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Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime

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Abstract

Common Article 3 to the four Geneva Conventions encourages the parties to a non-international armed conflict to bring into force international humanitarian law provisions through the conclusion of special agreements. Since armed groups are ever more frequent participants in contemporary armed conflicts, the relevance of those agreements as means to enhance compliance with IHL has grown as well. The decision-making process of special agreements recognizes that all the parties to the conflict participate in the clarification and expansion of the applicable rights and obligations in a way that is consistent with the principle of equality of belligerents. This provides incentives for armed groups to respect the IHL rules they have themselves negotiated. However, even upon the conclusion of such agreements, it remains unclear which legal regime governs them. This paper will argue that special agreements are governed by international law instead of domestic law or a sui generis *legal regime.*

Keywords: armed groups, special agreements, sources of international law, equality of belligerents, participants.

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When the Geneva Conventions (GCs)[1] were adopted on 12 August 1949, some general provisions were designed as articles common to the four treaties. Among them – and for the first time since the birth of international humanitarian law (IHL) – was a set of rules included in common Article 3 (CA3), which were intended to be applied by each party to a conflict "not of an international character occurring in the territory of one of the High Contracting Parties".

One of the groundbreaking characteristics of CA3 is precisely that it creates equal obligations for States and armed groups (AGs).[2] This means that these non-State actors are, by virtue of this provision, directly addressed as subjects of IHL with

1 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

2 Jelena Pejić, "The Protective Scope of Common Article 3: More than Meets the Eye", *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 197–198; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 52–88; Jonathan Somer, "Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict", *International Review of the Red Cross*, Vol. 89, No. 867, 2007, p. 661. See also Anne-Marie La Rosa and Carolin Wuerzner, "Armed Groups, Sanctions and the Implementation of International Humanitarian Law", *International Review of the Red Cross*, Vol. 90, No. 870, 2008, p. 328. Throughout this paper, the term "AG" will be used in a very general sense, including both armed groups fighting against each other and those fighting against governments. For a brief explanation on how these terms are being used in the international realm, see Ezequiel Heffes, Marcos D. Kotlik and Brian E. Frenkel, "Addressing Armed Opposition Groups through Security Council Resolutions: A New Paradigm?", in Frauke Lachenmann, Tilman J. Röder and Rüdiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 18, Brill Nijhoff, Leiden and Boston, MA, 2015, pp. 43–45.

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specific obligations.[3] The importance of CA3 and its application to all armed conflicts has been recognized by a number of international tribunals.[4] Most notably, the International Court of Justice (ICJ) in its *Nicaragua* judgment asserted that its provisions "constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'".[5]

Despite its undisputed relevance, it has also been noted that certain aspects of IHL, such as the protection of civilians, the regulation of the means and methods of combat, and the respect for the Red Cross and Red Crescent emblems, are not included within the content of CA3.[6] However, the drafters of the GCs were certainly conscious of the many aspects of non-international armed conflicts (NIACs) that were being left without specific regulation. In fact, they envisaged and included an alternative solution within the text of CA3, by seeking that the parties expand their obligations through the conclusion of special agreements.[7]

Nowadays, as NIACs prevail in number over international armed conflicts (IACs),[8] AGs tend to play leading roles. Thus, if used wisely and taking into account their advantages and challenges, special agreements may prove to be of crucial

3 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, p. 1372, fn. 18; L. Moir, above note 2, pp. 65–67; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 152; Marco Sassòli, "Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law", paper submitted at the Armed Groups Conference, 2003, p. 6.

4 See, e.g., International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, paras 608–609; Special Court for Sierra Leone (SCSL), *The Prosecutor* v. *Morris Kallon and Brima Bazzy Kamara*, Case No. SCSL-04-15-PT-060, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, paras 45–47. See also J. Pejić, above note 2, pp. 197–198; L. Moir, above note 2, p. 56; J. Somer, above note 2, p. 661.

5 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Judgment, *ICJ Reports 1986*, para. 218.

6 L. Moir, above note 2, p. 88. Of course, it cannot be ignored that many shortcomings of the GCs were dealt with to some extent within the framework of the 1977 Additional Protocols (AP I and AP II) – specifically, AP II develops and supplements CA3 and addresses important matters such as the protection of the civilian population. Additionally, many rules of customary IHL have also developed as applicable to non-international armed conflicts. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), p. xxxiv.

7 Christopher Greenwood, "Scope of Application of Humanitarian Law", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press, Oxford, 2008, p. 56. For an explanation on the existence of special agreements even before CA3, see Michel Veuthey, "Learning from History: Accession to the Conventions, Special Agreements and Unilateral Declarations", *Collegium*, No. 27, 2003, pp. 140–143.

8 Recent surveys have concluded that the great majority of ongoing armed conflicts around the world are non-international. According to different sources, the total number of armed conflicts in recent years fluctuates between thirty and thirty-eight, and only two or three of them are considered to be international. See Stuart Casey-Maslen (ed.), *The War Report 2013*, Oxford University Press, Oxford, 2014, pp. 28–29; Stuart Casey-Maslen (ed.), *The War Report 2012*, Oxford University Press, Oxford, 2013, pp. 3–4. See also data available from the Uppsala Conflict Data Program, available at: www.pcr.uu.se/research/ucdp/.

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importance for encouraging compliance with IHL by all parties to the conflict, and especially by AGs. This will be the main argument of the following section.

The second part of this article will deal with one of the main challenges regarding special agreements: the lack of a unified view on which legal framework regulates such agreements. Different alternatives will be explored, and it will be argued that the regulation of special agreements by international law is the most appropriate solution in order to deal effectively with IHL compliance issues.

What are special agreements, and why are they useful tools for enhancing IHL compliance in NIACs?

Just like any other actor in the international realm, AGs make public statements on their ideological perspectives, their justification for the use of force, and other moral, political and historical aspects of their own existence. Some of these expressions are also intended to affirm their commitment to applying a set of international rules in the context of the armed conflicts in which they are involved.[9]

Unilateral declarations, codes of conduct and special agreements have been used by several AGs in order to express their views on the applicable international rules during armed conflicts.[10] They have even been encouraged or facilitated by third parties, such as States, international organizations, the International Committee of the Red Cross (ICRC) and non-governmental organizations.[11] Of these instruments, only special agreements are an expression of concurrent will. In particular, CA3 establishes that "[t]he Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".[12] In light of this wording, special agreements can be understood as explicit commitments between two or more parties to a NIAC to comply with certain rules of IHL, and they may be expressed in a signed document, a joint declaration or any other form. They are essentially public expressions of a concurrent will to abide by IHL.

9 See Olivier Bangerter, "Internal Control: Codes of Conduct within Insurgent Armed Groups", in *Small Arms Survey*, Occasional Paper No. 31, November 2012, pp. 4 ff., available at: www.smallarmssurvey.org/fileadmin/docs/B-Occasional-papers/SAS-OP31-internal-control.pdf; Marcos Kotlik, "Reconocimiento de beligerancia y uso de la fuerza: La construcción de legitimidad en la Selva Lacandona", in Emiliano Buis (dir.), *¿Justificar la guerra? Discursos y prácticas en torno a la legitimación del uso de la fuerza y su licitud en el Derecho Internacional*, Eudeba, Buenos Aires, 2014, pp. 241–242.

10 A.-M. La Rosa and C. Wuerzner, above note 2, pp. 332–333. See also Sandesh Sivakumaran, "Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War", *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 463.

11 Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, No. 1, 2010, p. 30. See also Gérard Aïvo, "Le Rôle des Accords Spéciaux dans la Rationalisation des Conflits Armés Non Internationaux", *Revue québécoise de droit international*, No. 27.1, 2014, pp. 23–30.

12 CA3. A similar provision can be found in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 19(2). Although our analysis is focused on CA3, we believe it would also be applicable to special agreements under the 1954 Hague Convention. However, even if Article 19(2) of the 1954 Hague Convention did not exist, the parties to NIACs could still reach agreements concerning the protection of cultural property based solely on the text of CA3.

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The above definition makes no distinction between agreements concluded by States and AGs and those exclusively concluded between the latter.[13] For example, in recent NIACs, special agreements have been concluded between States and AGs in Indonesia and Sudan,[14] but also exclusively between non-State entities in Somalia and El Salvador.[15] Moreover, under the same definition, ceasefire agreements and peace agreements could also be included within this category inasmuch as they bring into force humanitarian provisions, since they are concluded by the parties to the conflict.[16] Examples of these agreements can be found in Angola and in Liberia.[17]

13 A special agreement exclusively between AGs can be envisaged taking into account that an armed conflict "exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed opposition groups or *between such groups within a State*" (emphasis added). International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor* v. *Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

14 Cessation of Hostilities Framework Agreement between Government of the Republic of Indonesia and the Free Aceh Movement, 9 December 2002 (Indonesia Agreement), available at: www.usip.org/sites/default/files/file/resources/collections/peace_agreements/aceh_12092002.pdf; Humanitarian Ceasefire Agreement on the Conflict in Darfur, 2 April 2004, available at: http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_040408_Humanitarian%20Ceasefire%20Agreement%20on%20the%20Conflict%20in%20Darfur.pdf; Protocol on the Establishment of Humanitarian Assistance in Darfur, 8 April 2004, available at: http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_040408_Humanitarian%20Ceasefire%20Agreement%20on%20the%20Conflict%20in%20Darfur.pdf.

