused from his responsibility as a superior because: ‘a superior is bound to take necessary and reasonable measures to punish the commission of a crime by his subordinates, but not to commit another crime’.¹¹⁷⁹ Accordingly, measures that amount to an (international) crime cannot be considered ‘necessary’ or ‘reasonable’.

In light of the above, any assessment of the necessity and reasonableness of the measures should pay close attention to circumstances of the specific situation, as well as legal constraints stemming from other parts of ICL or IHL.¹¹⁸⁰ It follows that where

¹¹⁷⁶ Spadaro (n 1171) 12; Mettraux (n 1156) 52.

¹¹⁷⁷ *Bemba*, Trial Judgment (n 52) [209].

¹¹⁷⁸ Spadaro (n 1171) 3.

¹¹⁷⁹ *Hissein Habré*, Chambre Africaine Extraordinaire d’Assises, 30 May 2016, [1864] and [2257] (translated by the author).

¹¹⁸⁰ Arnold and Jackson (n 1169) 1315 [72].

the gravity of a transgression requires penal sanctions, which cannot be imposed by the commander alone, the duty to punish cannot be considered ‘an alternative’ to the duty to submit the matter to the competent authorities as it was described in the *Bemba* case.¹¹⁸¹ This does not mean that commanders do not have to make use of their disciplinary powers. To the contrary, the duty to punish subordinates through immediate disciplinary action exists *in addition*, rather than as an alternative, to the duty to submit the case to the competent authorities.¹¹⁸² As noted by the ICC Trial Chamber, the commander is required to take an ‘important step in the disciplinary process’,¹¹⁸³ and when holding disciplinary power ‘he is required to exercise it, within the limits of his competence’.¹¹⁸⁴ Where superiors do not hold disciplinary power, they can at least be expected to ‘conduct an effective investigation with a view to establishing the facts’.¹¹⁸⁵ Such investigations might also reveal structural problems, for example a lack of adequate training in IHL.¹¹⁸⁶ However, where a superior holds no adequate powers to also sanction a transgressing subordinate, they are required to ‘report them to the competent authorities’.¹¹⁸⁷

6.3.3. ... Submitting the Matter to the ‘Competent Authorities’

It was explained above that in the case of crimes that are sufficiently severe, referring the matter to the competent authorities becomes obligatory for avoiding criminal

¹¹⁸¹ *Bemba*, Confirmation of Charges (n 1005) [440].

¹¹⁸² *Arnold and Jackson* (n 1169) 1313.

¹¹⁸³ *Limaj*, Trial Judgment (n 632) [529].

¹¹⁸⁴ *Bemba*, Trial Judgment (n 52) [207].

¹¹⁸⁵ *Limaj*, Trial Judgment (n 632) [529]; *Orić* (Trial Judgment) IT-03-68-T (30 June 2006) [330]-[331].

¹¹⁸⁶ A failure to address such structural problems might also render the commander liable for failure to prevent. See *Bemba*, Confirmation of Charges (n 1005) [438].

¹¹⁸⁷ *Strugar*, Trial Judgment (n 632) [376]; *Kordić and Čerkez*, Trial Judgment (n 956) [446].

responsibility under the doctrine of command responsibility. The important question, however, is what constitutes a ‘competent authority’ from the perspective of an armed group. In the context of a State armed force, suspected crimes can be expected to be referred to the domestic prosecution services or to military or civilian courts. It is evident that an armed group is unlikely to refer transgressing subordinates to the authorities of a government they are fighting against.¹¹⁸⁸ This leads to the question of whether courts or tribunals established by armed groups can be considered ‘competent authorities’ for the purpose of command responsibility, or whether the term is limited to State institutions.

Amnesty International argued, during the confirmation of charges proceedings in the *Bemba* case, that superiors within armed groups can only avoid liability for crimes committed by their subordinates by referring the matter to competent State or international authorities.¹¹⁸⁹ Jean Pierre Bemba’s MLC had taken over the pre-existing court system of the DRC and established a court-martial, as well as ‘disciplinary councils’.¹¹⁹⁰ When allegations of crimes committed by MLC forces had become public, he launched commissions of inquiry into the events and had several of his soldiers tried.¹¹⁹¹ Amnesty’s argument was clearly rejected by Pre-Trial Chamber, which emphasized the ‘availability of a functional military judicial system’ within the MLC through which Bemba ‘could have punished crimes committed’.¹¹⁹² The Trial Chamber equally noted that ‘Mr Bemba was the competent authority to investigate and

¹¹⁸⁸ Clapham (n 548) 4; Sivakumaran (n 14) 557.

¹¹⁸⁹ *Bemba* (Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence) ICC-01/05-01/08-406 (20 April 2009) [22]-[23].

¹¹⁹⁰ *Bemba*, Trial Judgment (n 52) [402].

¹¹⁹¹ *ibid* [582]-[587].

¹¹⁹² *Bemba*, Confirmation of Charges (n 1005) [501].

prosecute the crimes’.¹¹⁹³ Accordingly, courts of the armed groups can, in principle, qualify as ‘competent authorities’ for the purpose of command responsibility. When they meet the necessary institutional and procedural guarantees outlined in **Chapter 4**, a commander will have to refer sufficiently serious matters to these institutions for investigation and prosecution in order to discharge their obligations under command responsibility.¹¹⁹⁴

A crucial question is whether these institutions remain ‘competent’ in the event they lack the necessary fair trial guarantees. Both the ICTY and ICC have noted that referral to a non-functioning authority or an authority likely to conduct an inadequate investigation or prosecution may not be sufficient to fulfil the commander’s obligations.¹¹⁹⁵ Yet, this finding was meant to clarify that commanders cannot discharge their obligation by knowingly referring the matter to an institution that will conduct a sham investigation to shield the accused.¹¹⁹⁶ Would this reasoning also apply the other way round, that is, in situations where the commander refers the case to an institution that will, in disregard of fair trial standards, prosecute and punish the accused? In cases where such prosecution and subsequent punishment would amount to a serious violation of the fair trial guarantees of CA 3, triggering the individual criminal responsibility of those involved, the answer should be in the affirmative.¹¹⁹⁷ As noted above, a war crime cannot remedy another war crime. In conclusion, it can neither be ‘necessary’ nor ‘reasonable’ for a commander to refer transgressing

¹¹⁹³ *Bemba*, Trial Judgment (n 52) [733].

¹¹⁹⁴ Provost (n 40) 165; Sivakumaran (n 1036) 1149.

¹¹⁹⁵ *Bemba*, Trial Judgment (n 52) [208]; *Boškoski and Tarčulovski* (Appeals Judgment) IT-04-82-A (19 May 2010) [234].

¹¹⁹⁶ *ibid.*

¹¹⁹⁷ See also Spadaro (n 1171) 12 concluding that ‘international criminal law rules should not be construed as requiring a commander to commit a crime in order to escape criminal responsibility as a superior’.

subordinates to such malfunctioning authorities. Such courts simply do not qualify as ‘competent authorities’.

The more problematic question is what is to be expected by a commander in intermediate cases; that is, situations where a court that is generally willing and capable of conducting a fair trial¹¹⁹⁸ is available, but which may lack the capacity to provide individual due process guarantees. It was demonstrated in **Chapter 5** that not every failure to afford the full range of applicable fair trial guarantees, even if constituting a violation of IHL, necessarily triggers the individual criminal responsibility of those involved. Accordingly, it could be argued that such courts remain ‘competent authorities’ for the purpose of command responsibility even if they do not comply with all requirements under IHL. As noted in **Chapter 5**, the ICC Appeals Chamber in the *Bemba* case held that when commanders establish an inquiry or judicial process themselves, they may only be faulted for the shortcomings of such process if the shortcomings are ‘sufficiently serious’.¹¹⁹⁹ By analogy, referring transgressing subordinates to existing courts with minor shortcomings should be considered sufficient to relieve the commander from individual criminal liability.

