Rebel Courts
- The legality of courts established by non-state actors in the context of NIAC

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Abstract

Most armed conflicts today are not international, but rages within States. There are several examples where oppositional armed groups have established their own courts, and the reality of these courts is that they fail to comply with both international humanitarian law and international human rights law. However, there are some arguments to be made as to why these courts may be needed under certain circumstances. There is a legitimate interest in that armed groups should be able to uphold discipline within their own military units, and that the population of an area controlled by a rebel group for several years during a lengthy civil war might rather have a judicial system set up by rebels than nothing. Additionally, there are rebel groups with the aim to comply with international law, and legal recognition of their courts might have a positive impact. Contrary to this is the interest of the State in keeping its sovereignty and the fact that these courts often fail to afford fair trial guarantees. The question of these courts’ legal standing in international law is the main focus for this thesis. The treaty law regulating non-international armed conflict, and specifically courts, is limited to the Common Article 3 (1) (d) of the 1949 Geneva Conventions and Article 6 of the Additional Protocol II. The international humanitarian law gives no obvious answer to the question if these courts are legitimate, but notably there is no apparent prohibition against them. Examination of the applicable international humanitarian law, interpreted in the light of the closely connected international criminal law and international human rights law, rather points to the conclusion that rebel courts may in fact be legitimate.
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### Abbreviations

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<th>Description</th>
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<tr>
<td>AP II</td>
<td>Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, 8 June 1977</td>
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<td>CPN-M</td>
<td>Communist Party of Nepal-Maoist</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>FMLN</td>
<td>Farabundo Marti Front for National Liberation (Spanish: Frente Farabundo Martí para la Liberación Nacional)</td>
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<td>GC</td>
<td>1949 Geneva Conventions</td>
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<td>IAC</td>
<td>International Armed Conflict</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>LTTE</td>
<td>Liberation Tigers of Tamil Eelam</td>
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<td>NDFP</td>
<td>National Democratic Front of the Philippines</td>
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<tr>
<td>NIAC</td>
<td>Non-International Armed Conflict</td>
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<tr>
<td>ONUSAL</td>
<td>United Nations Observer Mission in El Salvador</td>
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<tr>
<td>RUF</td>
<td>Revolutionary United Front</td>
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<td>UN</td>
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1 Introduction

1.1 Background

In armed conflicts rebel groups set up courts and this challenges the international community. It is not a new phenomenon; there are in fact several examples where armed groups have established courts within a non-international armed conflict (NIAC).\(^1\) The international humanitarian law does not offer a clear answer to the question of whether rebel groups under any circumstances can create legitimate courts, and this is a problem. Each party to the NIAC are called upon to respect the Common Article 3 (1) (d) of the 1949 Geneva Conventions (GC), which with respect to those placed “hors de combat” prohibits:

“the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

The Common Article 3 GC is aimed at both parties, but what does the requirement that a court must be regularly constituted mean; and can a rebel group ever comply with this requirement? It is a relevant question for several reasons, one being the fact that there are both historical and ongoing NIAC’s where rebel courts have been created, why there is an apparent interest in clarification of their legal status. It is a question of what legitimacy an armed group can have in a sphere usually exclusive for the State, and a question of limitations on State sovereignty. Adding to the relevance of the question is the fact that most armed conflicts today are non-international to the character.\(^2\) Furthermore the question touches upon interesting conflicts of interests. There is the perception that the competence to create courts emanates from State sovereignty and that a court created by any other actor than a State, or multiple States as a collective, would not be legitimate. States have a strong interest in maintaining their sovereignty and their status in the international community. But there is also a legitimate interest in that rebel groups should have the possibility to maintain law and order within their own military units and in the areas where they are in effective control. The international community calls upon rebel groups to ensure that their members respect

\(^{2}\) Moir, Lindsay, *The law of internal armed conflict*, Cambridge University Press, Cambridge, UK, 2009, p 1
international humanitarian law; an effort that might be facilitated through the ability to prosecute said members that violate said law within the rebel group.

One of the most recent examples where a rebel group has created a court was brought up in the Swedish case of the Prosecutor v. Omar Haisam Sakhanh, in the Stockholm District Court, where judgement was delivered on the 16th of February 2017.³ The case was about the Syrian citizen Haisam Sakhanh who was prosecuted for grave violations against international law for having participated in the killing of seven Syrian government soldiers, killings he claimed were legitimate executions since they were preceded by a rebel court decision. The main legal question of the case was whether a non-state actor in the context of a NIAC could create a legitimate court. It is the only case to date that has dealt with this specific question.

The area of law where this problem takes place is closely related to and intertwined with human rights, not least because alongside international humanitarian law, international human rights law is also applicable in the situation of NIAC. Courts are a vital part of society upholding an established human rights standard domestically and in the international community, why one also has to consider human rights interests. The right to a fair trial is of particular importance to this thesis. International humanitarian law and international criminal law, is to some extent to sides of the same coin: grave breaches of international humanitarian law are international crimes, war crimes; thus international criminal law is also naturally relevant for this question.⁴

1.2 Purpose and Research Questions

The purpose of this thesis is to examine whether a non-state actor, specifically an armed group, can establish a court in the context of a NIAC. The main focus will be on whether it is possible under international humanitarian law. However there will also be discussion on international human rights law and international criminal law since these legal frameworks are all interconnected, and also for the purpose of bringing the analyses outside the scope of international humanitarian law. In the aim to do this, part of the discussion will be exploring if

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³ Prosecutor v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February 2017, the judgement was upheld by the Svea Court of Appeals in Prosecutor v. Omar Haisam Sakhanh, Svea Court of Appeal, B 2259-17, Judgement 31 May 2017, and appeal was not granted by the Supreme Court, Decision by the Supreme Court, B 1357-17, Decision 21 July 2017
any characteristics of legitimate courts can be found in the right to a fair trial according to both international humanitarian law and international human rights law, though with focus on the former. There will be discussion on what different interests are in question and how they relate to each other. There will be some discussion on the concepts of statehood and sovereignty, concepts which will be analyzed in connection to the research questions. Human rights obligations will also be touched upon to an extent relevant for this thesis. The main research question is:

- Can rebel groups create courts, in the context of NIAC?

In addition to the main research question, these questions will also be discussed:

- What is the relevance of international human rights law?
- Are rebels bound by international law, and on what basis?
- What could be the possible negative and positive effects if rebel courts are legal according to international law, what interests are in question?

1.3 Methodology and Materials

The aim of this thesis is to investigate the legal implications of rebel courts in the context of a NIAC. Primarily there will be reference to the international sources of law as set out in art 38 of the Statute of the International Court of Justice (ICJ), namely treaties, customary law, legal doctrine and case law. Based on the concept that States are equal and sovereign and that the foundation of international law lies within consent between States, there will be positive approach to international law. With reference to literature and articles on the subject, and case law, there will be an attempt of clarifying the legal standing of rebel courts.

This undertaking is associated with several methodological difficulties, one being that there is not a wide variety of cases where this question has been discussed, and where the question has come up in the international courts conclusions can only be drawn in an indirect manner. Another notable difficulty is that there is not a lot of discussion on this topic in the legal doctrine. There will be mention of several examples where armed groups have set up courts, and given a slightly more detailed presentation of three. This is also associated with methodological difficulties, since access to firsthand sources is limited, the sources are limited

in general and may reflect political bias, though there will be attempt to limit such bias. There
is to date only one national case where the question has been discussed, why the judgement
will be accounted for and commented upon. This is the case of Haisam Sakhanh, regarding
crimes committed in relation to the armed conflict in Syria.\(^6\) It is a highly relevant example
because it is a judgement where the main research question for this thesis is discussed. It is
also an example that serves to illustrate some key difficulties in regard to negative points
about the regulations. The case was tried in two instances; the Stockholm District Court and
the Svea Court of Appeals. Since the answer to the legal question – can a non-state actor
create a court within a NIAC – is accounted for in a rather concise manner in the judgement
of the Court of Appeal, and since there is referral to the discussion in the judgement of the
District Court, the latter will be focused on in the presentation in this thesis. The second
eample is the one of the Liberation Tigers of Tamil Eelam (LTTE) in the armed conflict in
Sri Lanka and the third example that will be used is that of Frente Farabundo Martí para la
Liberación Nacional (FMLN) in the armed conflict in El Salvador. The examples of the LTTE
and of FMLN balance the picture of armed groups courts and clarifies why they might
actually be needed under certain circumstances, and why recognition of armed groups courts
could be positive from a humanitarian standpoint. All three examples serve to illustrate the
difficulties associated with the question at hand, both from a humanitarian standpoint, but also
from the point of view of the State interest.

In the discussion aimed at clarifying what rules are applicable, the legal framework of
the international humanitarian law will be discussed, with specific focus on the Common
Article 3 (1) (d) of the GC and Article 6 of Additional Protocol II (AP II).\(^7\) However other
documents within the framework of international humanitarian law will be discussed, and also
documents in the closely connected areas of international criminal law and international
human rights law, since they can be used for interpretation. The Commentary of the
International Committee of the Red Cross (ICRC) on the 1949 Geneva Conventions will be
used as a guide to interpret the conventions.\(^8\) Legal doctrine and articles will also be used for

\(^6\) Prosecutor v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February
2017, Prosecutor v. Omar Haisam Sakhanh, Svea Court of Appeal, B 2259-17, Judgement 31 May
2017

\(^7\) The Geneva Conventions of 1949, International Committee of the Red Cross (ICRC), Protocol
Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of
Non-International Armed Conflicts (Protocol II), 8 June 1977

\(^8\) Clapham, Andrew, Gaeta, Paola, Sassòli, Marco, The Geneva Conventions, A Commentary, Oxford
Commentaries of International Law, 2015
the purpose of interpreting the legal frameworks. Applicable customary law will also be examined.

The International Criminal Court’s (ICC) Elements of Crimes will to some extent be used to interpret the contents of the relevant rules in the GC and the AP II. This document is part of international criminal law and not legally binding, but meant to be of assistance to the ICC when interpreting and applying the articles in the Rome Statute regarding the international crimes: genocide; crimes against humanity; and war crimes.⁹

The analysis will be exploring the conflicting interests of States regarding sovereignty and monopoly to establish courts, and of rebel groups upholding law and order, and what objectives these interest are based on. Part of the discussion will also comment on State interests set against humanitarian interests. There will be some brief comments on whether the framework as it is today is desirable.