15 General Agreement Signed in Addis Ababa on 8 January 1993, available at: www.usip.org/sites/default/files/file/resources/collections/peace_agreements/somalia_01081993_gen.pdf; Agreement on Implementing the Cease-Fire and on Modalities of Disarmament (Supplement to the General Agreement Signed in Addis Ababa on 8 January 1993), available at: www.usip.org/sites/default/files/file/resources/collections/peace_agreements/somalia_01081993_sup.pdf; *Acuerdo político entre el FMLN y la Juventud Militar para la constitución del nuevo ejército*, 1981, available at: http://www.cedema.org/ver.php?id=4788. Sivakumaran mentions the 2008 *Acte d'engagement* concluded in the Democratic Republic of the Congo as an agreement between AGs. Although it is true that AGs undertake most of the commitments in the agreement and that the government is initially only referred to as a facilitator, Article 4 establishes specific obligations upon the Government. Hence, it is not clear to what extent the *Acte d'engagement* can be considered as exclusively concluded between armed groups. Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts*, Oxford University Press, Oxford, 2012, p. 133; *Acte d'engagement*, 2008, available at: www.essex.ac.uk/armedcon/story_id/000720.pdf.

16 Of course, ceasefire agreements and peace agreements may also include provisions that do not deal with humanitarian concerns. However, this prevents neither their consideration as special agreements, nor their regulation under international law, as will be argued in the second part of this paper.

17 For example, in a ceasefire agreement concluded in 2002 between the government of Angola and UNITA, it was established that "[t]he task of re-establishing a cease-fire encompasses … [t]he guarantee of protection for people and their possessions, of resources and public assets, as well as the free circulation of persons and goods". Cease Fire Agreement between Angola Government and UNITA, 4 April 2002 (Angola Agreement), available at: www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3e81949e4. In the case of peace agreements, references to IHL "most commonly pertain to the provisions of the law that continue to apply, or that come into force, after the cessation of hostilities …. [S]uch commitments have included … the release of 'prisoners of war' or detainees belonging to the respective parties (e.g. in Angola, Bosnia and Herzegovina, Cambodia, Côte d'Ivoire, Liberia, and Sierra Leone), the duties of the parties towards evacuated, displaced and interned civilians (e.g. in Cambodia), the respective duties of military and civilian authorities to account for missing and dead members of armed formations and civilians (e.g. Rwanda, Bosnia and Herzegovina), and the duty of the parties to report the location of landmines (e.g. Rwanda)." ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, Geneva, February 2008, p. 26, available at: www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf. Another agreement containing

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Other instruments, such as unilateral declarations or codes of conduct, might contain humanitarian provisions adopted between one of the parties to the conflict and other actors such as the ICRC or non-governmental organizations.[18] Although they can also serve the purpose of encouraging IHL compliance, they are not concluded between the parties to the conflict, as framed in CA3.[19] This differentiates them from special agreements, as the latter's key feature is the concurrent will of the parties.

This particular characteristic also helps to explain why special agreements can be very useful tools for enhancing IHL compliance by AGs, even though there is no obligation to actually conclude them.[20] On the one hand, special agreements involve AGs in the process of creation of the rules that will bind them. On the other hand, in this process, it is possible for the parties to the conflict to agree upon specific rules that might not otherwise apply. In general, this is a unique opportunity for AGs to actually have some input on what their concrete rights and obligations will be. They may express their views as to what commitments they are factually prepared to undertake, and they may find incentives to comply if the other parties to the negotiations also show good will. Moreover, in some cases the parties will be able to agree upon enforcement mechanisms, a possibility that they do not usually have. Overall, this type of process may influence the perspective of AGs' leadership and create a sense of ownership of the agreed-upon rules among them, also making it easier to disseminate the content of the agreements to the members of the group. These features will be explained below.

humanitarian provisions is the 1993 Cotonu Agreement between the Interim Government of National Unity of Liberia, the National Patriotic Front of Liberia and the United Liberation Movement of Liberia for Democracy, which deals, for example, with the release of prisoners of war and detainees (Article 10), humanitarian assistance (Article 17) and repatriation of refugees (Article 18). Cotonu Agreement, 25 July 1993, available at: www.refworld.org/docid/3ae6b5796.html.

18 For example, the Deed of Commitment signed between the non-governmental organization Geneva Call and the Puntland State of Somalia. Geneva Call, Deed of Commitment under Geneva Call of Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, Puntland State of Somalia, reproduced in Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, Vol. 3, ICRC, Geneva, 2011, pp. 1706–1708, available at: www.icrc.org/casebook/doc/case-study/geneva-somalia-mines-case-study.htm.

19 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 59–60. The author refers to "bilateral agreements" which "will generally only be concluded because of an existing situation which neither of the parties can deny, no matter what the legal aspect of the situation may in their opinion be". Nevertheless, in our opinion, the fact that agreements between a single party to the conflict and other entities are not framed by CA3 does not mean that they have no legal value within the international realm. Quite the contrary, they may serve the important purpose of reaffirming and/or enabling compliance with international obligations.

20 In the Commentary to GC I, Pictet affirms that the parties are "under *an obligation to try* to bring about a fuller application of the Convention by means of a bilateral agreement" (emphasis added): *ibid.*, p. 59. This means that they must make an effort to reach an agreement. If this were not the case, it would seem improbable to think that a State would feel itself obliged to negotiate a special agreement with an AG, especially since these groups are by definition in breach of domestic law.

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The principle of equality of belligerents: Engaging AGs in the creation of IHL rules

In a NIAC, the effectiveness of IHL can be linked to several circumstances – for example, the unwillingness of the parties to acknowledge that a situation of violence amounts to an armed conflict, the absence of an incentive for the parties to abide by IHL, or AGs' lack of an appropriate structure or resources.[21] The particular features of these conflicts have shown the importance of implementing strategies specifically aimed at achieving IHL compliance by these non-State actors. Accordingly, it has been pointed out that the means that AGs use to express their will can be very useful tools to that end, and that they should be encouraged and further studied since "they provide an indication as to the views of armed groups on humanitarian norms and they comprise a useful entry point for engaging with armed groups on humanitarian issues".[22]

In the case of special agreements, it can be argued that they are not only entry points, but also crucial tools for achieving greater levels of respect for IHL in NIACs. One factor behind this is that special agreements are concluded through a process that entails the application of the principle of equality of belligerents, thus directly engaging AGs in the creation of IHL rules, along with other parties to the conflict.

The sole fact of participating in such negotiations may already help enhance IHL compliance for at least two reasons. First, negotiations enable the involved actors to engage in a conversation about humanitarian issues, which might otherwise not take place. Second, an additional incentive may be found in the fact that all parties will have the same opportunities to express their views, regardless of their domestic law asymmetry. AGs may not want to risk missing such a chance by committing acts contrary to IHL.

However, in order to fully understand this process and its relevance, it is important to begin by highlighting that CA3 addresses "each Party to the conflict" and that Additional Protocol II (AP II) applies to "all armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups". This is of particular relevance because it allows the identification of a direct relationship between IHL rules and the parties to a NIAC. This relationship is the same for all parties, and it does not vary if the conflict is between a State and AGs or exclusively between the latter. In sum, what is implied in the texts of CA3 and AP II is that all parties to a NIAC have the same rights and obligations

21 ICRC, *Improving Compliance with International Humanitarian Law – ICRC Expert Seminars*, Report, October 2003, pp. 20–21, available at: www.icrc.org/eng/assets/files/other/improving_compliance_with_international_report_eng_2003.pdf; Olivier Bangerter, "Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not", *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 357.

22 S. Sivakumaran, above note 10, p. 464.

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irrespective of their status. This is precisely the expression of the principle of equality of belligerents.[23]

This paper argues that this principle provides not only that the same rights and obligations bind all parties, but also that the source of those rights and obligations should be the same for all parties. This entails that all parties to an armed conflict, including AGs, have a role in the process of creation of IHL rules. The contrary would lead to subordinating AGs' obligations to those of the State, which appears to be an unacceptable outcome for several reasons.

From a practical point of view, it seems unlikely that AGs will accept any set of rules merely by the fact that it has been previously agreed upon by States, be it customary or treaty law.[24] This seems obvious when AGs are actually fighting against a State, but it also holds true when AGs are fighting each other, to the extent that the recourse to violence by these groups is usually contrary to the State's domestic law to begin with. In this sense, if IHL rules were to be considered binding upon AGs only by virtue of State acceptance, the perception of legitimacy of such rules from the standpoint of AGs would be diminished. This, in turn, would probably reduce the incentives provided to AGs to comply with IHL.

But even if an argument based upon the State's acceptance of IHL obligations on behalf of AGs is acknowledged as useful to explain why AGs must also comply with IHL in some cases, it most certainly does not provide a legal approach that is capable of covering every possible scenario. It is not clear how this kind of explanation would work in some complex situations, such as armed conflicts fought across borders by AGs but without State involvement.[25]

Also, as explained above, the texts of CA3 and AP II directly address AGs. Hence, a theoretical perspective that subordinates their obligations to those of States would straightforwardly ignore the standing of AGs in international law and vis-à-vis other parties.[26]

These problems affect the arguments that hold that AGs are bound by IHL because of their territorial link to a State party to the GCs, or because they act under the domestic legislative jurisdiction of a State party to the GCs.[27] In short, to what

23 On the principle of equality of belligerents, see Christopher Greenwood, "The Relationship between *Ius ad Bellum* and *Ius in Bello*", *Review of International Studies*, No. 9, 1983, pp. 221–234. Interestingly, Somer argues that the term "equality" is a narrow concept and proposes to use instead "parity", which better represents a general equality of status. See J. Somer, above note 2, pp. 661–662.