A different question is whether commanders are *required* to refer cases to these institutions despite such shortcomings. Both Mettraux and Spadaro argue in the context of the ‘legal capacity’ to be taken into account for the purpose of determining what is ‘necessary and reasonable’ that commanders cannot be expected to take measures that would violate *any* other applicable norm of customary IHL or human rights,

¹¹⁹⁸ ‘Generally capable of providing a fair trial’ in this context should be understood as whether or not, in light of all relevant circumstances, the cumulative effect of factors with respect to the individual guarantees deprived the person or persons of a fair trial. See Elements of Crimes of art. 8(2)(c)(iv), fn. 59. See also *Ibrahim and ors v UK* (n 193) [250] in which the ECtHR noted that ‘a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case’.

¹¹⁹⁹ *Bemba*, Appeals Judgment (n 52) [180].

irrespective of whether these violations may amount to an international crime.¹²⁰⁰ This position seems intuitively appealing but is not without problems. First, from a positivist perspective, it is vital to recall that certain IHL norms, including those relating to penal prosecutions and fair trial guarantees, bind the group as a collective and not necessarily the individual member.¹²⁰¹ Therefore, for the commander as an individual, the duty to comply with their obligations under command responsibility does not necessarily conflict with the fair trial obligation incumbent on the group as such. Second, it is worthwhile to consider the practical consequences of Mettraux and Spadaro's position. It was explained in **Chapter 4** that the judicial guarantees required by CA 3 are far-reaching and incorporate demanding standards from IHRL. It was also demonstrated that even States systematically fail to maintain a judiciary that fully complies with the guarantees required by CA 3, especially in times of armed conflict. If commanders are only required to refer cases to institutions that fully comply with every norm of international law, the requirement of 'submitting the matter to the competent authorities' would become all but inoperable in practice.

6.3.4. A Positive Duty to Establish Courts under Command Responsibility?

The final question is whether, in the absence of competent judicial institutions meeting the necessary fair trial standards, command responsibility implies a positive duty for a commander to set up a court-martial or criminal tribunal.¹²⁰² First of all, it needs to be reiterated that the doctrine of command responsibility only requires commanders to take measures that are 'feasible' and 'within their power'.¹²⁰³ Not only does a military

¹²⁰⁰ Mettraux (n 1156) 240 fn 45; Spadaro (n 1171) 12.

¹²⁰¹ Fortin (n 78) 194.

¹²⁰² See also Murray (n 60) 221.

¹²⁰³ *Bemba*, Appeals Judgment (n 52) [167].

commander usually lack the competence and resources to establish a fully functioning court, doing so could also be at odds with the requirement of institutional independence that is so fundamental to the judicial guarantees under IHL.¹²⁰⁴ Even advocates of such an obligation thus acknowledge that this would place commanders whose forces are suspected of committing war crimes, but who belong to a group that does not have the capacity to conduct fair trials, in a rather difficult position.¹²⁰⁵

It could be argued that a different standard may apply to commanders who are also political leaders and possess the relevant decision making powers and financial resources. The ICC Trial Chamber in the *Bemba* case, for example, found that Mr. Bemba controlled the MLC's funding, had ultimate decision-making authority, and, therefore, held 'the power to initiate enquires and establish courts-martial'.¹²⁰⁶ The Trial Chamber also noted that Mr. Bemba 'failed to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes', and, consequently, 'cannot be said to have submitted the matter to the competent authorities for investigation and prosecution'.¹²⁰⁷ This statement implies some sort of positive obligation on behalf of high-ranking superiors to establish judicial institutions capable of investigating and prosecuting crimes.

However, Mr. Bemba's conviction was ultimately overturned by the Appeals Chamber, which held, *inter alia*, that the Trial Chamber did not appreciate the inherent limitations he was facing in investigating and prosecuting crimes committed by his troops in a foreign country.¹²⁰⁸ The Appeals Chamber also held that 'the Trial Chamber

¹²⁰⁴ See **Chapter 4**, section 4.2.1

¹²⁰⁵ Murray (n 60) 221.

¹²⁰⁶ *Bemba*, Trial Judgment (n 52) [697].

¹²⁰⁷ *ibid* [733].

¹²⁰⁸ For an insightful critique of the Appeals Chamber's decision, see Leila N. Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre

failed in finding that Mr Bemba failed to empower other MLC officials to fully and adequately investigate and prosecute crimes'.¹²⁰⁹ Since it is unclear whether the Appeals Chamber would have reached the same conclusion had Mr Bemba not ordered the trial of several soldiers and established multiple commissions of inquiry, it is difficult to say whether this implied duty for (civilian) superiors to establish judicial mechanism is actually good law. One indication against such a duty is that the Appeals Chamber contrasted the Trial Chamber's statement as to Bemba's alleged 'failure to empower other MLC officials to fully and adequately investigate and prosecute allegations' with the fact that 'MLC Commanders also had some disciplinary authority in the field'.¹²¹⁰ This implies that providing commanders with disciplinary powers might be sufficient positive action by superiors where adequate judicial institutions are not available. Moreover, the Appeals Chamber emphasized that a commander is not required 'to employ every single conceivable measure within his or her arsenal, irrespective of considerations of proportionality and feasibility'.¹²¹¹ Indeed, the Appeals Chamber has taken a rather lenient approach to what is "necessary and reasonable".¹²¹²

In light of the above considerations, it remains doubtful whether command responsibility can be said to require an individual commander to establish a judicial system capable of repressing breaches of IHL with penal sanctions. In his in-depth study on the doctrine of command responsibility, Mettraux notes that '[i]nternational

Bemba Gombo', *EJIL:Talk!*, 12 June 2018, available at <<https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/>> accessed 20 December 2022.

¹²⁰⁹ *Bemba*, Appeals Judgment (n 52) [182].

¹²¹⁰ *ibid.*

¹²¹¹ *Bemba*, Appeals Judgment (n 52) [169].

¹²¹² *ibid* [170].

law does not require a superior to set up special procedures to investigate allegations of crimes'.¹²¹³ *A fortiori*, the doctrine of command responsibility cannot be said to include a positive obligation for individual commanders to establish judicial structures. The *Bemba* Appeals decision seems to have further entrenched that conclusion. Provost equally notes that 'it is not possible to interpret the doctrine of command responsibility as imposing a duty for non-State armed groups to create courts, even for the narrow purpose of sanctioning international crimes committed by members of the groups'.¹²¹⁴ This position seems reasonable. It was explained in **Chapter 4** that States have a positive obligation – under IHRL – to set up and maintain an independent and impartial judiciary capable of providing all the necessary fair trial guarantees as required by customary law. Deducing a similar far-reaching obligation for armed groups from the doctrine of command responsibility, which is merely a mode of criminal liability for superiors, seems to overstretch the purpose of the doctrine and the limits of its interpretation.¹²¹⁵

6.4. Alternatives to Penal Sanctions

The previous sections have argued that while stopping short of extending the obligation to prosecute serious violations of IHL to armed groups, there are growing expectations that such groups should nevertheless ensure accountability where such violations occur. This invariably raises the question how such accountability should be implemented in situations where the armed group in question does not operate a judicial system capable of complying with the necessary fair trial guarantees. One alternative

¹²¹³ Mettraux (n 1156) 252-253.

¹²¹⁴ Provost (n 40) 166.