Since this thesis will be discussing three different legal frameworks, namely international humanitarian law, international human rights and international criminal law, these three will initially be explored separately in the following third and fourth chapters for the structural purpose of being clear that they are separate frameworks. In the sixth chapter, however, they will be discussed and analyzed together since they are interconnected.

In this thesis the terms armed group and rebel group will be used interchangeably; both having a smaller scope of definition than non-state actor, which is a term that could possibly include other entities that are not in question for this thesis. However the term non-state actor will also be used in this thesis, when required. The specific courts in question for this thesis will be referred to as armed groups courts or rebel courts interchangeably.

1.4 Delimitations

When presenting the examples of rebel courts, facts necessary for answering the research questions of this thesis will be presented. Furthermore there will not be any lengthy presentations of history of the conflicts leading up to the armed conflict in which the armed groups created courts.

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In this thesis there will be three examples of rebel courts, namely the one in question in the case of Haisam Sakhanh, the courts set up by the LTTE in Sri Lanka and those of the FMLN in El Salvador. Only three have been chosen, mainly because this thesis is meant to discuss the current state of international law regulating the area and the examples are meant to be illustrative. The focus will not be on studying all the cases where rebel courts have been set up, this would also be an interesting investigation, however this is not included in the aims set out for this thesis. The examples are presented to illustrate both the eventual positive and the negative consequences of rebel courts, and these three are meant to give a nuanced, broad picture of the scope of the problem.

The intensity of the armed conflict needs to reach a certain level for both the Common Article 3 GC and the AP II to be applicable, and the threshold for AP II is somewhat higher. When the threshold for AP II is reached, they are both in effect alongside each other. This thesis will be discussing the situation where there is enough intensity in the conflict for both to be applicable. There will be further comment on this in the fourth chapter.

This thesis will stay within the framework of a NIAC for the reason that international regulations differ in international armed conflicts (IAC) and in NIAC. Some of the regulations overlap and they will be touched upon, but this thesis will be written from a NIAC perspective. This thesis is aimed at a target group already in possession of some knowledge in international law, and specifically international humanitarian law, why no extensive explanations of the basic concepts will be given unless it is required for the purpose of deeper understanding.

International human rights law is applicable, but the question if non-state actors have human rights obligations can be left aside. Because the recognition of the violation against human rights law does not hinge on the question of whether non-state actors have obligations or not; States have undoubtedly got human rights obligations and therefore the responsibility will fall on the state if not on the non-state actor. This will not be discussed in any further depth, because this thesis’ aim is to discuss the legality of rebel courts, not the possibility of enforcement of violations against the right to a fair trial in the context of a NIAC.

1.5 Outline

Chapter two of this thesis will give a short presentation of the fundamental principles constituting the basis for States competence of establishing courts. There will be a short discussion on the concept of sovereignty, human rights obligations and the interplay between States with regard to reciprocity.

Chapter three will discuss the contents of the right to a fair trial. This will be presented from both an international human rights law perspective, and from the international humanitarian law perspective. Then there will follow a short summation on what can be said about general characteristics of a court.

In chapter four the question of whether non-state actors, and specifically rebel groups, can create legitimate courts in the context of a NIAC will be explored and discussed. The treaty- and customary international humanitarian law regulating NIAC will be clarified, and interpretations of the law with regard to the research questions will be presented. International criminal law will be included in the discussion since it is relevant for interpretation. The fourth chapter also includes a discussion on which legal framework, international humanitarian law or international human rights law, will be applicable. There will also be a discussion on why rebel groups are bound by international law, and on what basis they are bound.

Chapter five will consist of three examples of rebel courts. The first one will be about the judgement delivered in the case of Haisam Sakhanh, and the discussion will focus on presenting the relevant arguments from the judgements. Then there will be two presentations of examples where armed groups have set up courts, what arguments they have made as to their legitimacy and something will be said about their compliance with international law.

The sixth chapter will present some further analysis on how to interpret the international humanitarian law applicable to the situation, and the research questions will be answered. The seventh chapter will present some final conclusions.
2 The Competence of States

2.1 Introduction

In order to answer the question of whether rebel groups can establish courts, some discussion needs to be made on the nature of States and of sovereignty. States are the actors that traditionally create courts; it is a natural part of statehood and of ruling on the national level. Additionally there are courts on the international level, and since there is no “world State” they have been established in a non-traditional manner. There are international courts dealing with both State-to-State concerns and with individuals. One example is the ICC, where individuals can be prosecuted for international crimes. The ICC was created through States ratifying the Rome Statute\(^\text{12}\), thus it is a court based on State decision. The legitimacy of a court is intimately connected to, and emanates from, the sovereignty of States.

With recognition of statehood come rights and obligations. Sovereign States have monopoly on the right to exercise jurisdiction over its territory and population, and courts are incorporated in this exercise. In principle, States have the exclusive right to set up the courts and in any State the court system plays an important role in upholding law and order and enabling the people to enforce their rights. Another side of this competence, and also emanating from the principle that all States are equal, is the principle of non-interference; that States should not interfere with the domestic affairs of other States\(^\text{13}\).

To give a nuanced description of different aspects that makes this a problematic question it is important to touch upon some key concepts regarding States traits, competences and motivations. This chapter will touch upon some of these concepts, which are relevant for the questions of this thesis.

2.2 The Concept of Statehood and Sovereignty

States are the main actors in the field of international law; they are the ones who primarily create the rules of international law. They are also the ones whose behaviour the majority of international law aims at regulating. This makes for a unique area of law where the system is


horizontal, in contrast to most national systems where the structure is vertical; as mentioned above there is no “world State”. The nature of international law is consequently naturally connected to the concept of what a State is, and the concept of State sovereignty. The concept of a State is primarily based on State practice, the attitude of other States. In short, if the international community accepts an entity as a State, then it is a State. Nevertheless there are three general criteria that are usually mentioned, even though there is no definite consensus on this. There needs to be a defined territory, a population and a government or central power that is effectively able to exercise control over the two first mentioned.\(^\text{14}\) Perhaps the most essential one of the three is the territory, because without a territory that is reasonably well defined, there cannot be a State. It is also the most graspable and concrete criteria. The respect for territorial integrity is an essential principle of international law.\(^\text{15}\) Another important and relevant factor for the entity to be defined as a State is whether or not it has the capacity to enter into legal relations with other States.\(^\text{16}\)

The foundation of international law rests upon the presumption that States are sovereign and equal actors, and that they have the power to dispose of their sovereignty as they wish.\(^\text{17}\) However there is no consensus on the definition of sovereignty, and the equality is not absolute. Furthermore there is a noticeable, though perhaps theoretical, contradiction in this system. On the one hand States are sovereign entities that have the power to govern themselves; on the other hand they are part of a system where they agree to observe certain rules that by definition limit the legal options of action. It is therefore necessary to join the view upon sovereignty as something that States can limit if they wish; the limitation is in itself being a use of the State sovereignty.\(^\text{18}\) In contrast, States sovereignty can be limited without consent, for example by State practice by the community at large. But one has to consider this; if States are to function together and abide by the international rules set up, and


also respect human rights, sovereignty cannot be limitless.\textsuperscript{19} It is another question however, if a non-state actor can limit the sovereignty of a State, without consent.

### 2.3 Human Rights Obligations

Taking a positivist view on the matter, States are legally obligated to respect human rights.\textsuperscript{20} This too is connected to sovereignty; States do not as a rule interfere with other States domestic human rights violations. But if there are breaches or issues on this subject, this is not an exclusively domestic affair. A demonstration of this is the rule of exhaustion of domestic remedies. It basically means that States should get a chance to remedy a situation in violation of human rights on the State level, but if this is not possible or does not happen for whatever reason, it is then an international matter.\textsuperscript{21}

Human Rights in general are not all absolute, far from it. But certain rights are regarded as higher in hierarchy, and that can be understood from which rights States are able to legally derogate from in times of war or other emergency. One of the non-derogable ones is the right to freedom from retroactivity of criminal offences.\textsuperscript{22} It is clear from many different human rights documents.\textsuperscript{23} This right is closely connected to the right to a fair trial, which is noticeably not mentioned in the human rights treaties as a non-derogable right. There will be a more elaborate discussion on the right to a fair trial in chapter 3.2.

### 2.4 Motivation and Interplay between States

Despite the particular character of international law the majority of states abide by it the majority of the time. Part of the answer to the question as to why that is, can be found in the element of reciprocity. States are motivated to abstain from certain actions, because it makes

\textsuperscript{22} Shaw, Malcom N., \textit{International Law}, 6\textsuperscript{th} ed., Cambridge University Press, Cambridge, 2008, p 256
it more likely that other states will also abstain from these actions. This is clear in the area of diplomacy.\textsuperscript{24} Additionally the political cost of breaking international law can be extensive, and also lead to great economic costs.\textsuperscript{25} Indeed states have to consider not only the legal effects of their actions, but also the political, economic, military and social ones.\textsuperscript{26} There are also advantages to be gained from complying with international law, namely getting the public opinion on one’s own side, perhaps to encourage cooperation of some kind.\textsuperscript{27}

Law and politics have a more complex relationship in international law than in national orders, where there is often a clearer separation between the two. This also affects the motivations of why states behave the way they do. The territory controlled is connected through politics, culture and economy amongst other things.\textsuperscript{28}

\textsuperscript{24} Shaw, Malcom N., \textit{International Law}, 6\textsuperscript{th} ed., Cambridge University Press, Cambridge, 2008, p 6-9
\textsuperscript{25} Bring, Ove, Mahmousi, Said, Wrang, Pål, \textit{Sverige och Folkrätten}, 4\textsuperscript{th} ed., Norsedts Juridik, Visby, 2011, p 24
3 Characteristics of a Court

3.1 Introduction

The characteristics of a legitimate court can with benefit be seen through the right to a fair trial; the two are intimately connected. This right is regulated in both international humanitarian law and in human rights law. The right to a fair trial aims at the organization of the judicial process; it is a right to a fair process. This means that the court has to meet and live up to certain criteria, important ones being for example independence and impartiality.\(^{29}\) In order to make some relevant observations on what a legitimate court is, there will be a discussion on what the right entails. First there will be a presentation of the right to a fair trial from the human rights perspective, then from the international humanitarian law perspective.