24 See Jean-Marie Henckaerts, "Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law", *Collegium*, No. 27, 2003, pp. 126–127; and L. Moir, above note 2, pp. 54–55.

25 Other unsolved situations are mentioned by J. Somer, above note 2, p. 661; and L. Moir, above note 2, pp. 55–56.

26 Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts", *International and Comparative Law Quarterly*, Vol. 30, No. 2, 1981, pp. 429–430.

27 Such argumentation is presented in J. Pictet, above note 19, p. 51; and Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. II: *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960, p. 34. Additional explanations and critiques can be found in Jean d'Aspremont and Jérôme de Hemptinne, *Droit international humanitaire*, Pedone, Paris, 2012, pp. 98–99; and historically in A. Cassese, above note 26, p. 416; and Erik Castrén, *Civil War*, Soumalainen Tiedeakatemia, Helsinki, 1966, p. 154.

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extent is it possible to attain AGs' compliance with rules imposed by their "enemies"?

Of course, there is a limit to AGs' refusal of previously agreed provisions. As explained in the introduction to this article, CA3 constitutes the minimum humanitarian norms to be respected in any armed conflict. The fact that it lies at the very foundation of IHL means that no actor can deny its existence and applicability during hostilities. The only alternative for AGs would be to deny any link whatsoever with the international community in the first place – that is, not to recognize the validity of the international legal system as a whole. In such a case (that is, even if an AG refused to recognize the validity of the international system), IHL would continue to apply. And in any case, AGs' members could still face criminal charges at the domestic or international level.

By contrast, the interpretation of the principle of equality of belligerents proposed in this paper can be upheld by supporting a different approach, although this represents a minority opinion. The above-mentioned problems can be dealt with by submitting that AGs' practice is in fact taken into account in the creation of IHL, particularly in the form of customary rules.[28] This has been argued by Sassòli, who explains, for example, that

> [a] first step for creating a sense of ownership among armed groups is to involve them into the development and reaffirmation of the law. In my view, as far as customary IHL of NIACS … [is] concerned, this already is the case. Customary law is based on the behaviour of the subjects of a rule, in the form of acts and omissions or (whether qualified as practice *lato sensu* or evidence for *opinio juris*) in the form of statements, mutual accusations and justifications for their own behaviour … IHL implicitly confers a limited international legal personality to armed groups involved in armed conflicts, i.e., by providing them the functional international legal personality necessary to have the rights and obligations foreseen by it.[29]

According to this argument, AGs participate in the elaboration of IHL and are therefore bound by its provisions. As Somer suggests, "the notion that armed opposition groups are bound by the customary nature of their Common Article 3 obligations makes one question the meaning of 'equality' if they have been unable to participate in its formation".[30]

In fact, this perspective also gives insight into the process of creation of special agreements. As mentioned above, CA3 addresses "[t]he Parties to the conflict", and not exclusively the "High Contracting Parties", when it encourages their conclusion. This means that both States and AGs – or exclusively AGs if no State is involved in the conflict – should endeavour to bring into force other provisions of the GCs.

28 J. Somer, above note 2, pp. 661–662. See also Jann Kleffner, "The applicability of international humanitarian law to organized armed groups", International Review of the Red Cross, Vol. 93, No. 882, 2011, pp. 443–461.
29 M. Sassòli, above note 11, p. 13.
30 J. Somer, above note 2, p. 662.

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Yet, some scholars have claimed that the principle of equality of belligerents could not be applied in NIACs because AGs' members remain at all times subject to domestic criminal law and may be prosecuted for its breach.[31] However, despite the legal prohibition of participating in armed conflict against the State, under *jus in bello*, all parties to an armed conflict have the obligation to comply with the same set of rules under the equality of belligerents principle.[32] Hence, CA3 merely invites the parties to broaden that set of rules and accommodates their capacity to actually accomplish this.

Thus, this recognition of AGs' capacity to conclude special agreements can also be understood as an application of the principle of equality of belligerents, in the sense that the parties which conclude such an agreement will not only be accepting the same rights and obligations as binding, but will also be doing so by virtue of the same reason: their own participation in the adoption of IHL rules. This can have a direct impact on IHL compliance, as pointed out by Ryngaert, who notes:

> [I]t can hardly be denied that willingness to comply on the part of an actor is crucially dependent on the perception of it having consented to, or at least of having participated in, the formation of the law by which one is bound.[33]

This perspective highlights the link between special agreements and the principle of equality of belligerents. In doing so, it recognizes that such agreements might enhance the chances of AGs actually applying IHL, since they (i) address the direct relationship between IHL and AGs and avoid the practical problems that would otherwise result from the arguments concerning the territorial link and domestic legislative jurisdiction; (ii) provide an incentive for AGs to comply with IHL, as the negotiation process may demonstrate a mutual will to that end; (iii) create a sense of ownership, as AGs participate in the decision-making process, which leads them to be bound by those rules in the first place; and (iv) give AGs the opportunity to assess the feasibility of accepting or rejecting specific commitments as well as their factual ability to comply with them.

The importance of specific commitments agreed upon by the parties

The second reason that special agreements are appropriate tools for enhancing IHL compliance in NIACs is related to their potential content. As these agreements comprise and formalize the concurrent will of two or more entities involved in a specific NIAC, they undoubtedly imply a minimum degree of willingness of all parties to apply and abide by IHL. In fact, they represent an unparalleled

31 S. Sivakumaran, above note 15, p. 243.

32 Marco Sassòli, "Ius ad bellum and Ius In Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?", in Michael Schmitt and Jelena Pejić (eds.), *International law and Armed Conflict: Exploring the Faultlines*, Martinus Nijhoff, Leiden and Boston, MA, 2007, p. 246.

33 Cedric Ryngaert, "Non-State Actors in International Humanitarian Law", in Jean d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, Routledge, Oxon, 2011, p. 288.

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opportunity for the parties to NIACs to address mutual concerns: they can emphasize some existing rules that the parties consider to be especially relevant and bring into force other rules that might otherwise not be applicable to a particular armed conflict, such as the rules applicable to IACs. In this regard, the ICRC has affirmed that

> [a] special agreement might either create new legal obligations by going beyond the provisions of IHL already applicable in the specific circumstances (a "constitutive" agreement), or it might simply restate the law that is already binding on the parties, independent of the agreement (a "declaratory" agreement). It may also be limited to specific rules that are particularly relevant to an ongoing conflict.[34]

Moreover, special agreements often include both declaratory and constitutive clauses. The importance of declaratory clauses is due to the fact that the parties have an opportunity to demonstrate their concurrent will, publicly expressing their intention to comply with pre-existing IHL obligations. For instance, the 1992 Agreement on the application of IHL between the parties to the conflict in Bosnia-Herzegovina, concluded at the invitation of the ICRC,[35] contained a commitment to respect and to ensure respect for the provisions of CA3, which was quoted in full. Similarly, the 1985 Nairobi Agreement between the military government of Uganda and the National Resistance Movement affirmed in its Article 1(i) that CA3 was applicable, while reproducing the full text in its Appendix D.[36] Also, the 2008 *Acte d'engagement* negotiated by multiple actors involved in the armed conflict in the Democratic Republic of the Congo includes, in Article III, the commitment to comply with IHL principles.[37]

When special agreements refer to specific provisions, they can be extremely beneficial, as "all parties concerned have a clear understanding of the nature and content of a particular commitment".[38] If the specific rule was already binding for the parties (for example, if it is a part of CA3), its inclusion in the agreement will highlight the parties' concrete concerns and reinforce their commitment to dealing with them in accordance with IHL.[39] Such normative references are an important symbolic resource that may impact the attitudes of individuals and

34 See ICRC, above note 17, p. 16.

35 Bosnia and Herzegovina, Agreement No. 1, 22 May 1992 (1992 Agreement), reproduced in M. Sassòli, A. Bouvier and A. Quintin, above note 18, pp. 1717–1721, and available at: www.icrc.org/casebook/doc/case-study/yugoslavia-agreements-case-study.htm.

36 Nairobi Peace Agreement, 17 December 1985, available at: http://theirwords.org/?country=UGA&ansa=109&document_type=1

37 *Acte d'engagement*, above note 15.

38 S. Sivakumaran, above note 10, p. 471.

39 Interestingly, Bangerter explains that in order to get AGs to respect IHL "or to respect it better, we need to understand the factors that influence their choices". Thus, "[r]espect for IHL can only be encouraged – and hence improved – if the reasons used by armed groups to justify respect or lack of it are understood and if the arguments in favour of respect take those reasons into account". See O. Bangerter, above note 21, pp. 354, 383.