¹²¹⁵ See also Spadaro (n 363) (forthcoming).

to penal prosecution has already been discussed in detail: disciplinary measures, which can have a significant deterrent effect.¹²¹⁶ Three additional alternatives deserve to be mentioned in this regard: administrative or security detention, the transfer of the accused to the courts of the territorial State, and the transfer to third parties, including to an international criminal court or tribunal.

6.4.1. *Security Detention*

One alternative for armed groups could be to detain a perpetrator until either the capacity to hold fair trials has been developed or until the conflict has ended and transitional justice mechanisms can take over. In practice, many armed groups use detention as an alternative to penal proceedings.¹²¹⁷ The updated ICRC commentary, for example, notes in its treatment of CA 3 that if ‘a fair trial cannot be provided, other forms of detention may be considered, in particular internment for security reasons’.¹²¹⁸

However, as discussed above¹²¹⁹, any form of internment must respect the prohibition of arbitrary detention under customary IHL.¹²²⁰ If we accept that the

¹²¹⁶ See section 6.1.2.

¹²¹⁷ See e.g. ‘Islamic State Group: Syria's Kurds call for International Tribunal’, *BBC News*, 26 March 2019, available at <<https://www.bbc.co.uk/news/world-middle-east-47704464>> accessed 20 December 2022.

¹²¹⁸ ICRC 2020 GC III Commentary [730].

¹²¹⁹ See **Chapter 3**, section 3.3.2 and **Chapter 5**, section 5.2.1.

¹²²⁰ See ICRC Customary IHL Study, Rule 99. Apart from IHL, **Chapter 2** has explained that armed groups may incur certain core IHRL obligations where the application of these norms is supported by specific State practice and *opinio juris*. The prohibition of arbitrary detention is among those IHRL norms frequently invoked by States in relation to armed groups. However, it has been argued that ‘it is still premature to hold NSAGs accountable for the obligations related to the treatment of detainees that are based solely on IHRL’. See Gavrilova (n 548) 37. However, the prohibition of arbitrary detention is similar under IHL and IHRL and armed group’s detention operations will often be measured – either implicitly or explicitly – against the standards applied under IHRL. See Katharine Fortin, ‘Which legal framework applies to deprivation of liberty by non-State armed groups and do they address the particular challenges when detention is conducted by non-State armed groups?’, San Remo Institute of Humanitarian Law, 41st Round Table on Current Issues of International Humanitarian Law, 14-15.

application of IHL extends to intra-party abuse, this would logically also include the respective customary rules on detention.

Furthermore, it was explained in **Chapter 3** that the absence of an explicit authorization in IHL to engage in certain conduct, in this case detention operations, cannot be interpreted as an implicit prohibition.¹²²¹ However, it was also noted that based on the customary law rule prohibiting arbitrary detention, armed groups must arguably provide additional authority related to the grounds and procedures for detention, ‘in keeping with the principle of legality’.¹²²² It was further argued that this authority, in its *formal* aspect, could be found in the group’s own disciplinary rules or legislation.¹²²³

Problems may arise, however, with what has been referred to as the *material* aspect of legality. Neither CA 3 nor AP II provide guidance on the grounds based on which detention or internment is considered permissible and legitimate. Even under treaty IHL for IACs, administrative detention outside a criminal process requiring the necessary fair trial guarantees is limited to individuals who pose a serious threat to the security of the detaining authority.¹²²⁴ Applying this principle to NIACs by analogy would allow the detention of captured enemy fighters but not the detention of the groups’ own members for the commission of serious IHL violations without a proper judicial process.¹²²⁵ Indeed, these individuals will usually not pose a threat to the group’s own security, but rather to the enemy or the civilian population.

¹²²¹ See Gavrilova (n 548) 45-47, arguing that ‘IHL provisions applicable to NIACs do not contain any rules that could be interpreted as a general prohibition of administrative internment’.

¹²²² ICRC 2020 GC III Commentary [765]. See also Pejic (n 542) 383.

¹²²³ See **Chapter 3**, section 3.3.2. See also Clapham (n 548) 29 and Heffes (n 282) 231.

¹²²⁴ ICRC 2020 GC III Commentary [755]; art 21 GC III; and arts 27, 42 and 78 GC IV. See also ICRC, Internment in Armed Conflict: Basic Rules and Challenges, ICRC Opinion Paper, November 2014.

¹²²⁵ Ezequiel Heffes, ‘Closing a Protection Gap in IHL: Disciplinary Detentions by Non-State Armed Groups in NIACs’, *EJIL:Talk!*, 3 July 2018, available at

A better justification for detention in these circumstances may be found by looking at IHRL. Whereas IHL seems to restrict the use of security detention to circumstances threatening the security of the group as such, IHRL allows for security detention where ‘the person concerned constitutes a *clear and serious threat to society* which cannot be contained in any other manner’.¹²²⁶ By analogy, a ‘serious threat to society’ should be considered a legitimate ground for detention in NIAC where a proper judicial system is not available.¹²²⁷ Were this not the case, it would lead to the strange situation where IHRL would be a more permissive regime than IHL when it comes to the possibility for administrative detention. Moreover, it would appear inconsistent with the humanitarian rationales underpinning IHL to interpret it in a way that would prioritize the rights of the interned fighter over the protection of the civilian population from a potentially harmful individual.

However, it needs to be reiterated that administrative detention does not constitute a penal punishment. It can never replace the imposition of penal sanctions following a proper trial by a regularly constituted court affording all the necessary fair trial guarantees.¹²²⁸ Goodman thus rightfully notes that the fact that CA 3 prohibits the passing of a sentence without affording fundamental judicial guarantees implicitly restricts the use of administrative detention for punitive purposes.¹²²⁹ Administrative

<<https://www.ejiltalk.org/closing-a-protection-gap-in-ihl-disciplinary-detentions-by-non-state-armed-groups-in-niacs/>> accessed 20 December 2022.

¹²²⁶ See e.g. *Davide Alberto Campora Schweizer v Uruguay*, Comm no 66/1980 (12 October 1982) UN Doc CCPR/C/OP/2 [18.2] (emphasis added). See also Murray (n 60) 240.

¹²²⁷ Alternatively, it has been suggested that based on an interpretation of the human treatment principle in CA 3, detention should be considered lawful where it is ‘necessary as a result of the war’. It is arguable that such necessity is present not only where an individual poses a threat to security of the armed group but also the civilian population more generally. See Hill-Cawthorne (n 545) 78-82.

¹²²⁸ Gavrilova (n 548) 61.

¹²²⁹ Ryan Goodman, ‘Authorization versus Regulation of Detention in Non-International Armed Conflicts’ (2015) 91 ILS 155, 164.

detention (beyond mere short-time detention in the ordinary framework of military life¹²³⁰) is thus not a tool to punish and deter violations by others but must be understood as a measure of last resort to prevent further infringements by the same individual. In some cases, especially where a member of the group is alleged to have committed a war crime vis-à-vis an enemy fighter, their potential for further transgressions can be eliminated by less invasive means such as the withdrawal of their weapon and removal from their post. Accordingly, the permissible use of administrative detention as an alternative to trials remains limited.

Finally, under IHRL, any security related detention is also subject to certain procedural requirements, including the option to challenge the lawfulness of the detention through ‘initial and periodic reviews by an independent body possessing the same attributes of independence and impartiality as the judiciary’.¹²³¹ In Libya, the OHCHR applied this strict standard, on the basis of IHRL, to armed groups and State authorities alike.¹²³² However, while there is certainly some overlap, the question of whether the same safeguards are required by IHL in NIAC is still the subject of considerable debate.¹²³³ The right of an internee to challenge the lawfulness of their detention certainly forms part of the core of guarantees that can be expected even during NIAC.¹²³⁴ However, there is some authority to suggest that the institutional requirements of the review body are not as strict as under IHRL. Were it otherwise, the

¹²³⁰ See section 6.1.2 and Heffes (n 282) 235-236.