3.2 The Right to a Fair Trial

3.2.1 According to International Human Rights

The right to a fair trial is guaranteed as a human right through most regional human rights treaties. It contains rules on how court proceedings should be conducted and on how the courts should be organized, with the purpose of making sure of proper administration of justice and also safeguarding the rule of law. What is not included is a right to a fair outcome of the trial.\(^{30}\) The rather detailed regulations are motivated by the exposed situation of the individual while under the authority of the state. This is a situation where there is not naturally equality of arms, why a purpose of regulating is protecting the weaker part from arbitrariness.\(^{31}\) As is mentioned in chapter 2.3 above, when looking at the human rights treaties, the right to a fair trial is not one of the rights that appears highest in the hierarchy of rights. It is not mentioned in the clauses of the different human rights treaties where it is regulated which articles the states are not permitted to derogate from in times of war or emergency. Nonetheless the right to a fair trial is also considered a part of international

customary law and according to The UN Human Rights Committee it is a peremptory part of international law. The Committee has expressed that even though the right is not mentioned in the non-derogation clauses, the right to a fair trial cannot be derogated from.\textsuperscript{32} This is because it plays a vital role in guaranteeing the other non-derogable rights, such as the prohibition against torture, and because it is an essential part of ensuring the principles of legality and the rule of law.\textsuperscript{33}

Looking closer at the first part of article 14 in the human rights treaty 1966 International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{34}

“All persons shall be equal before the courts and tribunals. In determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

Amongst other things, this means that like cases should be treated alike, that no one can be treated differently if there are not objective and reasonable objectives to why, and that both parties must be provided with the same procedural rights. It means that the court must be independent from the executive and the parties of the case, and that there must be measures taken to safeguard this independence. It means that proceedings cannot be unreasonably delayed, which is a matter of making an assessment in the specific case. Delays because of lack of financial resources are not acceptable.\textsuperscript{35} It is noteworthy that contained in the right to a fair trial is the requirement that courts and tribunals are “established by law”. This requirement means that the rules on how the court is to be operated should be established in law, as a safeguard for interference from the executive.\textsuperscript{36} It is not entirely clear however, how this requirement would stand in relation to a rebel court. The requirement has been discussed by the ICTY in the Tadic case. There the Appeals Chamber argued that the most sensible and most likely interpretation in the context of international law is that “established by law”

\textsuperscript{32} UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, para 11
\textsuperscript{34} UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
means that a courts establishment must be in accordance with the rule of law. Also the
Appeals Chamber notes; “the important consideration in determining whether a tribunal has
been “established by law” is not whether it was pre-established or established for a specific
purpose or situation; what is important is that it be set up by a competent organ in keeping
with the relevant legal procedures, and should that it observes the requirements of procedural
fairness”.37 The requirement has also been discussed by the European Court of Human Rights
(ECtHR) in the case Coëme and others v. Belgium, where the ECtHR referred to the
requirement as an insurance that the executive does not abuse the judicial organization but
rather that is should be regulated by law emanating from Parliament.38

3.2.2 According to International Humanitarian Law

There are also requirements of fair trial guarantees in the international humanitarian law. The
Common Article 3 GC (1) (d) GC prohibits (emphasis added):

“the passing of sentences and the carrying out of executions without previous
judgement pronounced by a regularly constituted court, affording all the judicial guarantees
which are recognized as indispensable by civilized peoples”

There is no list of guarantees or apparent content in this article in itself. But in Article
6 AP II there is a list of guarantees, and Common Article 3 GC is to be interpreted in the light
of Article 6 AP II. This list is considered customary, and it is not exhaustive. The list in
Article 6 AP II includes amongst other things the right of the accused to not be convicted of
an offence except on the basis of individual penal responsibility; to be informed of the
particulars of the offence alleged without delay; to not be held guilty of any criminal offence
which did not constitute a criminal offence under the law at the time it was committed; and
the right for the accused to be tried in his/her presence. According to the Commentary of the
ICRC on the Geneva Convention II, there are some minimum guarantees that are generally
the ones included in Common Article 3 GC. These include; the right to be presumed innocent,

37 Tadic, Prosecutor v. (Case No. IT-94-1), 2.10.1995, Appeals Chamber, Decision on the Defence
Motion for Interlocutory Appeal on Jurisdiction, para 45
38 European Court of Human Rights, Coëme and others v. Belgium, applications nos. 32492/96,
32547/96, 32548/96, 33209/96 and 33210/96, 22.6.2000, para 98
the principle of *nullum crimen, nulla poena sine lege* (no crime or punishment without law) and the requirement that an accused have the necessary rights and means of defence.\(^{39}\)

Perhaps the most interesting part of the right to a fair trial for this thesis is the guarantee of impartiality and independence. The impartiality has two sides to it; a subjective and an objective side. The court must be subjectively impartial in the way that the judges come to decisions without personal bias, and that they cannot base their decisions on preconceptions of the case. They must be uninfluenced by the public and media. The court and its judges must also appear impartial from the point of view of an outside observer without bias. That is the objective impartiality.\(^{40}\)

It is unclear what the legal significance of statements by human rights bodies like The UN Human Rights Committee is for the courts operated by rebel groups. However there is little doubt that such human rights bodies’ interpretations of human rights are relevant for State operated courts in the context of NIAC. It might have to do with what human right obligations rebel groups can be considered to have, this will be elaborated on in chapter four of this thesis.

### 3.3 Characteristics of a Court

So what characteristics of a court can be seen through the right to a fair trial? It is complicated to make a list of things that define a court, but some requirements definitely have to be met. A key characteristic is the principle of separation of powers; the judicial and the executive must be separated.\(^{41}\) And the right to a fair trial is required to ensure that other human rights are respected. Additionally a failure to live up to an acceptable degree of regulation of this right is bound to raise concerns as to the credibility of a justice system.\(^{42}\) As mentioned above, independence and impartiality is very important. It is noteworthy that, even though the right to a fair trial is a right that is high in the hierarchy, and not possible to derogate from to any

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\(^{40}\) Clapham, Andrew, Gaeta, Paola, Sassoli, Marco, *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, Commentary on GC II, para 703


great extent, states still fail to comply with it. This is mainly because of problems in the structures and organisations of the States justice systems.\textsuperscript{43}

4 Courts Established by Rebel Groups

4.1 Introduction

During a NIAC international humanitarian law is applicable, however international human rights law is also applicable. The two frameworks exist alongside each other, and overlap.  

This thesis aims to deal with the topic of rebel courts in the context of a NIAC, why both legal frameworks will be discussed, although the main focus will be on international humanitarian law. It should also be pointed out that national legislation of the State party will continue to be in force during the NIAC.

International humanitarian law is based upon the principle of humane treatment of individuals, and the principle of respect for human life and dignity. Its goal is to protect human life and dignity. This goal is shared with the body of international human rights law. The two frameworks have both developed in a direction where the individual is more and more in focus, because of these common values, but they do have different foundations and motivations. International humanitarian law, historically regulating warfare between States, has been based on reciprocal expectations of two States at war. The principle of humanity has been able to arise through this reciprocity. Since it has historically been a body of law regulating States behaviour in relation to other States, it has by its very nature been of international character. In contrast international human rights law is founded on a relationship of a fundamentally different character, the relationship between a State and its citizens, whom are bearers of rights that said State has to protect/respect. Historically human rights have been a domestic matter of constitutional law.

Before the late 1940’s a non-international armed conflict was an almost exclusively domestic matter. National law was the applicable regulation. The fact that States themselves had the right to determine how they wanted to deal with armed conflict within its borders, where no other State was involved, was in itself a part of international law. It was part of the

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principle of sovereignty and non-interference.\textsuperscript{47} The Common Article 3 GC regulates NIAC, and the second additional protocol of 1977 extended the regulations of NIAC even more. There are still numerous and more detailed rules regulating IAC, but a lot of these regulations have also become customary law and are thus applicable in NIAC as well. The ICRC has concluded that about 86\% of all the customary rules of IHL apply in both IAC and NIAC.\textsuperscript{48}

The expansion of NIAC IHL regulation, both treaty law and customary law, after the Second World War happened parallel to the expansion of international human rights law. The UN General Assembly adopted the Universal Declaration of Human Rights in 1948. This cemented the fact that individuals have rights, which the State needs to relate to. There is an individual-State relationship that is regulated on the international level; it is not a purely domestic affair. The development in both international humanitarian law and international human rights law is that the perspective has drifted towards focusing more on the individual. In human rights law, the individual is a barer of rights that are recognized internationally. The development has gone towards the international community progressively enabling the individual to enforce her rights on an international level. The same shift of focus can be seen in international humanitarian law. Historically, armed uprising has been seen as an entirely domestic security affair, but this is no longer the case and it is based on humanitarian considerations.\textsuperscript{49} Also the fact that there has been a shift in the character of armed conflict from States waging wars against other States, to armed conflicts between States and non-state actors, has brought the international humanitarian law closer to international human rights law.\textsuperscript{50} Additionally, the preamble of AP II reads that States agree to the protocol “recalling furthermore that international instruments relating to human rights offer a basic protection to the human person”.\textsuperscript{51} Also noteworthy is that both the ICTY and the International Criminal

\textsuperscript{47} Ohlin, Jens David, \textit{Theoretical Boundaries of Armed Conflict and Human Rights}, Cambridge University Press, 2016, Chapter "The use and abuse of analogy in IHL”, Kevin Jon Heller, p 241
\textsuperscript{48} Ohlin, Jens David, \textit{Theoretical Boundaries of Armed Conflict and Human Rights}, Cambridge University Press, 2016, Chapter "The use and abuse of analogy in IHL”, Kevin Jon Heller, p 232
\textsuperscript{49} Moir, Lindsay, \textit{The Law of Internal Armed Conflict}, Cambridge University Press, online publication July 2009, p 3ff
\textsuperscript{50} Meron, Theodor, \textit{The Humanization of Humanitarian Law}, American Journal of International law, Vol.94, Issue 2, April 2000, p 244
\textsuperscript{51} Preamble to the International Committee of the Red Cross (ICRC), \textit{Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Pretection of Victims of Non-International Armed Conflicts (Protocol II)}, 8 June 1977
Tribunal for Rwanda (ICTR) have been using methodology and looking to international human rights law while applying international humanitarian law in their jurisprudence.\textsuperscript{52}

4.2 \textbf{International Humanitarian Law or International Human Rights Law?}

As mentioned above, there is no question today that international human rights law is applicable alongside international humanitarian law in armed conflict. The right to a fair trial, which is the right that is of most interest for this thesis, exists in both frameworks. So if the answers to the question of legality of rebel courts are different according to the two frameworks, which one shall preside and how to they relate to each other? This question is not clear since the relationship between international humanitarian law and international human rights law is not settled.\textsuperscript{53} This warrants some discussion on the subject.