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have a preventive effect, even more than the acknowledgment of moral requirements.[40]

However, in the context of NIACs regulated only by CA3, special agreements also provide the opportunity to bring into force obligations that stem from the entire GCs, Additional Protocol I (AP I) and AP II. In fact, the ICRC has submitted that the parties "should be encouraged to include both treaty and customary rules".[41] Thus, if the agreement includes rules that were not previously binding, those provisions will have a "constitutive" nature, since the parties will have voluntarily extended their rights and obligations.[42] For example, agreements concluded in Afghanistan, Angola, Liberia, the Democratic Republic of the Congo, Tajikistan and Uganda include clauses concerning the release of prisoners or detainees, and in some cases they also provide for the ICRC or other organizations to assist or to verify compliance with those commitments.[43] More broadly, in 1991 a Memorandum of Understanding was concluded between the parties to the conflict in the former Yugoslavia, making multiple references to rules of the GCs, AP I and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices annexed to the 1980 Weapons Convention.[44]

Constitutive clauses are a key feature of special agreements, inasmuch as the parties have the opportunity to specifically assess, within the process of negotiations, the extent to which they are factually able to comply with those "new" rules. Afterwards, it might be quite difficult to argue that they lacked the structure or resources to comply with them, as such clauses were agreed upon during the conflict.

As stated above, a special agreement can include both declaratory and constitutive clauses at the same time. In this regard, the 1992 Agreement on the application of IHL between the parties to the conflict in Bosnia-Herzegovina[45] is also a good example of the inclusion of additional IHL rules. As mentioned, its

40 See Daniel Muñoz-Rojas and Jean-Jacques Frésard, "The Roots of Behaviour in War: Understanding and Preventing IHL Violations", *International Review of the Red Cross*, Vol. 86, No. 853, 2003, pp. 192, 203.

41 See ICRC, above note 17, p. 16.

42 In order to asses precisely what rules were previously binding, it should be taken into consideration whether AP II – with its more restricted scope of application – was already in force between the parties to the conflict, or if the conflict was only regulated by CA3.

43 Afghan Peace Accord (Islamabad Accord), 7 March 1993, available at: www.incore.ulst.ac.uk/services/cds/agreements/pdf/afgan1.pdf; Peace Accords for Angola, May 1991, available at www.incore.ulst.ac.uk/services/cds/agreements/pdf/ang1.pdf; *Acte d'engagement*, above note 15; Agreement on Cessation of Hostilities and Peaceful Settlement of Conflict between the Armed Forces of Liberia and the National Patriotic Front of Liberia and the Independent National Patriotic Front of Liberia, 24 October 1990, available at: www.ucdp.uu.se/gpdatabase/peace/Lib%2019901024.pdf; Agreement between the President of the Republic of Tajikistan, E. S. Rakhmonov, and the Leader of the United Tajik Opposition, S. A. Nuri, on the Results of the Meeting Held in Moscow on 23 December 1996, available at: http://theirwords.org/media/transfer/doc/1_tj_uto_1996_03-787be4c90d0af3748b7c4630429c01b7.pdf; Nairobi Peace Agreement, above note 36.

44 Memorandum of Understanding of 27 November 1991, reproduced in M. Sassòli, A. Bouvier and A. Quintin, above note 18, pp. 1713–1717, and available at: www.icrc.org/casebook/doc/case-study/yugoslavia-agreements-case-study.htm.

45 1992 Agreement, above note 35.

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text quoted CA3 in full, but the parties also agreed to bring into force other provisions concerning the protection of the wounded, sick and shipwrecked, of hospitals and other medical units and of the civilian population, the treatment of captured fighters, the conduct of hostilities, assistance to the civilian population and respect for the Red Cross and Red Crescent emblems. Even though the 1992 Agreement did not have the expected effect of preventing violations,[46] the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) would later use it to demonstrate the existence of a prohibition on attacking civilians.[47]

Similar examples can be found in several ceasefire agreements.[48] Among them, the 2004 Humanitarian Ceasefire Agreement on the Conflict in Darfur[49] is of particular relevance, since it was supplemented by a specific Protocol on the Establishment of Humanitarian Assistance in Darfur, where the parties agreed to apply the international principles enshrined in the GCs, AP I, AP II and a series of international human rights law instruments. Consequently, the Protocol mentions six guiding principles (humanity, impartiality, neutrality, dignity, transparency and accountability) and lays out operational criteria for the setting up of humanitarian assistance programmes by humanitarian agencies.[50]

It must be noted, then, that the parties to a NIAC can also agree to other kinds of obligations: if the purpose of special agreements is to broaden protection for the victims of armed conflicts, it should not come as a surprise that they may also include international human rights law provisions.[51] Examples of such practice can be found in agreements concluded in the Philippines and Sierra Leone.[52]

46 L. Moir, above note 2, p. 127; François Bugnion, "*Jus ad Bellum, Jus in Bello* and Non-International Armed Conflicts", *Yearbook of International Humanitarian Law*, Vol. 6, 2003, p. 193.

47 ICTY, *The Prosecutor* v. *Enver Hadzihasanovic and Amir Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber on Rule 98bis Motion for Acquittal (Appeals Chamber), 11 March 2005, para. 28, fn. 51. For how the ICTY has used special agreements, see Luisa Vierucci, "'Special Agreements' between Conflicting Parties in the Case-Law of the ICTY", in Bert Swart, Alexander Zahar and Goran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, pp. 401–433.

48 See, for example, Agreement on a Ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tiers of Tamil Eelam, 22 February 2002 (Sri Lanka Agreement), available at: www.regjeringen.no/nb/dokumentarkiv/Regjeringen-Bondevik-II/ud/Lover-og-regler/2002/agreement_on_a_ceasefire_between.html?id=260701; Indonesia Agreement, above note 14; Angola Agreement, above note 17.

49 In this agreement, among other relevant provisions, the parties "decided to free all the prisoners of war and all other persons detained because of the armed conflict in Darfur" and undertook "to facilitate the delivery of humanitarian assistance and the creation of conditions favorable to supplying emergency relief to the displaced persons and other civilian victims of war and this, wherever they are in the Darfur region, in accordance with the appendix attached to the present Agreement". Humanitarian Ceasefire Agreement on the Conflict in Darfur, above note 14.

50 Protocol on the Establishment of Humanitarian Assistance in Darfur, above note 14.

51 S. Sivakumaran, above note 15, p. 125. Still, the legal basis for the inclusion of human rights obligations in special agreements can be disputed. See different arguments in L. Zegveld, above note 3, p. 50; and L. Moir, above note 2, p. 64.

52 In the Philippines, the government and the National Democratic Front of the Philippines devoted an entire part of a special agreement, composed of thirteen articles, to "respect for human rights", addressing such matters as the right to life, the prohibition of summary executions, and involuntary

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In addition, both when special agreements restate rules that were already binding and when they include rules not previously applicable, they can also be considered as an expression of the parties' *opinio juris* concerning the content of such provisions and *praxis* regarding AGs' active role in the process of creation of international customary law. This is a very clear example of the role that AGs may have in the formation of customary IHL rules.

Of course, there is also the possibility that special agreements are too vague or limited in scope, whether this is because States are worried about the potential granting of legitimacy to AGs,[53] because the parties to the conflict do not wish to commit to these norms and risk the possibility of their members facing criminal charges, or because the parties do not sincerely wish to comply with IHL.[54] But these risks are not a downside to the agreements as a form of expression *per se*; rather, they are the result of numerous factors involved in determining the actual will of the parties to comply with certain humanitarian norms. Moreover, as pointed out by Moir, in many cases even statements that only refer to a set of humanitarian principles can still be advantageous.[55] This is true for two reasons: (i) CA3 provisions are applied regardless, as they embody the underlying principles of IHL; and (ii) such statements may include principles not included in CA3, such as proportionality, or only included to some extent, such as distinction.[56]

In sum, one of the main advantages of special agreements, understood as tools for enhancing compliance with IHL, stems from the fact that they serve the purpose of clarifying the obligations that the parties to the conflict undertake. Equally important is the opportunity that the parties have to extend their rights and obligations by mutual agreement, after assessing the possibility of actually complying with them.[57]

Yet, it is very important to bear in mind that special agreements are concluded within the framework of IHL, and thus it seems fairly clear that they could never be used to diminish the rights and obligations enshrined in CA3.[58] In

disappearances. Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, 16 March 1998 (Philippines Agreement), available at: http://theirwords.org/media/transfer/doc/ph_ndfp_1998_17-ef3249df335f48cd378d1c5082457be4.pdf. In Sierra Leone, the parties addressed political and civil liberties, with reference to other international human rights law instruments, in Article 19 of the Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, 30 November 1996, available at: http://theirwords.org/media/transfer/doc/1_sl_ruf_1996_03-e377977056bb4bc499dfaa593507511d.pdf.

53 Churchill Ewumbue-Monono, "Respect for International Humanitarian Law by Armed Non-State Actors in Africa", *International Review of the Red Cross*, Vol. 88, No. 864, 2006.

54 A.-M. La Rosa and C. Wuerzner, above note 2, pp. 332–333. See also S. Sivakumaran, above note 10, p. 464.

55 For example, the Protocol on the Establishment of Humanitarian Assistance in Darfur, above note 14.

56 L. Moir, above note 2, pp. 86–87, 274.

57 This may counter the argument of reciprocity that is sometimes used to justify IHL violations. D. Muñoz-Rojas and J.-J. Frésard, above note 40, p. 202.