¹²³¹ *Hassan v UK* (n 547) [106]. See also HRC, General Comment 35 (n 554) [15]; UNHRC, Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings (15 February 2016) UN Doc A/HRC/31/CRP.3 [128]; and Clapham (n 548) 15.

¹²³² UNHCR, Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya (n 1231) [130].

¹²³³ 2020 ICRC GC III Commentary [756].

¹²³⁴ Pejic (n 542) 386; Clapham (n 548) 16.

entire concept of administrative detention would become redundant as an armed group that is not capable of conducting a fair trial would equally not be in the position to establish a detention review mechanism that is held to similar standards. The ICRC's commentary implies, for example, that administrative review (as opposed to judicial review) can suffice if the review body maintains a certain amount of independence and impartiality.¹²³⁵ Ultimately, however, administrative detention should remain the exception rather than the rule.

6.4.2. *Transfer to State Courts*

Another option is to transfer an alleged perpetrator to the official courts of the respective territorial State. In practice, however, it is highly unlikely that an armed group will surrender someone to the very government it is fighting against.¹²³⁶ Indeed, related efforts have often been futile. After interventions by the UN Office of the High Commissioner for Human Rights (OHCHR) office in Nepal, for example, the CPN-M agreed to hand over to the local police civilians held by CPN-M courts, but not CPN-M personnel that were being subjected to disciplinary proceedings.¹²³⁷ Apart from this understandable reluctance of armed groups to surrender their own members to the governmental authorities, there might be legal considerations that bar such extradition in the first place. **Chapter 2** has demonstrated that while the application and scope of human rights law to armed groups is still controversial, there seems to be increasing consensus that armed groups are bound by a certain minimum of core obligations,

¹²³⁵ ICRC 2020 GC III Commentary [761].

¹²³⁶ See also Sassòli (n 333) 156.

¹²³⁷ OHCHR Nepal, Human Rights Abuses by the CPN-M, Summary of Concerns, September 2006, 2.

including the prohibition of torture, cruel or inhumane treatment.¹²³⁸ It is commonly accepted that the *jus cogens* nature of the prohibition of torture includes the obligation not to return or expel an individual to a country or territory where he or she would be in danger of being subjected to torture (*non-refoulement*).¹²³⁹ Moreover, it has been argued that a similar prohibition against the transfer of persons to authorities where they will be in danger of being subjected to murder, torture and other forms of ill-treatment is implicitly enshrined in CA 3.¹²⁴⁰

Unfortunately, the use of torture by governmental authorities is still widespread during NIACs.¹²⁴¹ Transposed onto an armed group, the peremptory prohibition against torture and inhumane treatment would prevent the group from surrendering a potential criminal to State courts and police forces, if these institutions are known to systematically make use of torture. In addition, it was mentioned in **Chapter 4** that both the HRC and the ECtHR have held that a trial that involves the death penalty and does not respect fundamental judicial guarantees can amount to ‘inhuman treatment’.¹²⁴² The law can thus hardly prohibit armed groups from holding a trial due to their inability to provide for judicial guarantees while simultaneously allowing or even requiring the same group to surrender an individual to State authorities that are equally unable or unwilling to do so. Therefore, surrender to government authorities will often be barred by both legal and political reasons.

¹²³⁸ See e.g. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (n 186) [106], and more generally **Chapter 2**.

¹²³⁹ See e.g. *Furundzija* (Trial Judgment) T-95-17/1 (10 December 1998) [144]; Erika de Wet, ‘The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law’ (2004) 15 EJIL 97.

¹²⁴⁰ ICRC 2020 GC III Commentary [744]-[746].

¹²⁴¹ See e.g. Report of the Independent International Commission of Inquiry on deaths in detention in the Syrian Arab Republic (n 31).

¹²⁴² *Larrañaga v The Philippines* (n 592) [7.11]; *Öcalan v Turkey* (n 592) [175].

However, the possibility of surrender to governmental authorities could remain a feasible option in specific situations. These include situations where armed groups fight alongside State authorities¹²⁴³, in transnational conflicts where the armed group concerned is not involved in an armed conflict with the territorial State¹²⁴⁴, or in situations where two armed groups are fighting against one another. An example would be the above-mentioned attempts by Jean Pierre Bemba to co-operate with the CAR authorities in the investigation of crimes committed by MLC forces, although doubts remain as to whether these attempts were genuine.¹²⁴⁵ It also needs to be reiterated that a prior trial by an armed group court does not prevent a subsequent trial by a State court and *vice versa*. As explained in **Chapter 4**, the prohibition against double jeopardy enshrined in Article 14 (7) of the ICCPR was deliberately dropped during the negotiations of Article 6 AP II in order to allow State courts to try individuals without taking into account prior judgements issued by insurgent tribunals.¹²⁴⁶

6.4.3. *Transfer to a Third Party*

As already discussed, in IACs, State parties may discharge their obligation to investigate and prosecute war crimes by handing over perpetrators for trial to third States.¹²⁴⁷ Doing so relieves them of the obligation to submit the case to their own

¹²⁴³ Sivakumaran (n 1036) 1146.

¹²⁴⁴ See e.g. Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (OUP 2012) 70-79.

¹²⁴⁵ *Bemba*, Trial Judgment (n 52) [721].

¹²⁴⁶ Bothe, Partsch and Solf (n 236) 650; see also Dinstein (n 2) 237. Art 75(4)(h) AP I and its customary law equivalent prescribe that no one shall be prosecuted or punished *by the same Party* for the same offence. Even if applied in a NIAC, the phrase 'by the same Party' makes it clear that while neither the state nor the rebel group would be compelled to recognize each other's judgements, armed groups would still be under an obligation to prevent double trials for the same offence within their group.

¹²⁴⁷ See art 49 GC I, art 50 GC II, art 129 GC III and art 146 GC IV.

authorities for prosecution.¹²⁴⁸ From a normative point of view, it would probably be the most desirable outcome if an armed group could hand over persons suspected of having committed war crimes to State other than their adversary, which then, in line with the principle of universal jurisdiction, could subject these individuals to a fair trial.¹²⁴⁹ This could also include referral to the ICC or another international tribunal, in case the relevant institution has jurisdiction. However, even where the ICC or another international tribunal is competent to prosecute, their efforts will normally be confined to a handful of leading perpetrators.¹²⁵⁰

Although rare, requests to have both their own and captured personnel tried by States do occur in practice. Kurdish officials in Syria, for example, have called upon European States to repatriate and try foreign ISIS fighters detained by the Democratic Union Party (PYD) and other groups.¹²⁵¹ Another example could be observed in 2010, when Mai-Mai militias in the DRC handed over one of their commanders charged with large scale sexual violence to the local UN peacekeeping force.¹²⁵² Apparently the group had assumed the peacekeepers would transfer the accused to the ICC but they instead handed him over to the Congolese authorities.¹²⁵³

¹²⁴⁸ ICRC 2020 GC III Commentary [5146].

¹²⁴⁹ See also *Bemba*, Amicus Curiae Observations (n 1189) [25].

¹²⁵⁰ In addition, the ICC does not enjoy primacy over domestic courts. In case domestic authorities are genuinely investigating and prosecuting the same individual, the case might be inadmissible under Article 17 of the ICC Statute.