When a right is established in both legal frameworks, the principle of \textit{lex specialis} presides. This principle can be divided into two different variants depending on the nature of the contradiction. The first variant is applicable when the two rules contradict each other. Then the more general rule has to give way for the more specific rule, but only in the part that is contradictory. The second variant is applicable when there is a more general rule and a more specific rule or a rule that is more fitted to the circumstances at hand; there is no specific inconsistency between the rules. Then the more specific/fitted rule is to be used.\textsuperscript{54} The International Court of Justice examined the relationship in its advisory opinion on the legality of nuclear weapons. The advisory opinion discussed the right to life and specifically the right to not be arbitrarily deprived of one’s life in relation to the possible use of nuclear weapons: “in principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable \textit{lex specialis}, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to

\textsuperscript{52} Meron, Theodor, \textit{The Humanization of Humanitarian Law}, American Journal of International law, Vol.94, Issue 2, April 2000, p 244 f


Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”\(^{55}\) The ICJ considered international humanitarian law *lex specialis* in this case and therefore that it was to be applied in the question of nuclear weapons. However one cannot overdraw the implications of this case as they did not explicitly establish a rule that international humanitarian law is always to be *lex specialis*, but rather that there must be an assessment on a case to case basis.\(^{56}\)

### 4.3 Applicable Law

#### 4.3.1 International Humanitarian Law

The base of the legal framework for international humanitarian law is the four Geneva Conventions with additional protocols, which contain rules ensuring protection of individuals during armed conflict.\(^{57}\) In the situation in question for this thesis, when there is an armed conflict of a non-international character, the only parts of the legal framework that is directly applicable is the Common Article 3 GC and the AP II. And to begin with, the intensities of the conflict must reach a certain threshold for Common Article 3 GC and AP II to be applicable. The threshold for AP II to be applicable is somewhat higher than of Common Article 3 GC, the conflict must be more intense, but once they are both applicable they are both in effect alongside each other.

After some of the most difficult discussions of the Geneva Conference the States could agree on the Common Article 3 GC.\(^{58}\) The article became the first legal regulation of non-international armed conflict to be contained in an international instrument.\(^{59}\) The great focus on this article in this thesis warrants an almost complete quotation:

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\(^{55}\) International Court of Justice (ICJ), *Legality on the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p 226, para 25


\(^{59}\) Moir, Lindsay, *The Law of Internal Armed Conflict*, Cambridge University Press, online publication July 2009, p 23 ff
“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) 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'… To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

To start with this means that the conflict has to take place on the territory of a state that is a party to the Geneva Conventions; virtually all states are.\(^6^0\) Secondly there has to be an armed conflict that is not international to the character. In the Tadic case, the Appeals Chamber of the ICTY found that an armed conflict exists "whenever there is a resort to armed force between States of protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".\(^6^1\) There is no established definition of what situation amounts to an armed conflict; however determining when an international armed conflict exists is not very problematic. This has to do with the fact that States don’t usually use force against each other, why the determination is not very complicated. But determining whether the armed conflict is not of an international character is associated with different considerations. One thing that makes it harder to determine, is that one part of State conduct is to use force within its territory against individuals to a certain extent, whereas this is not normal conduct against other states. It is part of State sovereignty to have monopoly on the use of force. Another consideration that follows is that it can be problematic to determine when a situation has crossed over from being just internal disturbances to being an armed

\(^{60}\) Moir, Lindsay, *The Law of Internal Armed Conflict*, Cambridge University Press, online publication July 2009, p 30

\(^{61}\) Tadic, Prosecutor v. (Case No. IT-94-1), 2.10.1995, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 70
conflict; the line is somewhat blurry. If the situation amounts to an armed conflict, that is not international to its character, the Common Article 3 GC and AP II will be applicable.

When having determined that the article is applicable, one has to consider if the Common Article 3 GC gives any straight answer to the question if a rebel group can create a court without breaching the article. Notably there is no explicit prohibition for non-state actors courts in Common Article 3 GC; but does it entitle non-state actors to create courts?

The chapeau to Common Article 3 GC states that the article is aimed at “each Party to the conflict” in its entirety. Since the article is applicable in NIAC, a logical interpretation is that this means both the state and the non-state actor. If the non-state party to the conflict was not bound by the article in its entirety, then this provision would not be effective, thus the “regularly constituted court” requisite is directed at both the State party and the armed group party, this requisite is of particular interest for this thesis.

Looking closer at the formulation of “regularly constituted court”: this formulation seems to be referring to the way the court has been established, rather than to how the court should operate; the referral to “judicial guarantees” is the part that addresses the operational requirements. There are however, different interpretations of what the phrasing actually means. The formulation is not used in the Additional Protocol II. The Additional Protocol II elaborates on the regulations of humanitarian law in NIAC, and is applicable on the territory of a state that has ratified it. It is prescribed in Art 1(1) AP II that the protocol “develops and supplements Article 3… without modifying its existing conditions of application...”.

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62 Moir, Lindsay, *The Law of Internal Armed Conflict*, Cambridge University Press, online publication July 2009, p 33 f
64 Clapham, Andrew, Gaeta, Paola, Sassòli, Marco, *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, Commentary on GC II, para 714,
67 Art 1(1), International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977
II the formulation of a “regularly constituted court” was changed to “a court offering the essential guarantees of independence and impartiality”. In the ICRC commentary to the protocol little guidance as to why the formulation was changed is found, except that the new formulation was accepted without much opposition. Furthermore the ICRC commentary to the AP II remarked that some experts had argued that it would be “unlikely that a court could be “regularly constituted” under national law by an insurgent party”. That opens up for the problem that if a rebel group could not create a court living up to the requirements in the article, they would be unable to comply with the article since it is aimed at both parties of the conflict. In the ICRC commentary to the Common Article 3 GC there are two suggested lines of arguing to give the provision effect. The first argument is that a court is regularly constituted as long as it is established in accordance with the “laws” of the rebel group. This raises the question if rebel “law” counts as law at all. The second argument is that armed groups could continue to operate existing courts applying existing legislation.

Another perspective close at hand on how to interpret the phrasing is that it is close to the human rights standard “established by law”. This interpretation also raises the need to consider what goes in to the word law: the narrow scope where only State law qualifies would prohibit non-state actors courts; a wider scope including rebel law would not prohibit non-state actors courts. Under international humanitarian law it is suggested by Willms that rebel law could be included. This is supported by the reports of the United Nations Observer Mission in El Salvador (ONUSAL) where there was an investigation of the laws of the then oppositional group FMLN. The report reads that the FMLN laws do not establish sufficient procedural guarantees. This investigation, and the fact that there is no objection by the ONUSAL as to the FMLN enterprise to write its own laws, is an indication that the ONUSAL accepted the FMLN’s competence to do this, and supports the assessment that “rebel law” can

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68 Art 6 (2), International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
70 Clapham, Andrew, Gaeta, Paola, Sassoli, Marco, The 1949 Geneva Conventions: A Commentary, Oxford University Press, 2015, Commentary to GC II, para 714
be included in law. By the same token, it is held by Sivakumaran that inclusion of “rebels law” is interpreting the word law in the light of the situation where it is applied, and that law should be interpreted as to include “rebels law”.

Common Article 3 GC is part of international customary law, and Rule 100 of the Customary Law Study of the ICRC stipulates that fair trial guarantees are a part of customary international law. The ICRC study on the customary nature of the treaty rules of international humanitarian law concluded that according to customary law a “court is regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country” consequently it seems that the customary law is slightly more specific on the meaning of “regularly constituted court”, including in the formulation that the court needs to conform to national law, whereas that is not evident just looking at the treaty law. This would mean that customary law would not allow for the situation where a rebel group creates a court in line with its own “laws”. It does not however seem rule out the possibility for a rebel group to create a court – as long as it does so in accordance with the national laws and procedures in force in the country where it resides.

In contrast, according to the Appeals Chamber of the ICTY, the customary law and treaty law have developed alongside each other and are consistent and not conflicting.

Looking at the formulation in API art 75 (4), which is not applicable in a NIAC, the formulation “impartial and regularly constituted court” is used. It is based on the Common Article 3 GC but emphasizes impartiality by adding the word, and is therefore being clearer on the fact that administration of justice must be impartial. This article can also give

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78 Tadic, Prosecutor v. (Case No. IT-94-1), 2.10.1995, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 98
indications on how to interpret Common Article 3 GC and what guarantees the article entails.  

It has been suggested that the law of occupation could possibly be used through analogy, when dealing with the relationship between the national laws of the State in which the NIAC takes place, and the “laws” of the armed group. The IV Geneva Convention Article 64 regulates the matter of law in occupied territories, by another State. In its first paragraph it states that the national legislation of the occupied territory shall remain in force, but that there are two exceptions, namely if it constitutes a threat to the occupying State or if it disable the implementation of the Geneva Convention. In that case it is allowed for the occupying State to repeal or suspend the national legislation. These two examples should be seen as justified by military necessary considerations. The second paragraph allows for enacting legal provisions in the interest of maintaining public order. The occupying power is also allowed to set up courts for the purpose of maintaining security and public order. They will exist alongside the national authorities of the State. However the law of occupation is only directly applicable in IAC, which in many ways differ from NIAC; the scope of rules regulating IAC is vastly bigger than that of NIAC, thus many rules included in IAC do not have a NIAC counterpart, why not all rules will be able to use analogously. The ICRC commentary on the GC points out that notably NIAC has no equivalent to the IAC law of occupation.