58 Arai-Takahashi deals with similar issues during IACs. Based on Article 47 of GC IV, he explains that "the rights of protected persons in an occupied territory must not be derogated from by … an agreement entered into by parties to the conflict. This provision prohibits only negative derogation (*la derogation négative*). It does not prevent parties from entering into agreements to broaden the ambit of rights for

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any case, if such an agreement were concluded, CA3 would still continue to apply, as its rules constitute the minimum standard that protects individuals against any attempt to implement a lower threshold of protection.[59] As for the agreement in itself, those provisions less protective than CA3 would be inapplicable, while other clauses could remain in force, as long as they are compatible with that article.

Another advantage of these agreements, as mentioned in the previous section, is that they can easily be publicized and AGs can also use them to transmit a unified message or instructions to all their membership and to promote respect for IHL within the group and outside of it. This is a crucial feature, taking into account the identification of individuals with the group to which they belong and the relevance they give to orders that stem from those whom they consider to be the legitimate authority.[60] As explained by Muñoz-Rojas and Frésard, in order to achieve respect for IHL,

> the rules must be translated into specific mechanisms and care must be taken to ensure that practical means are set in place to make this respect effective. In other words, it is necessary, wherever possible, including with non-State bearers of weapons, to opt for an integrative approach. This means an approach which provides … for the rules to be incorporated into the orders passed down through the chain of command, and that combatants are given the necessary means of ensuring that their behaviour can indeed comply with IHL.[61]

However, the potential contribution of special agreements to the effectiveness of IHL in NIACs may go beyond the above observations. As mentioned before, special agreements can also provide an opportunity for AGs to agree upon the creation or implementation of enforcement mechanisms.

On the one hand, in the absence of a more complex or institutionalized structure or resources, special agreements can serve as tools for AGs to demand greater compliance with IHL by the other parties to the conflict. Despite some discussions on AGs' capacity to try and convict those responsible for IHL breaches,[62] these non-State actors typically do not have direct access to any kind of institutional mechanism to that end. Special agreements will usually not

protected persons (*la dérogation positive*)." See Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, Leiden and Boston, MA, 2009, p. 273.

59 See ICJ, above note 5, para. 218. The question remains, though, as to what extent special agreements can modify rules of other international treaties, such as AP II when applicable, or even customary rules. In the context of IACs, certain provisions attempt to address this matter: Article 6 of GCs I, II and III and Article 7 of GC IV all prohibit any special agreement that may adversely affect the situation of the wounded, sick, shipwrecked, prisoners of war, and medical and religious personnel. Article 10(5) of GCs I, II and III and Article 11(5) of GC IV also forbid certain derogations by special agreements. See also François Bugnion, *Le Comité International de la Croix-Rouge et la protection des victimes de la guerre*, ICRC, Geneva, 1994, pp. 502–504.

60 D. Muñoz-Rojas and J.-J. Frésard, above note 40, pp. 193–195, 203–204.

61 *Ibid.*, pp. 203–204.

62 J. Somer, above note 2.

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change that reality, but the commitments made therein might enable AGs to publicly condemn any violation of the agreed rules.

On the other hand, the mechanisms available to ensure IHL compliance by AGs are usually those established by the domestic legislation of States and, in some cases, international criminal tribunals. From the standpoint of AGs, these mechanisms probably lack any legitimacy whatsoever, and therefore it seems unclear if they can actually contribute *ex ante facto* to enhanced IHL compliance.[63] Conversely, special agreements can help achieve that goal by creating a sense of ownership of IHL rules and a better understanding of the potential consequences of their violation. In addition, some special agreements might even include new enforcement mechanisms, aimed at achieving full compliance by all parties concerned. This has been the case, for example, in agreements in Darfur, Sri Lanka and Indonesia.[64]

Although the few experiences in this realm do not allow us to extract definitive conclusions, it should be stressed that from the perspective of equality of belligerents, this type of mechanism, if compared to domestic legislation or international tribunals, has a better chance of succeeding as far as its perceived legitimacy is concerned. This is mainly because special agreements are by definition inclusive rather than exclusive of both sides' views and willingness to commit.

63 Certainly, there have been some discussions on the possible deterrent effect of such mechanisms, especially considering that preambular para. 5 of the Statute of the International Criminal Court establishes that the parties are "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". This view has been supported, for example, by Cassese and Falk: see Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2008, p. 440; Richard Falk, *The Declining World Order: America's Imperial Geopolitics*, Routledge, New York and London, 2004, p. 120. However, this effect has been questioned in Theodore Meron, *The Humanization of International Law*, Martinus Nijhoff, The Hague, 2006, pp. 179–180. See also ICRC, *Ad Hoc Tribunals*, available at: www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm. Crawford has explained that "[t]he deterrent effect of international prosecution is unclear, and probably always will be": James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford, 2012, p. 690. For a continuation of the discussion on the deterrent effect of international criminal justice, see the debate between Chirs Jenks and Guido Acquaviva in this issue of the *Review*.

64 In Darfur, the government of Sudan, the Sudan Liberation Movement/Army and the Sudan Justice and Equality Movement created a commission in charge of "receiving, verifying, analyzing, and judging complaints related to the possible violations of the cease fire" and "developing adequate measures to guard against such incidents in the future". See Humanitarian Ceasefire Agreement on the Conflict in Darfur, above note 14. In Sri Lanka, the 2002 agreement between the government and the Liberation Tigers of Tamil Eelam included the creation of the Sri Lanka Monitoring Mission "to enquire into any instance of violation of the terms and conditions of this Agreement": Sri Lanka Agreement, above note 48. In Indonesia, the government and the Free Aceh Movement reactivated a previously created Joint Security Committee and established that part of its functions was "to undertake full investigation of any security violations" and "to take appropriate action to restore the security situation and to agree beforehand on the sanctions to be applied, should any party violate this Agreement". Indonesia Agreement, above note 14.

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The legal nature of special agreements

Despite the importance of special agreements in the context of NIACs, CA3 does not determine which legal regime governs them; neither does any other rule of international law. Are these agreements regulated by international law or by domestic law? What sorts of obligations do they create? What kinds of relations do they create between the parties to them? Any answer to these questions will inevitably have consequences for the way in which the effectiveness of IHL at large is approached.

Taking this into account, this section will analyse three alternatives: (i) special agreements are regulated by domestic law; (ii) special agreements are regulated as a *sui generis* legal regime; and (iii) special agreements are regulated by international law. Ultimately, it will be argued below that this last perspective is not only a more accurate description of the current dynamics of international law, but also more useful for engaging with AGs and ensuring their compliance with IHL.

Special agreements as regulated by domestic law

The first alternative considers that AGs do not have a recognized ability to create international rules and therefore special agreements should be governed by domestic law.[65] According to this position, the creation of international law is exclusively reserved for States, or for those entities that States acknowledge to have the capacity to do so, such as some international organizations. Therefore, AGs are mere addressees of IHL rules. This State-centric view is based on the "subject–object" dichotomy,[66] entrapping AGs in the latter category. Furthermore, these non-State actors are envisaged not as part of the international community, but only as part of the State they are fighting against or within. Accordingly, IHL would only address AGs through the domestic legal systems of the States to which they are subject.[67]

This position is usually linked to the final phrase of CA3, which affirms that the content of the article "shall not affect the legal status of the Parties to the

65 Hersch Lauterpacht (ed.), *International Law: A Treatise*, Vol. 2: *Disputes, War and Neutrality*, Longmans, Green and Co., London, New York and Toronto, 1952, pp. 226–233; Fritz Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, ICRC and Cambridge University Press, Geneva, 2001, pp. 15–18.

66 "In international law, the problem of the subject appears in the designation of states as 'subjects' of the law while individuals and corporations are regarded as 'objects' of the law…whatever rights or duties individuals and corporations have are derivative of, and enforceable only by states who, as 'subjects', conferred these rights and duties upon them": A. Claire Cutler, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy", in Andrea Bianchi (ed.) *Non-State Actors and International Law*, Ashgate, Aldershot, 2009, p. 22. See also Rosalyn Higgins, "International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law", *Recueils des cours de l'Académie de droit international*, Vol. 230, 1991, pp. 79–81.

67 For a similar analysis on individuals, see *ibid.*; and Roland Portmann, *Legal Personality in International Law*, Cambridge University Press, New York, 2010, p. 42.

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conflict". This has been understood as an explicit refusal by States to recognize that an AG has "any new international status, whatever it may be and whatever title it may give itself or claim".[68]

Such a perspective was put forward by the Constitutional Court of Colombia when it affirmed that the CA3 special agreements "are not, strictly speaking, treaties, as they are not established between entities subject to public international law but between the parties to an internal conflict, which are subject to international humanitarian law".[69] The same view was affirmed by the Special Court for Sierra Leone, which held that the Lomé Agreement between the government of Sierra Leone and the Revolutionary United Front was not an international agreement, precisely because the parties to it were the government of Sierra Leone and an AG.[70] The underlying argument in both cases is that, by definition, NIACs involve non-State actors that have not previously been considered as subjects of international law with the capacity to create international rules. Hence, even if they were addressees of IHL rules, their capacity to conclude special agreements could only be understood from a domestic law perspective.

However, the practical consequences of considering special agreements as being regulated by domestic law have not been thoroughly envisaged.[71] There are at least three problems that this position cannot solve.