¹²⁵¹ Bethan McKernan, 'Foreign Isis fighters must face trial on home soil, Kurds say' (*The Guardian*, 24 September 2018) available at <<https://www.theguardian.com/world/2018/sep/24/foreign-isis-fighters-must-face-trial-on-home-soil-kurds-say>> accessed 20 December 2022.

¹²⁵² Sandesh Sivakumaran, 'Implementing humanitarian norms through non-State armed groups' in Krieger (n 56) 142.

¹²⁵³ *ibid.* He was ultimately tried by a military court in Goma. See also 'Congolese militia commander arrested over mass rapes' (*The Times*, 7 October 2010) available at <<https://www.thetimes.co.uk/article/congolese-militia-commander-arrested-over-mass-rapes-07fnglf7vz9>> accessed 20 December 2022.

Ultimately, however, third parties remain reluctant to undertake such trials. Furthermore, where such offers have been made on behalf of armed groups, they usually only concern captured enemy fighters. In addition, the transfer of the accused will normally require an act of enforcement jurisdiction by the receiving State or an international organization to be carried out on the territory of the conflict State and, therefore, require consent of the latter.¹²⁵⁴ Even if the armed group in question manages to transfer the perpetrator outside the boundaries of the conflict State without the support of the receiving State, the acceptance of that transfer without consent of the territorial State might nevertheless be considered an unlawful intervention on behalf of the receiving State. However, any illegality associated with such transfer does not interfere with the receiving State's right to try the accused for international crimes on the basis of universal jurisdiction (*male captus bene detentus*).¹²⁵⁵ In addition, States are under a customary law obligation to 'make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects'.¹²⁵⁶ While this obligation is not absolute, it is arguably broad enough to require States to at least consider, in good faith, offers of having individuals in the custody of armed groups tried abroad.¹²⁵⁷

¹²⁵⁴ O'Keefe (n 215) 29-42.

¹²⁵⁵ *ibid* 109.

¹²⁵⁶ ICRC Customary IHL Study, Rule 161, 618. See also Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, UNGA Resolution 3074 (XXVIII) 3 December 1973 [3].

¹²⁵⁷ The ICRC's customary IHL study noted that '[t]he voting record of the General Assembly resolutions, together with the fact that the UN Security Council and UN Commission on Human Rights urged States to cooperate rather than calling on them to do so, indicates that there does not seem to be, in customary international law, an absolute obligation to cooperate, but rather an expectation that States should make efforts in good faith to do so, to the extent possible.' See ICRC, Customary IHL Study, Rule 161.

6.5. Critical Assessment of Armed Groups Trials and Penal Sanctions as a Tool to Enforce IHL

The previous sections have demonstrated that penal sanctions, when imposed by a regularly constituted court affording all the necessary judicial guarantees, are a lawful, yet not indispensable tool for armed groups to ensure discipline and enforce IHL among its members. In addition, it was shown that armed group commanders may refer transgressing subordinates to such institutions, where they exist, for investigation and prosecution, in order to avoid being held criminal responsibility under the doctrine of command responsibility. However, neither IHL nor the doctrine of command responsibility can be interpreted to entail a positive obligation on behalf of the armed group to employ penal sanctions, or to set up a judiciary providing all the necessary judicial guarantees required by CA 3, AP II and customary law. In response to the **second research question** of this thesis, it can therefore be said that positive international law, at present, does not contain any obligation to pass penal sentences incumbent on armed groups.

At the same time, this Chapter has demonstrated that there is an increasing demand by States and international organizations for that armed groups to ensure genuine accountability within their ranks. This inevitably raises questions about the role courts and penal sanctions – even though not mandated by international law – can and should play in ensuring such accountability. **Chapter 2** has already explored some of the difficulties in enforcing the responsibility of armed groups for IHL violations as a collective. As noted above, the ICRC argued that ‘[a]lthough the establishment of such courts may raise issues of legitimacy, trial by such means may constitute an alternative to summary justice and a way for armed groups to maintain “law and order”

and to ensure respect for humanitarian law'.¹²⁵⁸ While acknowledging that the obligation to prosecute serious IHL violations remains confined to States, Clapham equally argues that 'it would make sense for those engaging with armed groups to explain that setting up procedures for the investigation and punishment of war crimes is an expectation that needs to be fulfilled'.¹²⁵⁹ Moreover, Sassòli points out that the criminal prosecution of armed group members by outside tribunals is less effective as a deterrent than punishment through the armed group itself.¹²⁶⁰ Indeed, prospective perpetrators know that there is a higher probability that they will be caught by their own group than by an international actor. Accordingly, rejection of their conduct by their own social environment has a greater stigmatizing effect than 'reprobation by the enemy, third States or a distant "international community"'.¹²⁶¹ Promoting the use of courts to administer penal sanctions for serious IHL violations or other crimes under customary law could, therefore, be a way to enhance accountability and increase a sense of ownership among armed groups.

Despite the arguments for armed groups courts outlined above, it remains debated to what extent they are effective in deterring IHL violations. In his assessment of the various judicial systems established by armed groups in sub-Saharan Africa, for example, Willms concedes that they were used mainly to enhance the military capacity of the group and only to a lesser degree for the implementation of IHL.¹²⁶² Nevertheless, he concludes that groups that had established courts, such as the SPLA, NRA and ANC, were more disciplined and used violence against civilians more

¹²⁵⁸ ICRC 2020 GC III Commentary [725].

¹²⁵⁹ Clapham (n 548) 19.

¹²⁶⁰ Sassòli (n 225) 10.

¹²⁶¹ *ibid.*

¹²⁶² Willms (n 56) 166-172.

selectively than other groups.¹²⁶³ Other studies suggest that several groups that operated a very sophisticated court system, for example the LTTE, did not exhibit a better IHL compliance record than other groups without such institutions.¹²⁶⁴ In conclusion, there is little empirical evidence that would demonstrate a causal link between the existence of courts and the IHL compliance record of armed groups.

6.5.1. Facilitating Armed Group Trials Through Capacity Building

Nevertheless, if one accepts the idea that penal sanctions imposed by courts are a tool that armed groups should use to combat impunity, implement command responsibility, and ensure compliance with IHL, one option would be to actively support such groups in developing such judicial capacities. This is not entirely without precedent. Some UN Missions, for example, have provided active training to armed groups in relation to their detention operations in order to improve the group's compliance with human rights protections against arbitrary detention.¹²⁶⁵ Occasionally, armed groups also actively ask for international assistance to carry out investigations into potential war crimes committed by their members. An example is Jean-Pierre Bemba's letter to the UN Special Representative in the CAR, asking for support in conducting an international investigations into certain acts of MLC troops.¹²⁶⁶ Similar requests have been made by the RUF and CNDP.¹²⁶⁷ As noted by Sivakumaran, such calls often turn

¹²⁶³ *ibid* 172.

¹²⁶⁴ See the assessment of the LTTE in Hyeran Jo's study on the rules of targeting (n 24) 124.

¹²⁶⁵ See e.g. ONUCI, *Droits de L'Homme: L'ONU Forme des Officiers des Forces Nouvelles*, 3 April 2009, available at <<https://onuci.unmissions.org/droits-de-l%E2%80%99homme-l%E2%80%99onuci-forme-des-officiers-des-forces-nouvelles>> accessed 20 December 2022.

¹²⁶⁶ *Bemba*, Trial Judgment (n 52) [604]-[605].