81 Art 64, 1 paru, International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949
4.3.2 International Criminal Law

The same wording is used in the Rome Statute of the International Criminal Court (Rome Statute), as in Common Article 3 GC. The Rome Statute was adopted in 1998 and it is a representation of important developments within the laws concerning internal armed conflicts. The majority of states have signed the Rome Statute, which is a clear expression of State practice. It is also meant to represent a codification of State perception of international crimes. Even though said document is part of international criminal law, which is of course a different legal framework than international humanitarian law, they are interrelated and mirror each other to some extent. The international criminal law, specifically war crimes law, criminalizes violations against some rules of international humanitarian law. However not all violations against IHL amounts to a war crime. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) set up some requisites for war crimes in its decision regarding jurisdiction in the Tadic case. It decided that for there to be a war crime: “(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, …; (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim...; (iv) the violation of the rule must entail, under customary or conventiona law, the individual criminal responsibility of the person breaching the rule.” Even though IHL and ICL have a close connection, there is a relevant distinction relevant for interpretation. One framework aims at regulating the conduct of States and other parties to conflict, while the other regulates the conduct of individuals. Breach of the international humanitarian law can result in some sort of compensation, breach of international war crimes law can result in imprisonment of an individual. The scope of prohibited acts under IHL is wider than that of ICL, which relates

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84 Moir, Lindsay, The Law of Internal Armed Conflict, Cambridge University Press, online publication July 2009, p160
85 Footnote here, perhaps book, international criminal law and procedure
87 Tadic, Prosecutor v. (Case No. IT-94-1), 2.10.1995, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 94
to the “most serious crimes of international concern”. However, when interpreting international criminal law, it is necessary to refer to international humanitarian law. Additionally it is relevant to consider international criminal law because it is an important mechanism for the possibilities of enforcing international humanitarian law. Article 8 (2) (c) (iv) of the Rome Statute regulating the war crime of sentencing or executing someone without due process, has the same wording as Common Article 3 GC: “regularly constituted court”. It does however, not outright prohibit court created by a non-state actor.

In the case of Bemba, which came up before of the ICC, rebel courts were touched upon. Bemba was convicted of war crimes and crimes against humanity according to the rules on superior responsibility, for the actions of his subordinates. Superior responsibility can be in question if a superior fails to take measures to prevent or repress offences of his or her subordinates, or if he or she fails to submit the matter to the “competent authorities”. In the case of Bemba Amnesty International filed a motion arguing that “competent authorities” should be interpreted with regard to international human rights law. This would require a tribunal “established by law”, and that law in this case should be understood as established by a parliament. The motion further argued that a non-state group judicial body would not be established by law in this meaning and thus not be satisfactory. The point being that Bemba could not escape superior responsibility by referring the alleged crimes of his subordinates to a rebel court. The Pre-Trial Chamber II did not share the view of Amnesty International but convicted Bemba on the grounds of superior responsibility, and even points out that it gave particular weight to the fact that there was a functional judicial system within the group

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93 Bemba Gombo, Prosecutor v. (Case No. ICC-01/05-01/08), 20.4.2009, Pre-Trial Chamber II, Amicus Curiae Observations on Superior Responsibility submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08-406, para 22-23
Bemba was affiliated with, which he did not use.\textsuperscript{95} This case can be seen as a confirmation that arms groups’ courts are not illegal, and that they could meet the requirements in Article 8 (2) (c) (iv). Because if they were, a person prosecuting someone in such a court would possibly commit a war crime, and this is not something the ICC would promote.\textsuperscript{96}

In the document Elements of Crimes, a guiding document not legally binding but used for the interpretation and application of the Rome Statute, the formulation “regularly constituted court” is elaborated on.\textsuperscript{97} The phrasing is explained as referring to an independent and impartial court affording “all other judicial guarantees generally recognized as indispensable under international law”.\textsuperscript{98} It seems that the key to interpret the formulation lies in the principles of independence and impartiality. One should look at the manner in which the court complies with these principles through affording sufficient standards of the right to a fair trial, rather than focusing on the way the court was created.\textsuperscript{99} The formulation in AP II is in line with the elaboration on art 8 (2) (c) (iv) Rome Statute in Element of Crimes.\textsuperscript{100}

4.4 Are Rebel Groups Bound by International Humanitarian Law, and if Yes; Why?

A question that is raised is whether non-state actors, specifically for the purpose of this thesis rebel groups, are bound by international humanitarian law at all, and if so; on what basis? Looking at Common Article 3 GC, there is nothing controversial about the fact that the State party is bound by the convention since they are bound through their own choice. It is a use of their sovereignty. And as has been shown above, the Common Article 3 GC is directed at both parties to the conflict, i.e. the State and the armed group. But rebel groups cannot be parties to the Geneva Conventions due to lack of capacity, and if they do not agree to be bound, how

\textsuperscript{95} Bemba Gombo, Prosecutor v. (Case No. ICC-01/05-01/08), 3.7.2009, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para 501
\textsuperscript{96} Willms, Jan, \textit{Justice through Armed Groups’ Governance – An Oxymoron?}, SFB-Governance Working Paper Series, No. 40, October 2012, p 8
\textsuperscript{97} UN General Assembly, \textit{Rome Statute of the International Criminal Court}, Art 9, International Criminal Court (ICC), \textit{Elements of Crimes}
\textsuperscript{98} International Criminal Court (ICC), \textit{Elements of Crimes}, p 34
\textsuperscript{99} Clapham, Andrew, Gaeta, Paola, Sassôli, Marco, \textit{The 1949 Geneva Conventions: A Commentary}, Oxford University Press, 2015, Commentary on GC II, para 700
\textsuperscript{100} Willms, Jan, \textit{Justice through Armed Groups’ Governance – An Oxymoron?}, SFB-Governance Working Paper Series, No. 40, October 2012, p 8
can they still be considered imposed with obligations.\textsuperscript{101} Because there is no need for the armed group to agree to consider themselves bound, for the Common Article 3 GC or the AP II to be applicable.\textsuperscript{102}

Starting by looking at the Vienna Convention on the Law of Treaties, it regulates the treaty relationships between States. Article 34-36 explains how treaties can create rights or obligations for third States. Even though the Vienna Convention only mentions States, it is relevant for rebel groups to.\textsuperscript{103} The requirement for a third party to be imposed with obligations is that it was the intention of the parties to the treaty to impose obligations on the third party, and that the third party accepts the obligations. Regarding the first requirement Common Article 3 GC was quite clearly intended to impose obligations on non-state actors/rebel groups. The second requirement, that the rebel group would have to consent to the obligations to be legally bound, is more problematic. A rebel group fighting a government might not be inclined to want to assent to duties imposed on it by the very government it is fighting.\textsuperscript{104} Consequently the law of treaties does not explain how a rebel group that does not wish to be bound by international law, might still be bound.

Another argument that has been presented in the ICRC commentary to GC IV for rebel groups being bound by the Common Article 3 GC emanates from them controlling a part of the states territory; by exercising effective sovereignty. They would also, however, have to claim to represent the State or part of the State.\textsuperscript{105} Consequently, of they exercise effective control and claim to represent at least part of the State; they would be bound by Common Article 3 GC. This is because if they were to be successful in their endeavour to take over the State, the State itself would not have changed its legal standing internationally. It would still be a State with State attributes, and therefore still bound by international law. It would be bound by Common Article 3 GC because of it being customary law. It would be unreasonable if the rebel group would not be legally bound by the standards that they would

\textsuperscript{104} Moir, Lindsay, \textit{The Law of Internal Armed Conflict}, Cambridge University Press, online publication July 2009, p 52
\textsuperscript{105} Pictet, Jean S. (ed), \textit{Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in time of war}, of 12 August 1949, 1958, p 37
most definitely be bound by on the day they became the new government. There is a problem with this argument, being that it presupposes that the rebel group claims to represent the State, because this is not always the case.\textsuperscript{106} Furthermore, this makes the binding effect of the actual provisions depend on the intentions of the rebel group, rather than on the facts of the situation, which is problematic.\textsuperscript{107}

There is also the doctrine of legislative jurisdiction, from which one could argue that rebel groups are bound by virtue of being nationals in a State that has ratified the Geneva Conventions. More specific, a national government with the capacity to legislate and through law bind its nationals, that has accepted the Geneva Conventions, has also bound all its nationals.\textsuperscript{108} Also the fact that States practice presumes that the provisions are binding for rebel groups, together with what appears to be opinio juris, could point to rebel groups being bound by customary law.\textsuperscript{109} This argument has been criticized by Cassese, as being based on a misconception of international versus domestic law. Cassese’s critique consists in part of the remark that regardless of the fact that States can bind their nationals through entering into international agreements, the question of rebel groups is what their legal status is in international law. The question is not whether the individuals of a rebel group are bound by national law, but rather what legal standing the rebel group has in relation to the State against which it is fighting, and also other States.\textsuperscript{110} Another problem with this doctrine is that the rebel group is unlikely to feel obligated to respect national law, and might even declare national law invalid in the territory they control. If this is the case, the doctrine of legislative jurisdiction does not offer a satisfying answer to why Common Article 3 GC would till be binding upon the rebel group.\textsuperscript{111} According to Fleck, however, the argument from an armed group that they are fighting the legal order of the State in which they are in opposition, is not

\begin{thebibliography}{99}
\bibitem{109} Moir, Lindsay, \textit{The Law of Internal Armed Conflict}, Cambridge University Press, online publication July 2009, p 53 f
\bibitem{111} Moir, Lindsay, \textit{The Law of Internal Armed Conflict}, Cambridge University Press, online publication July 2009, p 54
\end{thebibliography}
sufficient for them to not be bound by the international humanitarian law, they are bound by virtue of being nationals in the State that ratified the Geneva Conventions, and also because they are the addressees of the legal framework.\textsuperscript{112}

5 Case Studies

5.1 Introduction

Within the context of armed conflict, many armed groups have set up courts. They are often referred to as ‘people’s courts’, and are justified in the view of the armed groups with the argument that the people demand them. Some examples where such courts have been set up are: the National Democratic Front of the Philippines (NDFP) in the Philippines; the Revolutionary United Front (RUF) in Sierra Leone; the Communist Party of Nepal-Maoist (CPN-M) in Nepal; the Frente Farabundo Martí para la Liberación Nacional (FMLN) in El Salvador; the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka.\(^{113}\)