Firstly, it is difficult to imagine that any State will ever recognize an AG struggling against it as having some sort of legitimacy under its domestic legal system. Hence, States will hardly accept the regulation of some specific issues which their domestic law may treat quite differently than IHL. For example, if a special agreement, adopted under the regulation of domestic law, includes rules concerning the conduct of hostilities between the State's armed and security forces and the AG's members, it is likely that these rules will be in contradiction with other domestic rules that probably criminalize acts such as murder. The same would happen if AGs were to regulate the conduct of hostilities among two or more AGs, since under domestic law it would be unacceptable for entities other than the State to legalize the killing of any given individual. Therefore, it

68 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 44. According to Pictet in the Commentary to GC I, this provision was caused by States' fear that its application may interfere with their right to lawfully suppress AGs. Furthermore, it was not intended to "constitute any recognition by the de jure Government that the adverse Party has authority of any kind" or "to give [that party] any right to special protection or any immunity, whatever it may be and whatever title it may give itself or claim". See J. Pictet (ed.), above note 19, p. 60.

69 Constitutional Court of Colombia, Constitutional Conformity of Protocol II, Case No. C-225/95, 18 May 1995 (unofficial translation), partly reproduced in M. Sassòli, A. Bouvier and A. Quintin, above note 18, p. 2245, para. 17, and available in Spanish at: www.corteconstitucional.gov.co/relatoria/1995/c-225-95.htm.

70 See SCSL, *Kallon and Kamara*, above note 4, paras 45–50.

71 The SCSL had the opportunity to do so in the *Kallon and Kamara* case, above note 4. However, it limited itself to stating that the agreement did not need to be considered as an international treaty in order to create rights and obligations under municipal law, while expressly deciding not to analyze the validity of the agreement under municipal law, as that was not questioned before the Court.

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seems difficult for any government authority to admit the legality of actions that are already inherently illegal under domestic law.

Secondly, it is unclear how the domestic legislative jurisdiction might operate in complex scenarios, such as NIACs that take place in the territory of any given State between an AG and a third State. Could the national law of the third State be relied upon as a legal basis for the conclusion of special agreements in those cases? Or should the domestic law of the territorial State prevail? And what would happen in the case of armed conflicts where AGs fight across the borders of two States?

Finally, according to most national legislation, there is an asymmetrical relation between States and AGs, in which the former have the predominant position.[72] It is quite likely that States, after concluding these agreements, could legislate in such a way as to unilaterally alter, annul or effectively terminate them, without any consideration whatsoever of AGs' positions on the previously negotiated issues. In fact, even in the case of special agreements exclusively concluded between AGs, unless they are assimilated into some form of contract between private entities, there seems to be nothing to prevent States from unilaterally modifying their legal value.

Most importantly, by virtue of that asymmetrical relationship, States can easily deny the validity and effect of special agreements, since they would be automatically void in the majority of national regimes, given AGs' inherently unlawful domestic character. This could even be the case when AGs conclude agreements exclusively among themselves, irrespective of the content of said agreements. In sum, States can completely deny the *effet utile* of special agreements.

In general, this State-centric perspective undermines the equality of the belligerent parties to a NIAC by subordinating special agreements to domestic law. In addition, the enforcement of their provisions is also left exclusively within the domain of States. In fact, breaches of special agreements (either by a State or by an AG) would not have any consequences at the international level, and in the end, only national judges would be entitled to determine any kind of State or individual responsibility.[73]

This scenario is a huge disincentive for AGs to actually engage in the conclusion of special agreements, thus making it more difficult to use such agreements as a tool to achieve greater levels of compliance. In sum, this alternative seems to render IHL less effective.

72 J. Somer, above note 2, pp. 659–660.
73 This would raise a number of complex questions concerning the actors entitled to bring cases before national courts using special agreements as a legal basis and regarding the specific commitments that could entail State or individual responsibility. In any case, given the asymmetrical relationship described in this section, it does seem improbable that national judges would hold States accountable for violations of those agreements.

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Special agreements as regulated by a *sui generis* legal regime

A second view has been proposed by Sassòli, who argues:

> By analogy to other fields of international reality dominated by non-State actors, one could imagine armed groups developing among themselves a new transnational law of armed groups, just as sports clubs and their organizations have developed international sports law, internet users and providers the cyber law and merchants the *lex mercatoria*. The relationship between such new *lex armatorum* and the IHL adopted by States would have to be clarified, but similar clarification was also necessary to establish the relationship between the *lex mercatoria* and the instruments of international trade law.[74]

This means that AGs would have the capacity to create a new legal regime, neither entirely domestic nor international, but something in between. Indeed, *lex mercatoria* is often described as a set of rules constantly developing without any reference to any particular national or international system of law.[75] Rondeau has suggested that this idea seeks "to address practical gaps that rendered existing law impractical and unrealistic for … key non-state actors".[76] Of course, this approach presents a new perspective, as AGs would be considered to be participating in the creation not only of new rules, but of an autonomous legal regime: *lex armatorum*. In fact, the mere concept of *lex armatorum* in the creation of IHL would fundamentally challenge the notion of international law as being exclusively dominated by States.

However, Sassòli does recognize that this position has certain inherent difficulties, mainly related to the nature of AGs and their interaction with each other. On the one hand, the duration of hostilities has an effect on the existence of an AG, because when the armed conflict ends, the group will either triumph in its struggle, eliminating the need to fight, or be defeated and disbanded. In fact, that seems to be the reason why the notion of AGs is intrinsically related to the notion of NIACs, since one cannot exist without the other.[77] On the other hand, although AGs have common interests, they usually have different structures or characteristics, and – unlike sports clubs, merchants and internet users, who interact with each other globally and create transnational law[78] to

74 M. Sassòli, above note 11, p. 23.

75 Antonio Cassese and Luigi Condorelli, "Is Leviathan Still Holding Sway over International Dealings?", in Antonio Cassese, *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, p. 21.

76 Sophie Rondeau, "Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts", *International Review of the Red Cross*, Vol. 93, No. 883, 2011, p. 669.

77 On the link between the definition of NIACs and the elements that determine the existence of an AG, see generally Michael Schmitt, "The Status of Opposition Fighters in a Non-International Armed Conflict", in Kenneth Watkin and Andrew Norris (eds), *Non-International Armed Conflict in the Twenty-First Century*, International Law Studies, Vol. 88, Naval War College, Newport, RI, 2012, pp. 119–144.

78 For the purposes of this paper, transnational law refers to the law which regulates actions that transcend national frontiers without being "purely domestic nor purely international, but rather, a hybrid of the two". See Harold Hongju Koh, "Why Transnational Law Matters", Keynote at AALS Workshop on

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regulate such interactions – they fight against each other not on a worldwide scale, but rather in a restricted geographical vicinity, most frequently against governments "whom it would be difficult to subject to the new *lex armatorum*".[79]

Cassese and Condorelli criticize this theory by affirming that a "law without a state" is only possible when international and national law leave room for it, "opening up more or less extensive spheres of action for private autonomy: [such a law] is, in other words, an '*interstitial*' law, called upon to occupy the interstices left to it by domestic and international law".[80] This, however, relies on the classic State-centric theory of international law, pushing aside the stronger reasons to reject Sassòli's proposal without ignoring AGs' role in the conclusion of special agreements. Mainly, it does not seem clear that this perspective accurately describes what the parties to special agreements are actually doing. Indeed, one of the most frequent reasons why AGs conclude them is to achieve some political recognition from States;[81] the creation of a new legal regime separate from the one in which they are trying to get some legitimacy would therefore be a contradiction. In fact, the notion of *lex armatorum* seems to severely reduce the importance of State involvement, since it focuses almost exclusively on AGs' interactions between each other.

Moreover, given the content of special agreements, in particular their references to specific IHL rules,[82] it is difficult to believe that either States or AGs seek the creation of an entirely new legal regime – or at least, that does not appear to be the case from a black-letter reading of their content. In this sense, to consider that these agreements are part of a *lex armatorum* is conceptually problematic, since they usually bring into force (or expand the scope of) existing rules of international law rather than attempting to create a unique set of rules to govern conduct in an entirely new field of human activity.

Of course, this approach has the benefit of recognizing the role of AGs in the design and implementation of IHL rules, so it manages to avoid the problems mentioned in relation to a regulation exclusively by domestic law. However, by seemingly failing to properly consider the actual practice and intentions of the parties to NIACs, this framework also runs short of incentives for AGs to conclude special agreements and comply with IHL at large. To what extent would AGs be interested in creating agreements that do not provide them with the expected legitimacy?

Integrating Transnational Legal Perspectives into the First-Year Curriculum, 3–7 January 2006, *Penn State International Law Review*, No. 24, 2006, p. 745.

79 M. Sassòli, above note 11, p. 23.

80 A. Cassese and L. Condorelli, above note 75 (emphasis in original). The authors do not explain in great detail what exactly these spaces are, but they do suggest that "work is in progress on several fronts, with instruments of all types, both hard and soft, and within the framework of various international organizations (UN, International Labour Organization, Organization for Economic Co-Operation and Development, European Union, UNIDROIT, etc.). This is, for example, the case in the fields of development cooperation, the fight against corruption, corporate social responsibility, environment protection, promotion of virtuous human rights practices by multinational companies, identification of mandatory rules the *lex mercatoria* must respect, and so on."

81 O. Bangerter, above note 21, pp. 360–361.

82 See, for example, Memorandum of Understanding, above note 42; 1992 Agreement, above note 35; Philippines Agreement, above note 52.