¹²⁶⁷ Sivakumaran (n 1252) 144.

out to be bluffs.¹²⁶⁸ Nevertheless, he argues that they should be taken seriously by the international community in order to identify those offers that are genuine.¹²⁶⁹

However, any organised attempt at providing support and capacity building for prosecutions carried out by armed groups themselves has so far met fierce political opposition by States. For example, a proposed judicial monitoring system of LTTE courts in Sri Lanka, originally envisaged to be based on the Judicial System Monitoring Programme in East Timor, had to be cancelled for fear of legitimizing the courts.¹²⁷⁰ When the MLC announced its intention to conduct trials over its soldiers in the DRC, MONUC offered to organise airplanes for defence attorneys from Kinshasa to support the trials. However, the government of the DRC prevented the attorneys from boarding.¹²⁷¹ Even in Northern Syria, where many States have not objected to (and some even actively endorsed) AANES courts trying their nationals who committed crimes as part of ISIS, no State went as far as to actually provide technical assistance or officially recognise these Courts, despite repeated calls from the Kurdish authorities to do so.¹²⁷² Indeed, such engagement is often perceived as providing the armed group with undue international legitimacy.¹²⁷³ An additional consideration behind this reluctance could be the fact that States might expose themselves to legal liability by

¹²⁶⁸ *ibid.*

¹²⁶⁹ For example, the UN Special Representative in the CAR offered to assist in the investigation of war crimes allegedly committed by the MLC in response to Bemba's letter. Bemba, however, never followed up on this offer. See *Bemba*, Trial Judgment (n 52) [723].

¹²⁷⁰ Sivakumaran (n 39) 509.

¹²⁷¹ See Willms (n 56) 149.

¹²⁷² Beatrice Eriksson, 'A Visit to Northeast Syria Shows the Urgency for Governments to Repatriate Their Citizens, Many of Them Children, to Thwart ISIS' (*Opinio Juris*, 2 September 2021) available at <<https://www.justsecurity.org/78064/a-visit-to-northeast-syria-shows-the-urgency-for-governments-to-repatriate-their-citizens-many-of-them-children-to-thwart-isis/>> accessed 20 December 2022.

¹²⁷³ Krieger (n 19) 563-83.

being complicit in the conduct of potentially unfair trials, including in relation to their own nationals.¹²⁷⁴

In conclusion, serious efforts towards capacity building will often be legally and politically unfeasible.

6.5.2. *Selective Enforcement*

If the use of courts for enhancing compliance with IHL were to be promoted, the fact that many armed groups will not be able to comply with the necessary judicial guarantees to carry out trials poses a significant problem. **Chapter 4** has already demonstrated that the ‘downgrading’ of fair trial norms is not a valid option and would equally reduce the guarantees expected from States. In this regard, some have suggested that the international community may at times adopt a more tolerant position towards IHL violations by an ‘outlaw group with shakier law-applying institutions’.¹²⁷⁵ Shany, in particular, argues that in such cases, ‘selective enforcement may be viewed as a corrective measure, which somewhat offsets the elevated status of States over non-State actors in international life and the superior influence that the former have on IHL law-making’.¹²⁷⁶ Moreover, he proposes that monitoring bodies should accord some degree of deference to the work of IHL-applying bodies, such as court martials.¹²⁷⁷ As mentioned above, the ICRC expressed its concern that it is doubtful if armed groups

¹²⁷⁴ See Hannes Jöbstl, ‘Outsourcing Justice: State Obligations and the Prosecution of Foreign Fighters by Armed Groups in Syria’ (*Armed Groups and International Law Blog*, 6 April 2020) available at <<https://www.armedgroups-internationalallaw.org/2020/04/06/outourcing-justice-state-obligations-and-the-prosecution-of-foreign-fighters-by-armed-groups-in-syria/>> accessed 20 December 2022.

¹²⁷⁵ Sassòli and Shany (n 811) 436.

¹²⁷⁶ *ibid.*

¹²⁷⁷ Yuval Shany, ‘The End of the War/Peace Limit on the Application of International Human Rights Law’ in Bardo Fassbender and Knut Traisbach (eds), *The Limits of Human Rights* (OUP 2019) 326.

could ever, as a matter of law, conduct valid judicial proceedings in accordance with the procedural requirements of IHL.¹²⁷⁸ Yet, the ICRC also noted that trials by armed groups could constitute a somewhat welcome alternative to summary justice.¹²⁷⁹

These arguments seem to imply that a flawed trial might be preferable – as a kind of ‘lesser evil’ – to summary justice even though both actions would constitute serious violations of IHL. Such arguments are, therefore, based on the assumption of some implicit hierarchy of norms within the body of IHL, a hierarchy that formally does not exist. Both flawed trials and summary justice endanger protected persons, breach important values, and thus constitute serious violations of IHL (in particular, CA 3) and can entail individual criminal responsibility.¹²⁸⁰ It might seem like a pragmatic, realist argument to say that monitoring or enforcement bodies should ‘look the other way’ because a flawed trial still offers greater procedural protection to an individual than having no trial at all. However, it should not be forgotten that such trials are often used to strategically legitimise what is, essentially, arbitrary killing. As described by Darcy with regard to the systematic disregard for fair trial guarantees by the IRA, such proceedings allow armed group members to kill detainees while drawing ‘moral comfort as well as a sense of legitimacy from using the language of due process’.¹²⁸¹ This does not mean that every minor flaw in a trial should entirely preclude the use of courts by armed groups to enforce IHL and help commanders discharge their obligations under command responsibility through referral to such bodies. Effects on overall compliance, the level of substantive legal protection and

¹²⁷⁸ Melzer (n 155) 215.

¹²⁷⁹ ICRC 2020 GC III Commentary [725].

¹²⁸⁰ See ICRC, ‘What are Serious Violations of International Humanitarian Law: Explanatory Note’, available at <<https://www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>> accessed 20 December 2022.

¹²⁸¹ Darcy (n 317) 163-64.

potential social incentives must all be taken into account and balanced against each other when making a case for selective enforcement.

Selective enforcement is in fact used by international criminal tribunals – whether consciously or not – in relation to trials and penal sanctions imposed by armed groups on their own fighters. Several courts and tribunals have highlighted the flawed nature of trials or other judicial procedures employed by armed groups against their own members, usually in the context of determining whether the accused has complied with their duty to punish under command responsibility. The SCSL, for example, noted the arbitrary nature of the AFRC’s disciplinary system which sometimes resulted in immediate execution upon allegation without any formal procedure.¹²⁸² Nevertheless, the Trial Chamber suggested that the accused should have used this system to punish his subordinates in order to comply with this obligation under command responsibility.¹²⁸³ Equally, the trials of Jean Pierre Bemba’s MLC fighters have been publicly described as seriously flawed and criticised for their failure to provide essential rights of defence to the accused.¹²⁸⁴ Even so, however, neither Bemba nor AFRC leaders were charged with a violation of CA3(d) for such conduct – that is, the passing of sentences without a regularly constituted court affording the necessary judicial guarantees – despite the fact that both the SCSL and the ICC were competent to charge this war crime.¹²⁸⁵

A similar observation can be made with regard to the current proceedings against *Al-Hassan* at the ICC, who has been charged with the systematic denial of a

¹²⁸² *RUF case* (n 34) [707].

¹²⁸³ *Brima*, Trial Judgment (n 1159) [594]-[597] and [1739].

¹²⁸⁴ Recall the US intervention in the Security Council mentioned above at (n 1127).