These courts are often criticized for not living up to acceptable standards with regard to the right to a fair trial. In the example of the NDFP in the Philippines, the Special Rapporteur on extrajudicial, summary or arbitrary executions referred to the system of rebel groups as “either deeply flawed or simply a sham” because of the failure to respect rules on due process.\(^{114}\) In the case of Haisam Sakhanh, which will be discussed in the following section, the Swedish court came to the conclusion that simply the fact that the proceedings which lead to a decision of execution, only lasted a maximum of one and a half days, excluded the view that the right to a fair trial was respected in an acceptable manner.\(^{115}\) The State upon which territory the armed group is setting up the court is also naturally often critical, because of the violation against said States sovereignty.\(^{116}\)

5.2 The Case of Haisam Sakhanh

As mentioned in the introductory chapter to this thesis, the question whether non-state actors can create courts has been discussed in the Swedish judgement of the Stockholm District Court (The District Court) delivered on the 16\(^{th}\) February 2017, and after appeal by the Svea

\(^{115}\) *Prosecuter v. Omar Haisam Sakhanh*, Stockholm District Court, B 3787-16, Judgement 16 February 2017, p 38
Court of Appeal in its judgement delivered on the 31\textsuperscript{st} of May 2017.\textsuperscript{117} The judgement was appealed but the Supreme Court decided not to try the case.\textsuperscript{118}

Haisam Sakhanh was convicted of grave violations against international law, for having participated in the execution of a number of Syrian government soldiers. His defence consisted in that he only participated in the execution because a legitimate court, which met all the fair trial requirements of international humanitarian law, had sentenced the soldiers to death. This defence was disregarded because said court was not considered legitimate. However the Svea Court of Appeal did elaborate a bit on the legal question of courts created by non-state actors. There will be a short summary of the background to the case and then a description of the Courts reasoning on the legal question.

In the April of 2012 Haisam Sakhanh went to the northwest part of Syria, which was at the time headquarters for the oppositional group called the Suleiman Fighting Company (Firqat Suleiman el-muqatila). He took part in an attack carried out in the beginning of May the same year by the Suleiman Fighting Company, where seven Syrian soldiers were captured. After an amount of time that was proven to be no more than approximately one and a half days, the soldiers were executed by amongst others Haisam Sakhanh.\textsuperscript{119} The execution was video documented. The bodies of the executed soldiers where afterwards thrown into holes in the ground, this was also video documented. Haisam Sakhanh came to Sweden and was granted residence permit and refugee status in October of 2013. Part of the video of the execution was published on the online version of the New York Times in September of 2013 and Haisam Sakhanh was later identified in the video. In March of 2016 he was detained in Sweden. He was prosecuted for grave violations against international law, his actions consisting in grave breaches against the international humanitarian law, namely the participation in the killing of seven captured Syrian soldiers within the context of a NIAC.\textsuperscript{120}

The District Court established that there was a NIAC in Syria during the time of the killings, also that the applicable regulation was the Common Article 3 GC and the AP II,

\textsuperscript{117} Prosecuter v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February 2017, Prosecutor v. Omar Haisam Sakhanh, Svea Court of Appeal, B 2259-17, Judgement 31 May 2017
\textsuperscript{118} The Supreme Courts decision on appeal, B 3157-17, 20 July 2017
\textsuperscript{119} Prosecutor v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February 2017, pp 4-7, p 38
\textsuperscript{120} Prosecutor v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February 2017, pp 4-7
Syria is not a party to the protocol but it is applicable anyway because of its customary status. The execution was documented on film, and thus the District Court was able to establish that the executions had taken place and who had participated. Additionally Haisam Sakhanh confessed to participating in the killings, but argued he had not committed any crime since they were legal executions because of the preceded judicial ruling.\textsuperscript{121}

Regarding the legal question of whether a judicial ruling preceded the execution, the District Court examined the applicable law. First the fact that according to Common Article 3 GC a captured soldier in a NIAC may not be executed without a judgement by a “regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”, and pointed out that this could give the appearance that only a State could create such a court. Further it was pointed out that such an interpretation would be in line with the principle of state sovereignty and legality. Nonetheless, the content of the article has been clarified since the drafting of the Geneva Conventions, in the following additional protocols and in the Rome Statute, and according to the District Court there has been a shift in focus from the question of how courts are established to how well they uphold fundamental procedural guarantees. The District Court mentions art 75 of API where the requirement is that the court must be “impartial and regularly constituted” and the ICRC commentary on the article. Article 6 of AP II, where the words “regularly constituted” are replaced by “court offering the essential guarantees of independence and impartiality”, is also mentioned and stated to point in this direction.\textsuperscript{122} Furthermore, the fact that Common Article 3 GC is aimed at both the State party and the non-state party to the conflict, leads the Court to the ruling that a rebel group must be able to create a court to be able to comply with the article. In other words, in order to be able to uphold order in their own military units, they must also be permitted to create courts that ensure the order is upheld. This view is supported by associate

\textsuperscript{121} Prosecuter v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February 2017, pp 18-23
\textsuperscript{122} Prosecuter v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February 2017, p 24 ff, art 75 para 4, International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art 6 para 2, International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977,
professor of international law Mark Klamberg who was called as an expert witness in this case.\footnote{Prosecuter v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February 2017, 25 f}

The conclusion of the District Court is that state sovereignty does not prohibit a non-state actor from creating a court, and that the requirement that a court must be regularly constituted is closely linked to the question of whether the court can afford fundamental procedural guarantees. Finally there are two scenarios listed where creating a rebel-court is possible. The first one is to ensure order in the own military units; the other is to uphold order within a territory controlled by the non-state actor under the conditions that the judges were appointed in a regular way before the NIAC and that law that was in force before the NIAC is applied, or at least that the law applied does not deviate from previous law in a stricter direction.\footnote{Prosecuter v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February 2017, p 26 f
Prosecuter v. Omar Haisam Sakhanh, Svea Court of Appeal, B 2259-17, Judgement 31 May 2017, p 3}

The Svea Court of Appeal upheld the judgement of the District Court, and there is a rather concise presentation of the legal question. The Svea Court of Appeal stated that non-state actors must be able to create courts under certain circumstances, and that the 2017 ICRC commentary on Common Article 3 GC supports this position. It also stated that this is under the condition that it can afford fundamental procedural guarantees.\footnote{Sivakumaran, Sandesh, The Law of Non-International Armed Conflict, Oxford University Press, Oxford, 2012, p 553; Bandarage, Asoka, The Separatist Conflict in Sri Lanka: terrorism, ethnicity, political economy, Routledge contemporary South Asia Series, London, 2009, p 7}

5.3 Liberation Tigers of Tamil Eelam

Another example of a non-state actor that has created courts is the LTTE during the armed conflict in Sri Lanka. The conflict dates back earlier than 1983 and is from the beginning a regional South Asian conflict emerging from a complex composition of factors; a prominent one being ethnic confrontation. The armed conflict in Sri Lanka took place between 1983-2009 and during this time the LTTE had control of parts of the territory in the east and north of the country.\footnote{Prosecuter v. Omar Haisam Sakhanh, Svea Court of Appeal, B 2259-17, Judgement 31 May 2017, p 3

Prosecuter v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February 2017, 25 f
Prosecuter v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement 16 February 2017, p 26 f
Prosecuter v. Omar Haisam Sakhanh, Svea Court of Appeal, B 2259-17, Judgement 31 May 2017, p 3
Sivakumaran, Sandesh, The Law of Non-International Armed Conflict, Oxford University Press, Oxford, 2012, p 553; Bandarage, Asoka, The Separatist Conflict in Sri Lanka: terrorism, ethnicity, political economy, Routledge contemporary South Asia Series, London, 2009, p 7} During the conflict the LTTE has been reported to violate both international human rights law and international humanitarian law through amongst other acts extrajudicial
killings and attacks on civilians.\textsuperscript{127} About ten years into the conflict, the LTTE started establishing a court system on the territory of which it was in control. They developed a judicial system and the Tamil Eelam Penal and Civil Codes, inspired by Sri Lankan, Indian and British law. The codes where applied in the courts set up by the LTTE, which were about 17 at the systems most developed stage, consisting of district courts, High Courts and an Appeals Court. There was a specific procedure for cases concerning the death penalty with a special committee for pardoning. Any lawyer from Sri Lanka could appear before the court if he or she took an oath. The courts did not only deal with military cases, but heard also heard cases of land disputes and financial matters. As pointed out by Sivakumaran: this is “an example of a particularly developed court system”.\textsuperscript{128}

According to the LTTE themselves, the courts were created to help maintain law and order in the territory under their control. What is more is that the chief of the LLTE legal and administration division explained they needed to do it because the people demanded it, and that this demand emanated from a loss in faith in the legal system of Sri Lanka.\textsuperscript{129}

5.4 Frente Farabundo Martí para la Liberación Nacional

In the armed conflict in El Salvador taking place between 1980-1991, the oppositional armed group FMLN created several courts. The courts tried amongst other things violations against international humanitarian law, but also sentenced and executed persons suspected of espionage and collaboration with the government of El Salvador.\textsuperscript{130} The FMLN claimed that they were trying to make sure of compliance amongst themselves with international humanitarian law, and they pointed out that they had legal basis for their courts in Article 6(2)

of AP II. They argued that the requirement set forth in said article, namely that courts must offer the “essential guarantees of independence and impartiality”, did not require the courts to be operating in accordance with or set up in accordance with national law, i.e. the laws of El Salvador. They rather meant that they could use their own laws. They also argued that the requirements in Article 6 (2) AP II have to be adapted to the capacity of the warring parties. Following an incident where a FMLN combatant shot two wounded United States servicemen, whom had been flying a United Stated Army helicopter and been shot down by the FMLN, the FMLN acknowledged the incident and claimed that the responsible person would be charged for breaking both the laws of the FMLN and violating the Geneva Conventions.

In spite of the declarations from the FMLN of efforts and positive outlook on complying with international humanitarian law the report of the ONUSAL, as mentioned above, made several observations of violations of said law. Not only did the report find that the document the FMLN delivered to the ONUSAL was far from a penal code with the requirements set out by AP II; the proceedings before the FMLN courts were in regard to one case described as extremely summary in nature and the courts could be seriously questioned with regard to independence and impartiality.