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Once again, other problems may also arise concerning the enforcement of special agreements understood as a *lex armatorum*. In this realm, the main concern would be how to assure mutual compliance. Would States be willing to accept an entirely new legal regime that leaves them as actors in a supporting role? Would they accept the creation of new enforcement mechanisms not regulated by domestic or international law? These challenges seem quite difficult to address in the short term.

In sum, the notion that special agreements should be governed by an autonomous *lex armatorum* is neither reflective of the real intentions of the parties involved, nor is it suitable where the relevant obligations already exist.

Special agreements as regulated by international law

Finally, it is suggested that special agreements are already regulated by international law. This interpretation most closely reflects the parties' roles and intentions when concluding special agreements and recognizes AGs' role in their design.

Generally speaking, this approach logically follows from the principle of equality of belligerents, thus enabling greater levels of IHL effectiveness in the context of NIACs. As explained, special agreements are consistent with that principle because they are a tool designed to establish similar rights and obligations for all parties involved in the conflict and, most importantly, because they are based on those parties' joint commitment to abide by certain norms. By adopting an international law perspective, it is possible to accurately explain the process through which special agreements are usually concluded, recognizing each party's equal capacity to negotiate content and to take every necessary step to achieve compliance with the terms.

However, some difficulties may arise when trying to explain the nature of special agreements in light of the commonly accepted theories concerning the traditional sources of international law.[83]

Are special agreements international treaties?

In accordance with some drafts presented during the negotiation process of the 1969 Vienna Convention on the Law of Treaties (VCLT),[84] special agreements could be included in the category of international treaties, if treaties were to be defined very broadly. For example, a 1962 draft of Article 1 provided that the term "treaty" comprised international agreements between two or more States, or other subjects of international law such as international organizations and insurgents.[85] The

83 As expressed in Article 38 of the Statute of the ICJ, the undisputed sources of international law are international conventions, international customary law and general principles of law. See generally Malcolm M. Shaw, *International Law*, 6th ed., Cambridge University Press, Cambridge, 2008, pp. 113–122.

84 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

85 International Law Commission, *Yearbook of the International Law Commission: 1962*, Vol. 2, United Nations, New York, 1964, p. 162, Art. 1, Commentary 8.

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same year, draft Article 3 acknowledged the capacity of those insurgents to which a measure of recognition had been accorded to conclude treaties.[86] Those articles were subsequently deleted, and the final text of the VCLT does not acknowledge that any actor other than States can conclude treaties under its scope.[87] However, Article 3 of the VCLT does admit the possibility that there might be other international agreements concluded outside of its scope.[88]

As broad as any definition of international treaty can be, it is still usually required that the agreement be concluded by subjects of international law. This can be a problem when special agreements are faced with the final sentence of CA3, which denies the possibility that the application of the Article itself "affect[s] the legal status of the Parties to the conflict". Thus, there seem to be only two options: (i) special agreements cannot be considered international treaties because AGs do not have the capacity to conclude treaties and the contrary would inevitably modify their legal status; or (ii) AGs have a limited international legal personality which allows them, at least *a priori*, to conclude only the agreements referred to in CA3 and only to the extent that they refer to and concern IHL.

If one adopts the first perspective, there is no doubt that special agreements would fall outside the category of international treaties. If one prefers the second perspective, some practical problems arise. Within the limits of the final sentence of CA3, only those special agreements pertaining exclusively to IHL rules might be considered as "international treaties" (although, of course, falling outside of the VCLT's scope). However, some special agreements may include both IHL rules and provisions which are traditionally identified as belonging to other legal regimes, such as international human rights law.[89] In these cases, it would not be clear whether the agreements are international treaties or not. And it seems rather illogical that the limited international legal personality conferred to AGs may render the IHL-related portion of an agreement an international treaty, while the rest of the agreement remains something else.

In sum, classifying special agreements as international treaties would entail a number of complexities related to the aforementioned limitations. Consequently, it is necessary to seek other alternatives.

Participation in the creation of international law through an authoritative decision-making process

Even if the equality of belligerents perspective allows us to argue in favour of AGs participating in the creation of international law, may it also be claimed that they

86 *Ibid.*, p. 164.

87 When giving the definitions relevant to understanding its scope, Article 1.a of the VCLT affirms that "'treaty' means an international agreement concluded *between States* in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (emphasis added). Vienna Convention on the Law of Treaties, above note 84, Art. 1.

88 *Ibid.*, Art. 3.

89 See above note 52.

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take part in this process through different means from those accepted as the traditional sources of law? Is it possible to accept such an atypical process?

Certainly, this can be argued. In fact, special agreements can be understood as creating international law through an authoritative decision made by relevant actors that interact within the realm of international relations and with the intention to bind themselves to a set of rules designed to regulate such interaction. Hence, in order to fully grasp this alternative approach, it is necessary to focus on the goal of special agreements and on the decision-making process that leads to their conclusion.

As explained above, the specific commitments undertaken by the parties to special agreements usually have the ultimate objective of bringing into force a higher level of rights and obligations. Most notably, they aim to enhance the protection of individuals affected by armed conflicts. Therefore, it is proposed here that the capacity of AGs cannot be over-constrained by the final part of CA3. A comprehensive and harmonic interpretation of this provision's protective goal should be fulfilled without entailing a modification of AGs' legal status. By understanding special agreements as authoritative decisions rather than through the lens of traditional international law sources, it is possible to avoid entering into the maze of CA3's last sentence.

It is necessary, then, to leave aside the notions of "subjects" and "objects" of international law and, instead, embrace the idea that international rights and obligations are created by participants in a continuing process of authoritative decisions. Within this framework, all players in the international arena can be relevant in the context of the legal decision-making process, depending on their acceptance by other established participants.[90] In this sense, Higgins explains that

> [w]hen … decisions are made by authorized persons or organs, in appropriate forums, within the framework of certain established practices and norms, then what occurs is *legal* decision-making. In other words, international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the reference to the trend of past decisions which are termed "rules". There inevitably flows from this definition a concern, especially where the trend of past decisions is not overwhelmingly clear, with policy alternatives for the future.[91]

In this kind of process, where policy alternatives are embraced, the distinction between typical and atypical sources of international law may become obsolete.[92] Instead of following the traditional rules for verifying the existence of an international treaty, a customary rule or a general principle of law, the creation of international law is rather based upon the effective actions and interactions of

90 R. Portmann, above note 67, pp. 212–213.

91 Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, p. 2.

92 See above note 83 in reference to those sources that can be understood as typical.

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multiple actors within organized arenas like diplomatic negotiations or unorganized scenarios such as public campaigns, academic events or side events.[93]

This theoretical approach allows us to understand special agreements as regulated by international law, avoiding the complexities that emerge if they are considered as international treaties. At the same time, this perspective remains consistent with the principle of equality of belligerents, by considering AGs' will in the context of their effective interactions with other actors in the international decision-making process. Consequently, it may serve the purpose of enhancing their compliance with IHL.

Challenges and consequences

Some contemporary authors have expressed different concerns that must be addressed in order to further support the idea that special agreements can be understood as authoritative decisions.

A first set of critiques may undermine the idea that AGs are considered relevant actors in the international realm, although from different perspectives. In general terms, Portmann argues against the normative force of effective action in international law by analyzing the role of *opinio juris* in the creation of customary law. He explains that there is a

> distinction in international law between what specific entities actually do, and what legal effect such action may have: action in itself clearly is not sufficient to draw a normative conclusion … It therefore seems difficult to argue that in the field of personality or in any other field of international law there can be direct normative implications of effective behaviour or actual power: such conclusions require a principled justification in analogy to the role of *opinio iuris* in the formation of customary law.[94]

More specifically, although arguing in favour of the inclusion of non-State actors in the making of IHL, Ryngaert points out that to date, "only *state* practice, as opposed to non-state actor practice, appears to have been taken into account for the formation and identification of customary law".[95]

As previously pointed out, the idea that AGs already participate in the creation of customary IHL is still a minority opinion. However, in the case of special agreements, their conclusion is in itself sufficient proof of those non-State actors' participation. Nevertheless, according to Portmann's critique, such effective action could not be said to have any direct normative implications. What this author does not seem to consider is that under Higgins' theory,

93 As explained by Portmann, all these interactions "cumulate in decisions which themselves enjoy authority not because international rules exist to this effect, but because the relevant participants effectively accept, to varying degrees in different contexts, the decision as compulsory". R. Portmann, above note 67, pp. 211–212.

94 R. Portmann, above note 67, pp. 267–268, and in general, pp. 264–268.

95 C. Ryngaert, above note 33, pp. 288–289. See also ICRC Customary Law Study, above note 6, pp. xxxiv–lvii; and J.-M. Henckaerts, above note 24, p. 128.

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normative implications are derived not from isolated actions of single actors but from their interactions, which may also serve as principled justification. In fact, the relevance of actors in the international realm is dependent upon their acceptance by other established actors, and the creation of international law occurs as a result of a continuing process of decision-making among them.

Certainly, the "authorized persons or organs" and the "appropriate forums" may vary, in accordance with the actions taken by international actors themselves. But in the case of special agreements, CA3 is in itself sufficient proof of AGs' recognition as authorized entities by other established actors. When AGs interact among themselves and with States in such a way that they all commit to rules governing their respective conduct during armed conflict, they are in fact recognizing each other as authorized to do so, without affecting AGs' legal status in the terms of CA3. They are also acknowledging the forum in which they meet as an appropriate one. And when this interaction is encouraged by international and non-governmental organizations, they too accept a new way of making authoritative decisions.