¹²⁸⁵ Art 3(g) SCSL Statute and art 8(2)(c)(iv) Rome Statute. However, in the case of the SCSL this could also be due to the fact that the Court did not view CA 3 as applicable to intra-party violence. See **Chapter 3**, section 3.1 and *RUF case* (n 34) [1451].

fair trial under Article 8(2)(c)(iv) under the Rome Statute.¹²⁸⁶ Despite evidence that the *shari'a* tribunals used by *Al-Hassan* and others have not only been used to try civilians but also for proceedings against armed group members¹²⁸⁷, the victims listed by the prosecution seem to be exclusively civilians.¹²⁸⁸ As explained in **Chapter 3**, the ICC has endorsed the view that the protective scope of IHL can extend to intra-party violence.¹²⁸⁹ Yet, related prosecutions have so far been restricted to particularly vulnerable groups such as child soldiers.¹²⁹⁰ However, it is also understandable that, policy-wise, the prosecution is likely to ignore the denial of a fair trial to group members, especially if they were themselves involved in the above mentioned crimes. Selective enforcement may, therefore, be difficult to justify from the perspective of positive law, but inevitably forms part of legal reality and prosecutorial priorities.

6.5.3. *Rethinking Immunity in Relation to Accountability Measures*

Another aspect that could incentivise the use of IHL-compliant penal sanctions for accountability measures would be the introduction of some sort of ‘combatant immunity’ for armed group individuals involved in such measures. To recall, **Chapter 3** has explained how the legal capacity of armed groups to pass penal sentences is best characterized as a ‘weak permission’ since its lawfulness is based on the absence of any prohibitive rule. Moreover, it was demonstrated that as a result of this ‘weak permission’, individuals involved in armed group courts may be subjected to domestic

¹²⁸⁶ *Al-Hassan* (n 13).

¹²⁸⁷ See UNHRC, Report of the independent expert on the situation of human rights in Mali (9 January 2015) UN Doc A/HRC/28/83 [76]-[78].

¹²⁸⁸ *Al-Hassan* (n 13)

¹²⁸⁹ See **Chapter 3** and *Ntaganda*, Appeal of the Decision on the Defence’s challenge to the jurisdiction of the Court (n 304) [60].

¹²⁹⁰ *ibid.*

penal sanctions by State authorities even when these courts are operated in compliance with the necessary judicial guarantees. Indeed, only a *right* properly so-called would implicitly entail an obligation of non-interference – and in turn a prohibition of prosecution – incumbent on the State party to the conflict. However, as demonstrated in **Chapter 3**, State practice is abundantly clear that no such immunity currently exists, neither in relation to the general administration of justice in rebel-held territories, nor in relation to specific accountability measures in relation to violations of IHL. Absent a rule to the contrary, a sovereign State retains its right to declare certain acts by its citizens or conduct on its territory as criminal and punish it accordingly.

Since States remain free to punish the mere participation in a rebellion, immunity from penal prosecution for participation in accountability measures will matter little for members of armed groups properly so-called, who engage in fighting roles or otherwise engage in the struggle against the governmental authorities. However, such form of immunity might nevertheless benefit civilians such as judges, prosecutors or police officers, whose sole participation in the rebellion is related to specific accountability measures or the maintenance of law and order in territories controlled by the armed group. Such a specific and limited form of immunity could be desirable as it would incentivise trained lawyers and officials to participate in the proper administration of justice.

6.6. Conclusions

This Chapter has demonstrated that international law, as it stands today, contains no positive obligation to establish courts or employ penal sentences incumbent on armed groups. It has explained that any attempts to justify the existence of such obligation based on the organizational criteria necessary for armed groups to become a party to a

NIAC must be discarded. Such line of argumentation is not only difficult to reconcile with the jurisprudence of the ICC and ad-hoc tribunals, it would also introduce a dangerous conflation between threshold and substantive protection.

In addition, the Chapter has argued that any substantive obligation to prosecute serious IHL violations remains confined to States. Indeed, subsection 6.2.1 has demonstrated that the often invoked obligation to respect and ensure respect for IHL, to the extent it exists as a customary law norm applicable to armed groups in NIAC, cannot be interpreted to require armed groups to enforce IHL via penal sanctions. Moreover, section 6.2.2 has explained that current State practice and *opinio juris* do not support the extension of the customary law duty to prosecute war crimes in NIACs to such groups. Finally, contrary to States, armed groups are also not required by law to develop such judicial capacities.

While this difference in obligations between States and armed groups is often invoked as an example that belligerent equality remains a fiction in NIAC, the related concerns that usually accompany this conclusion do not necessarily apply with the same force to the passing of penal sentences. Indeed, it was shown that the limitation to States of an obligation to prosecute serious violations of IHL is a deliberate consequence of States' own desire not to legitimize any forms of rebel governance. In that sense, it would be difficult for States to invoke the less exacting regime applicable to armed groups in order to escape their own, more exacting duties. Moreover, the duty of States to maintain an independent judiciary providing the necessary fair trial guarantees stems from human rights law, which is not subject to the concept of belligerent equality in the first place.

These findings notwithstanding, where armed groups operate competent judicial authorities capable of delivering a fair trial, they enjoy a legal capacity to use

them in order to punish IHL violations and common crimes without *ipso facto* committing a violation of international law.¹²⁹¹ This includes the referral by armed groups commanders of transgressing subordinates to such courts in order to escape individual criminal responsibility under the doctrine of command responsibility. Indeed, it was shown that armed group courts can constitute ‘competent authorities’ in the sense of Article 28 of the ICC Statute.

While falling short of extending the obligation to prosecute to armed groups or require them to set up a judiciary, State practice seems to increasingly expect armed groups to take certain accountability measures, most notably the investigation of potential war crimes and the use of disciplinary sanctions. In this sense, the use of courts and penal proceedings can be *one way* for an armed group to ensure such accountability within its ranks. Some commentators, therefore, suggest that the international community should engage in capacity building efforts. However, apart from obvious political obstacles, in particular the implicit legitimization that comes with such efforts, it remains unclear to what extent courts can actually improve IHL compliance.

This Chapter has also shown that feasible alternatives to the use of penal sanctions by armed groups remain limited. The transfer of suspects to the territorial State might be attractive only in relation to common criminals but not for members of the armed group, and even less so for crimes related to an armed conflict fought against that State. States not party to the conflict, on the other hand, will often be reluctant to volunteer and prosecute armed groups members, while international tribunals frequently lack jurisdiction. Moreover, even where the ICC or another tribunal is

¹²⁹¹ See also 2020 ICRC GC III Commentary [936] which notes that ‘the imposition of disciplinary sanctions *alongside criminal sanctions* can play a crucial role in improving compliance with common Article 3 within such groups’.

competent to prosecute, their efforts will normally be confined to a handful of leading perpetrators. Finally, administrative detention can be a viable alternative to deter future transgressions by the same individual under certain circumstances. However, such forms of detention require procedural guarantees not so different from those expected for judicial institutions passing penal sanctions. Therefore, while frequently used by armed group in practice, detention operations that do not comply with IHL or IHRL should not be encouraged.

In light of these difficulties, some international criminal tribunals seem to be willing to turn a blind eye on the violation of fair trial guarantees where trials are used to punish subordinates for IHL violations. However, it is doubtful whether this practice should be encouraged, apart from cases with only minor judicial flaws.

7. Overall Conclusions

In order to summarise the conclusions of the previous six Chapters and to place them in a broader context, it is important to recall the research questions stipulated at the outset of this thesis:

a.) To what extent do armed groups have the legal capacity under international law to conduct trials and pass penal sentences?

b.) Does international law require armed groups to conduct trials and pass penal sentences?