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6 Analysis

6.1 International Humanitarian Law and “Regularly Constituted Court”

Starting out by discussing the international humanitarian treaty law in question, there are some points to be made. A textual interpretation of Common Article 3 GC seems to point towards the non-state actor being bound by the article in its entirety since it is directed, as is mentioned above, at both parties to the conflict. This would imply that an armed group could establish a court that is “regularly constituted”. Further, the ICRC commentary on Article 6 AP II points out that it would not be likely that a rebel group could create a “regularly constituted” court under national law.\footnote{Sandoz, Yves, Swinarski, Christope and Zimmerman, Bruno (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions, of 12 August 1949, Martinus Nijhoff Publishers, Geneva, 1987, para 4600} This might be, but there is no referral to national law in Common Article 3 GC, and there is no consensus that this is what the formulation aims at. Additionally, if the formulation would refer only to courts set up by States in accordance with national law, then this leaves no room for a non-state actor to comply with the article, and the formulation of “each Party to the conflict” would be without effect.\footnote{Clapham, Andrew, Gaeta, Paola, Sassòli, Marco, The 1949 Geneva Conventions: A Commentary, Oxford University Press, 2015, Commentary to GC II, para 714} It would also go against the principles of effectiveness and good faith to apply an article to a party, when there is no practical possibility for the party to comply with the article.\footnote{Willms, Jan, Justice through Armed Groups’ Governance – An Oxymoron?, SFB-Governance Working Paper Series, No. 40, October 2012, p 7}

As is pointed out by Sivakumaran, there have been propositions of not interpreting the phrase “regularly constitutes” in a literal, but rather in a more practical way. This would be in order to allow the non-state actor to meet the requirements of the Common Article 3 GC. The interpretation of a court established by law would then be as established by rebel law. It is motivated by the fact that rebel groups might not be able to comply with the article if they have to use national law for its courts, and that the relevance in this part of Common Article 3 GC is in that the court affords enough procedural rights: it would be a test of appropriateness. Also pointed out by Sivakumaran: “[as] Nigeria noted as the 1974-7 Diplomatic Conference, if an armed group is sufficiently organized as to be party to a conflict and observe the rules of
humanitarian law, it may be sufficiently organized as to enact laws and a legal basis for its courts.” This is a line of arguing that has been made by several rebel groups setting up courts.138

A point presented by Bond about the phrasing “regularly constituted court” is that this should not be interpreted too literally. There should rather be a test of authority, and that the test is as he puts it “whether the appropriate authorities, acting under appropriate powers, created the court according to appropriate standards”.139

Amongst the international treaties on international humanitarian law the wording has changed. Only the Common Article 3 GC and the AP II regulate the question of rebel courts in NIAC and perhaps the fact that the wording is different in the AP II than in the Common Article 3 GC can give some guidance on what direction States opinions have developed towards. AP II is a further development on Common Article 3 GC, the Geneva Conventions date back to 1946 while the AP II is of 1977. There is bound to be development in this area of law, especially since the way in which wars are waged has changed. Today the majority of wars are non-international to the character, unlike around the time when the Geneva Conventions were drafted.140 The fact that the words “regularly constituted” court are not used in AP II indicates that the emphasis of States concern has shifted from being on the way in which the rebel court would be established, to the way in which the rebel court would be operated. In other words the emphasis has shifted towards concern for fair trial guarantees.141 Furthermore, the API art 75 (4) a also changed the wording compared to Common Article 3 GC from just “regularly contrituted” to “impartial and regularly constituted”. The API is only applicable in international armed conflict, but Since the art 75 (4) API can be used to interpret the meaning of Common Article 3 GC, this emphasis on the impartiality may be interpreted as a step away from the focus on how the court is established, towards how it is operated.

140 Moir, Lindsay, The law of internal armed conflict, Cambridge University Press, Cambridge, UK, 2009, p 1
An interesting problem pointed out by Somer is the relationship between Common Article 3 GC and Article 6 AP II. The AP II sets out to develop and supplements Common Article 3 GC, without modifying the application. However if one divides the provisions into two parts, it seems that it is unclear whether AP II really does modify. The second part of both Common Article 3 GC and Article 6 AP II are about judicial guarantees. The Common Article 3 GC is general and Article 6 AP II lists some provisions; this is a development and a supplement. But the first part, where the requirement of “established by law” is included in Common Article 3 GC and not included in Article 6 AP II, the scope of application appears wider in AP II than in Common Article 3 GC. And it appears that AP II might not be entirely true to its aim of not modifying Common Article 3 GC, a loosening up of the requirements would be a modification rather than a development.\(^\text{142}\) Perhaps this contradiction is relevant for the evaluation of what is meant by “regularly constituted”, and can be taken to mean that the development is taking direction away from this requirement.

Looking to the attitude from the international community on the subject, as mentioned above the international community call upon armed groups to respect international humanitarian law and human rights. An approach presented by Willms is that some of the statements from States and special Commissions amongst others, can say something about the opinion of the international community on whether rebel courts are prohibited. According to Sivakumaran the fact that the international community calls upon rebel groups to investigate crimes within NIAC support the assumption that international humanitarian law does not prohibit rebel courts.\(^\text{143}\)

As mentioned above, it takes a certain level of organisation of an armed group for a conflict to amount to one that is regulated by the international humanitarian law. Reconnecting to the second chapter of this thesis, what about if an armed group starts fulfilling the requirements? What if an armed group starts undertaking the characteristics of a State; i.e. taking moderately effective control over a territory and its population? Does the armed group at some point step into the shoes of the State and adopt the right to establish courts, as is the inherent right of any State or entity acting as a State? Probably not, since the


\(^{143}\) Sivakumaran, Sandesh, Courts of Armed Opposition Groups: Fair Trials or Summary Justice?, p 497, see also Willms, Jan, Justice through Armed Groups’ Governance – An Oxymoron?, SFB-Governance Working Paper Series, No. 40, October 2012, p 7 ff
national law of the State will still be in force. Also there would probably political barriers, beyond the legal ones. For the armed group to be able to enter into agreements with other States would be such a problem. The situation would be different if it were another State convening courts on the territory of the State with which it is in conflict. Then the law of occupation is available, and as is shown above, this part of the Geneva Conventions is probably not suitable for analogical use.144

Regarding the discussion in the second chapter of this thesis on states competences: sovereignty as a concept is not absolute. States sovereignty will be limited both by the State itself, and also by the actions of other States. Hence in the concept of sovereignty itself there seems to be no inherent prohibition against rebel courts. This is also supported by the judgement in the case of Haisam Sakhanh. States can give away this power themselves and perhaps they already have through international humanitarian law.

6.2 The Relationship to Human Rights

As mentioned above, international human rights law is applicable in a NIAC. Regardless of whether armed groups have human rights obligations or not, the legal framework will still be applicable, who is responsible will be relevant while looking to enforcement but the right belongs to the individual regardless. As to whether this body of law would allow a rebel court, it will depend on the meaning of the requirement of the court to be “established by law”.145 If it is held to mean that the court has to be regulated by law which emanates from something like a Parliament, then armed groups might have a very hard time complying with this requirement.146 Assuming further that the rebel court would be compelled to comply with the right to a fair trial, there appears a similar problem as presented above. It would be counter effectiveness and good faith to hold a party compelled to comply with something where there is practially no possible way they could comply. Also the fact that there is a requirement that

144 See discussion in chapter 4.3.1 on the law of occupation
145 See discussion above in chapter 3.2
applies to armed groups, but one they cannot meet, would lead to them not meeting this requirement and thus undermining other rules validity and protective effect.147

If one arrives at the conclusion that the international humanitarian law and international human rights law give to different answers to the legality of rebel courts, the question of which law is to preside presents itself. The lex specialis principle and the two variations of this described above affords no obvious answer to the question. Perhaps the international human rights law should be considered lex specialis on the basis that the rules are more precise and developed, assuming that they are. On the other hand, perhaps international humanitarian law should be considered lex specialis because it is tailored to the situation at hand; the situation takes places in a NIAC which is the precise situation international humanitarian law is created to regulate unlike international human rights law which is more or less always applicable. Also one can consider that this is not really a discussion about rights in the traditional understanding: it is not really a question of the individuals right to a fair trial during NIAC and what legal framework should be applicable; but rather a question of a non-state actors right or possibility to operate a court without violating international law. It resembles Casseses critique that the question if rebel groups are bound by international law is about the legal standing of rebel groups in relation to States, rather than if individuals making up the rebel group are bound by national law.148 It is not a question of a right of an individual, but the question of what legal standing a particular group has, in a specific situation, in the international community. And then perhaps the lex specialis principle is not the principle to turn to at all. Because even though this principle is referred to in the ICJ advisory opinion on Nuclear Weapons, the discussion by the ICJ is still regarding individuals rights to life in relation to the threat or use of Nuclear Weapons. The question for this thesis is not really one of rights at all, it is a discussion on legality or not. Perhaps other interest may be weighed in when discussing what legal framework should preside. Using international human rights law analogously might not be advised, but keeping in mind the suggestion of Clapham that “the strength of the human rights system has always been its

ability to adapt to new demands and new needs”, the need in this case might motivate for human rights to be part of the discussion.\textsuperscript{149}

It is fair to assume that international humanitarian law will apply to NIAC, partly because of the same argument used in the \textit{lex specialis} argumentation; the framework is drafted with this situation in mind, and it is the most specific regulations of the matter. But perhaps international human rights should not be totally disregarded. The development in international human rights law is that it takes more and more place in different areas of law, and to totally disregard it in a question that could possibly have great consequence for individuals (the very aim in mind of human rights is to protect individuals) seems dissatisfaction. As noted above there are fair trial guarantees included in the international humanitarian law, but considering the different aims of the frameworks this is possibly not enough. And as pointed out by Clapham, also speaking to the point that one should involve human rights in the question, human rights organizations monitoring armed groups are “expanding the traditional normative framework beyond humanitarian law”.\textsuperscript{150} This leads to the question of enforcement. When there are grave breaches against the international humanitarian law there will be prosecution of the individual in accordance with international criminal law (and probably there are rules in the national law but setting that aside for now), while breaches of international human rights could lead to accountability for the State in which it happens. There is, however, a gap in the scope of what will be considered a war crime and what is a breach against human rights. The scope of human rights violations is bigger than that of war crimes. For the purpose of this thesis this might be interesting. If the international humanitarian law allows for rebel courts, but they are in breach with international human rights law, then the State in which this rebel court is set up will be responsible for the human rights violations on its territory and possibly held accountable, while still being expected to respect the judgements emanating from this court. This is a neither desirable nor reasonable situation. This can perhaps also speak in advantage for the argument that human rights have a place in the question.