A second set of arguments may cast doubt as to the possibility of actually achieving protective outcomes through decision-making processes. Portmann affirms that there is a confirmed tendency today to support the idea of having rules of international law that transcend acquiescence by particular States, especially peremptory norms. He then submits that this renders it impossible to assume that international law is a decision-making process rather than a set of rules, since this would imply that *jus cogens* rules would depend on policy considerations.[96]

In the realm of IHL, Ryngaert explains that when arguing in favour of AGs' participation in the norm creation process,

> one should also be willing to accept the consequence that the content of the customary rules thus formed may not, as a matter of course, be a humanitarian's dream. Armed opposition groups … are not known for their respect of IHL. Indeed, quite the contrary is true. Accordingly, including non-state actors in the process of customary law formation may possibly lead to *regression*.[97]

As for peremptory norms, Higgins does explain that States cannot limit or derogate them because of the critical importance they are given by the community as a whole.[98] What probably troubles Portmann is Higgins' acceptance that if the international community decided not to attribute *jus cogens* rules such importance any more, they would not retain their normative value. However, Higgins' position can also be understood by acknowledging that an isolated

96 R. Portmann, above note 67, p. 264. This is a relevant critique, as "certain rules of international humanitarian law are considered almost unanimously to be peremptory norms of international law". Rafael Nieto-Navia, "International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law", The Hague, 2001, p. 20, available at www.iccnow.org/documents/WritingColombiaEng.pdf.

97 C. Ryngaert, above note 33, p. 289.

98 R. Higgins, above note 66, p. 47.

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principled justification may not be enough to explain the hierarchy of international norms. Such a justification should also take into account the effective action – that is, how different actors interact concerning the normative value of those rules. In fact, she explains that

> [t]he status of norms that we hold dear is to be protected by our efforts to invoke and apply them, in turn ensuring that they do not totally lose the support of the great majority of States. But they cannot be artificially protected through classifying them as rules with a "higher normativity" which will continue to exist even if we fail to make States see the value of giving such proscriptions a normative quality.[99]

However, dealing efficiently with the difficulty presented by Ryngaert may require further examination. To some extent, proving or disapproving the contention that AGs' participation in the creation of binding rules may lead to a less protective outcome seems to actually require an *ex post facto* analysis of the specific instances of AGs' participation.

Although it would exceed the scope of this paper to examine the full content of and compliance with all special agreements, some basic aspects should be examined. To begin with, it is well established that the provisions of CA3 are considered basic humanitarian rules applicable in any armed conflict. Therefore, it can be argued that the international community as a whole considers them to be of critical importance[100] and, consequently, that they are in fact a "minimum yardstick" which could not be in any way diminished by special agreements.

In this vein, as was explained in the above discussion on the specific commitments included in special agreements, even the mere reference to a vague set of humanitarian principles may actually broaden the rights and obligations of the parties to a NIAC. Moreover, there are good examples of agreements that actually reproduce the content of CA3, or include general references to other international treaties such as AP I, AP II and the GCs, or specific rules that may even belong to the realm of international human rights law.[101]

Yet, if special agreements are regulated by international law, some practical consequences must be addressed. In particular, it is important to consider two questions within this theoretical framework: what rules will guide the process of international law creation through special agreements as well as their interpretation, and how can special agreements be enforced?

As for the first question, it must be taken into account that decision-making processes, as explained above, are not subject to concrete procedural rules, since the participants are continuously recognizing and accepting other actors and means of decision making. However, it is submitted here that the VCLT – or at least, some of

99 *Ibid*., p. 48.

100 See, among others, Jelena Pejić, "Non-Discrimination and Armed Conflict", *International Review of the Red Cross*, Vol. 83, No. 841, 2001, available at: https://www.icrc.org/eng/resources/documents/misc/57jqzq.htm; R. Nieto-Navia, above note 96, pp. 25–26; ICTY, *The Prosecutor* v. *Kupreškic et al.*, Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 520.

101 See above notes 44 and 52.

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its core provisions[102] – could be applied by analogy, both in terms of interpretation of special agreements and of the rules that may guide their conclusion.

While, strictly speaking, the VCLT rules are intended to apply only to international treaties, they have already been used with regards to other international instruments. For example, the ICTY, the ICTR and the Special Tribunal for Lebanon (STL) have applied VCLT rules in order to interpret their statutes.[103] The difficulties of considering special agreements as international treaties have already been dealt with. At the most, the analogical application of the VCLT rules of treaty-making and interpretation only provides a framework that the parties to special agreements are free to modify by expressing their concurrent will within the agreement or in separate instruments.

Concerning enforcement, special agreements will undoubtedly undergo the same difficulties that many other international rules must face in the context of a decentralized international system. However, building on the arguments presented throughout this paper, the regulation of special agreements under international law has the core advantage of equally taking into account the will of all parties. On the one hand, it provides the parties the opportunity to implement *ad hoc* enforcement mechanisms that are not subordinated to a State, but are not dependent on the creation of a wholly new legal and institutional framework. On the other hand, and much more importantly, the process of creation of special agreements as understood under the framework of international law serves to enhance the perceived legitimacy of the rules agreed upon, hence increasing the chances of voluntary compliance in the first place.

Concluding remarks

Compliance with IHL by AGs presents many challenges. This article has focused on the possibility of addressing some of them through the conclusion of special agreements, understood as authoritative decisions to create and be bound by international law.

It was first argued that special agreements are useful tools for generating respect for IHL for several reasons. Firstly, special agreements are concluded through a decision-making process that engages AGs in the reaffirmation and creation of IHL obligations, which is consistent with the principle of equality of

102 We are referring here to some substantial rules such as the *pacta sunt servanda* clause (Art. 26), the general rules of interpretation (Art. 31) and the rules concerning conflicts with peremptory norms (Arts 53 and 64). VCLT, above note 84.

103 ICTR, *The Prosecutor* v. *Bagosora et al.*, Case No. ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others (Appeals Chamber), 8 June 1998, para. 28; ICTY, *The Prosecutor* v. *Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah (Appeals Chamber), 7 October 1997, para. 3; ICTY, *The Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Trial Chamber), 12 November 2002, para. 63; STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No. STL-11-01/I/AC/R176 *bis*, 16 February 2011, para. 26.

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belligerents. In this context, the parties have an equal opportunity to express their views and demonstrate their mutual will regarding humanitarian issues. This is already an incentive to comply with IHL. Secondly, given that AGs play an active role in determining the terms of the agreement, they are likely to develop a sense of ownership of the IHL rules they undertake to respect. This may have a positive impact on AGs' levels of compliance with such provisions.

Finally, through the conclusion of special agreements the parties may clarify the general legal framework applicable during a NIAC, and they can also undertake additional commitments concerning specific rules, thus extending the set of rights and obligations mentioned in CA3. This can help to generate respect for IHL because (i) the parties will have the opportunity to assess their factual ability to comply before accepting any commitment; (ii) the rules agreed upon may be easily publicized and transmitted in the form of instructions to AGs' membership (which may be expected to happen if there is a sense of ownership of those rules); (iii) the acceptance of normative references has a symbolic value that may impact the attitudes of individuals (members of AGs) and have a preventive effect; and (iv) special agreements may contain provisions which accept the legitimacy of already existent enforcement mechanisms or even create new ones.

The core part of this paper aimed at explaining why special agreements are best understood as regulated by international law, as opposed to by domestic law or a *sui generis* regime. While the proposition that domestic law would be the appropriate legal regime regulating special agreements is difficult to reconcile with the principle of equality of belligerents; the *sui generis* proposition presents a few practical challenges that might obstruct the effective implementation of IHL. Therefore, it is suggested that the regulation of special agreements by international law is the only approach that enables their conclusion to be understood consistently and in accordance with the principle of equality of belligerents. And while special agreements cannot be considered as international treaties, they can - and often do - contain international legal rules to which the parties to a NIAC can commit through the established legal framework of CA3, within the continuing legal decision-making process conducted by various stakeholders involved in a conflict.

The need to find solutions to IHL compliance issues has led to the exploration of new paradigms, which may require the revision of some basic notions of international law. For the purpose of better protection of the victims, certain limits set by IHL and public international law should be challenged in order to solve practical problems that arise in today's armed conflicts.[104]

104 On the challenges and stakes inherent in defining certain phenomena as legal or non-legal, see Andrea Bianchi, "Reflexive Butterfly Catching: Insights from a Situated Catcher", in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking*, Oxford University Press, Oxford, 2012, p. 200. See also Ezequiel Heffes, "The Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law: Challenging the State-Centric System of International Law", *Journal of International Humanitarian Legal Studies*, Vol. 4, No. 1, 2013, pp. 81–107. There, the author explores the possible application of the International Law Commission's Draft Articles on the

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A first step is to begin thinking of special agreements in terms of the international rights and obligations they encompass and of the actors involved in their conclusion, without necessarily trying to fit them into the categories of traditional sources of international law. Inasmuch as this new perspective may create new incentives for AGs to comply with humanitarian rules, special agreements should continue to be encouraged as a means of generating respect for and enhancing the effectiveness of IHL.

Responsibility of States for Internationally Wrongful Acts (2001) to wrongful acts committed by members of an AG so as to attribute them to the AG as such.

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