In **Chapter 1**, the reader was introduced to the *Sakhanh* case, which sparked the research idea behind this thesis. The principle of sovereignty, in words of the Stockholm District Court, ‘does not prevent a non-State actor from establishing a court’.¹²⁹² Indeed, this thesis has shown that neither the principle of sovereignty, nor any other rule of international law, categorically prohibits armed groups from holding criminal trials and or passing and executing penal sentences. While it was explained that armed group courts must be ‘established by law’ in order to pass sentences in compliance with international law, ‘laws’ of the armed group can, in principle, meet this requirement. The right to a fair trial is therefore not, as Mégret has argued, a right to be tried by a ‘tribunal that is an emanation of the state’.¹²⁹³ Armed groups can be said

¹²⁹² *Sakhanh* (n 46) [30].

¹²⁹³ Mégret (n 43) 485.

to enjoy a legal capacity to conduct trials and pass penal sentences without violating international law. However, this conclusion comes with two caveats.

First, this legal capacity is based exclusively on the absence of a prohibition. International law remains indifferent on whether such trials and sentences are actually carried out during armed conflict. The capacity of armed groups to pass penal sentences is thus best understood as a ‘weak permission’. Accordingly, operating courts and passing sentences remains an ordinary act of rebellion and States are free to subject individuals participating in such acts to domestic penal sanctions. While there might be normative arguments in favour of introducing some sort of ‘combatant’ immunity to armed group trials that are meant to implement IHL and punish war crimes, current State practice simply does not provide any legal basis for such a proposal.

Second, CA 3 and its customary law equivalent incorporate exacting fair trial standards from IHRL and impose them onto armed groups irrespective of their organisational capabilities. Accordingly, these guarantees must be met by any armed group that meets the basic organisational threshold of CA 3. In practice, this will often render the above mentioned legal capacity illusory. However, the inclusion of these standards in CA 3, the ‘humanitarian minimum’ of protection, makes it difficult to justify any dilution of these standards. Moreover, it was demonstrated that the right to a fair trial – which is so essential to the implementation of many other rights – sets a very high normative ideal and full compliance is rare even among States. Since compliance is only a means to an end, calls to downgrade these standards should be met with caution. However, unrealistic standards are problematic when they entail the individual criminal responsibility of the accused. In this regard, it was shown that ICL cushions a potential normative overreach by dispensing with the legal basis of a court as a relevant aspect for determining the criminal responsibility of individuals involved

in passing sentences without the judicial guarantees mandated by IHL. Moreover, it focuses on the cumulative effect of individual judicial guarantees and their effect on victims.

With regard to the second research question, the thesis has demonstrated the capacity to pass penal sentences cannot constitute an indispensable criterion to meet the organisational threshold for a collective of individuals to become a party to a NIAC. Indeed, it was shown that while the existence of a disciplinary system is often highlighted by commentators as an element of the capacity to ensure respect for IHL, neither the text of CA 3 or AP II, nor the relevant case law of international criminal tribunals provide authority for such systems being a necessary prerequisite. Moreover, even if it were otherwise, there is no reason why this requirement cannot be met by the use of disciplinary sanctions that do not fall within the scope of the fair trial guarantees provided by CA 3 and customary law, and which have been recognised as effective tools to enforce compliance with IHL.

In addition, it was shown in **Chapter 6** that an obligation to use penal sanctions cannot be deduced from a customary law version of the CA 1, which incorporates an obligation to respect and ensure respect for IHL. It was demonstrated that it is doubtful whether existing State practice and *opinio juris* confirm the existence of CA 1 as a norm of customary law applicable to armed groups in NIAC. Even if such a norm did apply, its content would likely not amount to an obligation to enforce IHL with penal sanctions. Moreover, while there is an increasing amount of State practice demanding armed groups to engage in accountability measures, such practice does not, at present, suffice to establish a specific customary law duty that would require armed groups to prosecute war crimes.

These findings notwithstanding, where armed groups dispose over competent judicial authorities capable of delivering a fair trial, international law permits their use in order to enforce discipline and compliance with IHL. This includes the referral by armed groups commanders of transgressing subordinates to such courts in order to escape individual criminal responsibility under the doctrine of command responsibility. In this regard, it was shown that armed group courts can indeed constitute ‘competent authorities’ in the sense of Article 28 of the ICC Statute. However, the concept of command responsibility can not be interpreted to require an individual commander to establish a functioning judiciary, even less so the armed group as a collective. In conclusion, international law cannot be said to *require* armed groups to establish courts or pass penal sentences.

In answering these two research question, the thesis has also touched upon normative considerations that go beyond the narrow subject-matter of penal sentences and affect the regime of IHL in NIAC as a whole. In particular, it was demonstrated that the traditional perception of IHL as a body of law that is applicable only to the relationship between enemy parties of an armed conflict is no longer accurate. Indeed, IHL is not categorically precluded from providing protection to intra-party abuse, provided that potential victims meet the relevant status-based requirements.

Moreover, it was explained that the nexus criterion, as commonly applied by international criminal tribunals and endorsed by influential actors such as the ICRC, inserts an asymmetry into the application of IHL to acts of rebel governance. In particular, the focus on control of territory as a decisive factor to establish a nexus between a trial or penal sentence and the armed conflict privileges the State party to a NIAC. In the field of ICL, this privilege translates into immunity for State actors in

relation to unfair trials over common crimes whereas similar acts would constitute a war crime when carried out by an armed group.

A related aspect is the hesitancy of States to endorse the application of human rights obligations to armed groups, in particular positive obligations with regard to the civilian population in territories under their control. It was argued that in situations of prolonged control, IHL becomes inadequate and a nexus to the armed conflict increasingly difficult to justify for acts of rebel governance. However, as **Chapter 2** has demonstrated, States retain their dominant position in the creation of custom and it is unlikely that they are willing to expand positive IHRL obligations – and the perceived normative legitimacy that such obligations entail – to armed groups in the near future.

Finally, in elaborating on these questions, the thesis has at multiple points touched upon the principle of equality of belligerent and discussed to what extent it can be said to exist in NIAC. While treaty law in the form of CA 3 and AP II certainly incorporate this principle, it is clear that the non-existence of a customary law obligation to prosecute war crimes incumbent on armed groups – whose existence for States is widely accepted – provides support for the notion that this presumed equality under IHL is not absolute. However, this difference in obligations must be attributed to the deliberate attempt of States to keep positive obligations of armed groups, and therefore any norm that could legitimize acts of rebel governance, to a minimum. This minor discrepancy should therefore not be invoked to dispense with belligerent equality – as an imperfect ideal – altogether, given that it otherwise provides a vital incentive for compliance through reciprocity.

In that sense, the present study on armed groups and penal sanctions can be seen as a case study that highlights multiple problems that affect the body of IHL

applicable in NIAC as a whole. The application of IHRL to armed groups, the interpretation of the nexus criterion, and the (non)-existence of belligerent equality in NIAC are certainly topics that merit further research and deserve to be the subject of theses in their own right.

Even in relation to the narrower sub-field of courts and penal sanctions operated by armed groups, further research needs to be done. A promising next step would be to switch the focus of the inquiry towards State obligations in relation to the sentences passed by armed groups. Under what circumstances can, should or must such acts be recognised in domestic jurisdictions or before international (criminal) courts? Provost and Fortin have already made valuable contributions in this regard, discussing the national and transnational recognition of legal acts by armed groups.¹²⁹⁴ Others, such as Amoroso or Nuridzhanian have discussed armed group courts in the context of the complementarity regime of the ICC.¹²⁹⁵ It is the hope of the present author, that this thesis can serve as a reference work for these further inquiries and that the framework discussed and developed in the previous Chapters provides guidance to legal practitioners and academics alike.

¹²⁹⁴ Provost (n 40) 414-445; Fortin (n 968).

¹²⁹⁵ See (n 806).

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