6.3 The Case Studies

Reconnecting to the examples presented above in the fifth chapter, they are included to illustrate the problematic situation in which the question for this thesis takes place. The example of Haisam Sakhanh and the execution of seven persons just about two days after their capture paints a dim picture of a summary execution trying to disguise itself in legitimacy. Neither of the two other examples, namely the LTTE in Sri Lanka and the FMLN in El Salvador, were operating courts that lived up to international humanitarian law. In fact there were breaches against fundamental procedural guarantees that are put forth in both international humanitarian law and in international human rights law. But there was expression of will and intention to follow the humanitarian law, and to some extent what would seem like attempts according to the statements of the groups themselves. As pointed out by Willms, assessing the impact of courts on the overall compliance of a rebel group with international humanitarian law is problematic from a methodological point of view. However, he continues “if a responsible leadership installs courts to genuinely prosecute violations of international humanitarian law, it is quite likely to also take other measures that are apt to lead to a higher degree of compliance, such as careful recruitment, training and close supervision of subordinates”.

The conclusion by the District Court in the case of Haisam Sakhanh that there are two scenarios where a rebel group could create a court will be discussed. The first one where it would be for the purpose of upholding order in the military units seems well motivated. There are however some points of critique to be made against the scope of the second scenario. The requirement that the judges need to be appointed in accordance with existing law before the outbreak of the NIAC is perhaps problematic. To begin with, as is pointed out by Somer, the District Court does not present any justification as to why this is a necessary criterion. If the non-state actor follows the law that is in force and was so before the conflict, which would most likely include regulations on how to appoint judges, this criterion might even be redundant. As is also pointed out by Somer, the fact that the judicial capacity of the non-state actor might hinge on the factor of whether they have access to already appointed judges seems problematic. Partly because it is arbitrary: whether the non-state actor has access to such a judge or not would depend on the circumstances; and also because the state in which the

NIAC is taking place might rather get rid of their judges than risk a rebel group being legitimized by them and thus able to administer justice, impinging on the State sovereignty. This does not appear to do anything for the principles of impartiality and independence, who are the very core of the international humanitarian law on the subject, but rather it might create a possible safety problem for the judges in the described situation. Another point briefly mentioned by Somer is that the assumption seems to be that the laws of the State where the NIAC is taking place are satisfactory from a humanitarian standpoint, which might not be the case and additionally might in fact be the source of the conflict.\textsuperscript{152}

There are humanitarian interests in having a judicial system available for the population of a territory that is under the control of a rebel group. The fact that the civil wars mentioned in both Sri Lanka and El Salvador lasted quite a long time, 1983-2009 and 1980-1991, amplifies these interests. For the population, perhaps a rebel judicial system might provide better legal circumstances than just chaos.

### 6.4 Evaluating Interests

If one adheres to the opinion that there has been a shift towards the legality of rebel courts in international humanitarian law, this development might perhaps be connected to the shift in international law from a bigger perspective. The focus has in some ways shifted from being mainly about States interests to focusing on individuals. There has been what is referred to by Meron as a “humanization of the international humanitarian law”.\textsuperscript{153}

Looking at the question of rebel courts from the perspective of State interests, the international community in general might not be positively inclined, and even less so the State in which the rebel court is created, its interests being diseregarded and sovereignty impeached upon.\textsuperscript{154} The fact that Common Article 3 GC was one of the most difficult parts of the Geneva Conventions reasserts this.\textsuperscript{155} As mentioned above, a common argument by the non-state actor


\textsuperscript{153} Meron, Theodor, The Humanization of Humanitarian Law, American Journal of International law, Vol.94, Issue 2, April 2000

\textsuperscript{154} This seems to be the general rule, but perhaps there are examples where this is not true, one will be touched upon in the next section 6.5

\textsuperscript{155} Gutteridge, Joyce A. C., The Geneva Conventions of 1949, British Yearbook of International Law, Vol. 26, 1949, p 300
is that courts they set up are created in the interests of the civile populaiton. The level of non compliance could speak to the conclusion that this may be just a smokescreen covering the real motivation of power and control. A common critique is that these rebel courts do not live up to neither human rights nor humanitarian standards that are required for there to be a fair trial.156

Another point is the legitimate and indeed obvious interest in that rebel groups ensure compliance with international humanitarian law. This interest might be promoted by rebel rebel groups being treated closer to equal the States, by interpreting the rules so that it is possible for rebel groups to create courts. This might make the rebel groups more prone to acceptance of the international humanitarian law, which would also lead to respect and compliance with the rules.157 This would be a shift from the rules regarding establishment to the rules regarding offering a fair trial. Since it takes a rather well developed organization to be able to live up to the requirements that both Common Article 3 GC and Article 6 AP II demands, only the groups with sufficient capability would be recognized in the light of the articles and granted the right to operate a court accepteable by international humanitarian law. From the point of view of the interest that armed groups meet their international humanitarian law obligations, this would probably be a good thing. Because these courts would continue being set up and operating regardless of international prohibitions, and if they were to be seen as illegal, as Somer puts it: “their “illegal” nature would obstruct efforts to improve compliance with judicial guarantees”. Of course there will be groups where this line of argument will have no effect, since they have no interest in complying with international law regardless. But others will probably be swayed in a direction of compliance if they are recognized to a greater extent by the international community.158 Sassoli presents a similar approach, namely that from a humanitarian standpoint it would be preferable to give rebel groups the possibility to try individuals in court in accordance with international humanitarian law, rather than to categorically exclude them from this practice. This would increade compliance and probably provide more legal guarantees for individuals; this for the same

reason as mentioned above; armed groups courts will continue to exist regardless of their legal standing under international humanitarian law.\textsuperscript{159}

Considering the above together with human rights, the shift in international law towards focus on the individual might also speak in a direction that courts established by rebel groups perhaps should not be recognized. The reality seems to be that it is hard for a rebel group to reach a level of organization that makes it possible for them to create a court offering procedural guarantees that are acceptable. This is especially evident compared to the State party whom already has an organization in place, a view supported by Sassoli.\textsuperscript{160} Even States have a hard time living up to the procedural guarantees required by the human rights standards that are today expected. From a \textit{lex feranda} point of view, this may at least warrant the argument that there needs to be some clarification in the international humanitarian law as it is today.

\textbf{6.5 Implications of Rebel Courts}

The implication of rebel courts raises a lot of questions. One question that presents itself if one imagines a judgement from a rebel court that is legitimate (at least according to international humanitarian law) is how States are supposed to relate to said imaginary judgement. What would be the consequences if they were expected to respect a rebel court judgement? And on what basis are States supposed to be expected to respect this judgement when the element of reciprocity, which is natural when the question concerns two states, is probably not present? From a sovereignty perspective this is problematic. Another question from an economic perspective is who should actually pay for legal aid, implement the sentence: the rebel group; the State where the rebel group resides; or in the State in question in which the person prosecuted is a citizen? This is also a practical question; if the situation is that the rebel group can provide a perfect trial, but is not able to carry out the sentence.

Another problematic situation is the opposite. One could imagine a situation where a States judicial system is so defect and a rebel group is organized to a degree that the State

does not actually oppose the rebel courts. The rebel courts might be able to provide a legal proceeding that the State cannot. This would of course presuppose that the rebel courts afford all required procedural rights in accordance with international law. How then should the State handle the judgements? Because since national law would still be in force, there would be a clash with national law, and for example any person kept in custody for the sake of the proceedings would be victims of the crime of illegal imprisonment under national law. Would the State then afford amnesties to the rebels? Further discussion of these question is probably required.
7 Final Conclusions

A general remark is that international humanitarian law seems to allow for rebel courts. There is no apparent prohibition in either the Common Article 3 GC or in Article 6 AP II. Nor is it found in customary law. The calls for rebel groups to respect international humanitarian law, from the international community, supports this position. The requirement in Common Article 3 (1) (d) GC that the court needs to be “regularly constituted” can be interpreted in the light of the changed formulation in Article 6 (2) AP II, requiring that a court must offer “the essential guarantees of independence and impartiality”. It seems the most reasonable interpretation is that the requirement has more to do with the court having to afford an independent and impartial proceeding, than with the actual practical establishment of the court. International criminal law is also relevant for the interpretation of international humanitarian law, since grave breaches against the Geneva Conventions are criminalized as war crimes. The case of Bemba tried by the ICTR also supports the conclusion that rebel courts are not prohibited under international law.

There is resistance against rebel courts emanating from States concerns of keeping their sovereignty intact and also from the different reports of rebel courts violations against procedural guarantees. However there are situations where there are legitimate arguments that rebel courts might be needed. In a NIAC that is ongoing for a long time it might be better for the population that there is some judicial system than none, also it is important that the armed group can enforce international humanitarian law within their own units, an enterprise that benefits from the recognition of rebel courts. Furthermore an acceptance of rebel courts, might lead armed groups to comply with international humanitarian law to a greater extent, which is desirable from a humanitarian point of view. This can be seen through the will and aim from some rebel groups to comply with international law. In the case of rebel groups whom are not concerned with complying with international law, this argument will have no bearing. But there is value in this argument because of the groups who would most probably increase their compliance with international humanitarian law, because rebel courts will continue to be established and exist in spite of any prohibition in international law.

The fact that the question has been brought up in the national case of Haisam Sakhanh is positive for clarification on the subject. However some critique might be pointed towards
the fact that the judgement presents two specific situations where rebel courts could be legitimate, and that there is not enough justification for this conclusion.

The legal implications of rebel courts raise a lot of questions about how States would handle the judgements. In a situation where the State opposes the rebel court there would be a political barrier for the implementation of the rebel court judgement, in part because of the lack of the element of reciprocity. There would also be technical and economic questions, which would need addressing. In the situation where the State does not oppose the rebel courts, there would be questions raised concerning the clash between national law and the rebel court proceedings and judgements. These questions would also need addressing.

Even if recognition of rebel courts under international law would lead to better compliance and even though there are some valid arguments why they should be recognized in some situations, the reality of rebel courts poor compliance with both international humanitarian law and international human rights law on the right to a fair trial is still palpable. This makes some critique against the international law as it is today warranted, and clarification of the international humanitarian law on the subject is necessary.
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