



Justice through Armed Groups' Governance – An Oxymoron?

Jan Willms



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Jan Willms

Abstract

In this paper, the author addresses the question of whether armed groups' courts are suitable to enforce international humanitarian law. The ensuing question of whether the existence of these courts conforms to international law is answered in the affirmative: international humanitarian law and human rights law do not in principle prohibit the operation of such courts. Adjudication by armed groups has a relatively high potential to deter the groups' fighters from committing violations of international humanitarian law. This is to a large extent because convictions by armed groups' courts gain more attention among fighters than convictions by national or international criminal courts. However, the empirical record of armed groups' courts is mixed. The African armed groups examined in this paper violated international humanitarian law, including due process guarantees. Yet, they showed more respect for civilians than many armed groups without their own jurisdiction.

Zusammenfassung

Gegenstand des Arbeitspapiers ist die Frage, ob Rechtsprechung durch bewaffnete Gruppen geeignet ist, das humanitäre Völkerrecht durchzusetzen. Die sich daran anschließende Frage, ob Gerichte bewaffneter Gruppen selbst überhaupt völkerrechtskonform sind, wird bejaht: Grundsätzlich verbieten weder humanitär-völkerrechtliche noch menschenrechtliche Standards solche Gerichte. Die Rechtsprechung durch bewaffnete Gruppen hat ein vergleichsweise hohes Potential, die eigenen Kämpfer von Verletzungen des humanitären Völkerrechts abzuschrecken. Dies liegt zu einem großen Teil daran, dass von bewaffneten Gruppen gesprochene Urteile unter den Mitgliedern der entsprechenden Gruppe eine deutlich höhere Aufmerksamkeit erregen als Prozesse nationaler oder internationaler Strafgerichte. Allerdings ist die Bilanz von Gerichten bewaffneter Gruppen in der Praxis durchwachsen. Die Analyse verschiedener afrikanischer bewaffneter Gruppen zeigt, dass Gruppen mit Gerichten zwar fundamentale Normen des humanitären Völkerrechts – inklusive Verfahrensgarantien – verletzt haben, es jedoch in einem größeren Maße respektieren als viele Gruppen ohne eigene Rechtsprechung.

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1. Introduction¹

The armed group² Mouvement de Libération du Congo (MLC) led by Jean-Pierre Bemba controlled large parts of the North of the Democratic Republic of the Congo (DRC) between the late 1990's and 2003. In the beginning the MLC acted fairly responsibly and installed a civilian administration. In 2002 and 2003, however, its members committed atrocities in the DRC and the Central African Republic. In February 2003, the MLC tried twenty-seven of its members for extortion, rape, assassination, looting and disobeying orders.³ The trials took place in the headquarters of the MLC in the North of the DRC. The UN peace support operation MONUC would have provided planes for defence attorneys from Kinshasa, but the government of the DRC prevented them from boarding.⁴ The verdicts were already delivered one week after the beginning of the trial⁵ and attracted serious criticism. In front of the Security Council, the United States condemned three aspects of the trial, namely:

- “1. inadequate due process guarantees afforded to the defendants
2. disregard for the serious nature of the crimes, as reflected in the light sentences handed down [and]
3. the failure to charge anyone with crimes against humanity or war crimes.”⁶

Similarly, Jean-Marie Guéhenno, Under-Secretary-General for Peacekeeping Operations, said that the trials had not achieved real accountability.⁷ While the DRC simply obstructed the MLC's trial, the UN and the US were more pragmatic. They did not criticize that an armed group had used courts but only the manner in which the MLC had done so.

This example illustrates a basic dilemma. On the one hand, States are usually unwilling to accept the operation of a court of an armed group on their territory as the administration of justice is considered to be a very important aspect of their sovereignty. On the other hand, the international community has a strong interest in the enforcement of international humanitarian law, in which armed groups' courts might play a role.

¹ I am grateful to Dieter Fleck, Heike Krieger and Sandesh Sivakumaran for providing comments on earlier drafts of this article. I also owe thanks to the participants of the conference on the implementation of international humanitarian law in contemporary African conflicts in September 2011 in Potsdam where it was discussed. All possible errors remain, of course, mine.

² The term is used here for armed non-state actors that at least meet the requirements in Common Article 3 of the Geneva Conventions.

³ Integrated Regional Information Networks (IRIN), DRC: Interview with MLC Leader Jean-Pierre Bemba, 6 February 2003, <http://www.irinnews.org/fr/reportfrench.aspx?reportid=41456>, last accessed 21 September 2012.

⁴ IRIN, DRC: MLC Completes Ituri Rights Violations Trials, Subject to Appeal, 27 February 2003, <http://www.news.irinnews.org/printreport.aspx?reportid=41827>, last accessed 21 September 2012.

⁵ Ibid.

⁶ United Nations Security Council (UNSC), 4784th Meeting, S/PV.4784, p. 19 (Mr. Williamson, USA).

⁷ Ibid.: 3.

Can armed groups' courts be an effective tool for the implementation of justice despite States' concerns about their sovereignty? More precisely, the article will address to what extent armed groups' courts are able to enforce the law applicable during armed conflict, international humanitarian law. In response to that question, it will first be addressed whether armed groups' courts are legal or even required under international humanitarian and human rights law (2.). Then the paper will deal with the question whether the prohibition of double jeopardy must be applied to 'judgments' issued by armed groups' courts (3.). This will be followed by a more empirical analysis whether such courts can contribute to the implementation of humanitarian law (4.) and to what extent they respect fair trial guarantees (5.). Subsequently, the effect of armed groups' courts on the empirical legitimacy of the armed groups possessing them will be analyzed (6.). Finally, it will be discussed how the international community should react (7.).

2. The status of armed groups' courts

2.1 Are armed groups' courts prohibited?

Turning to their legal status, armed groups' courts are normally illegal under a State's domestic law. In light of the topic of this paper it is more important to focus on their legality under international law standards for the protection of individuals. If armed groups' courts were illegal under international law, this would compromise any positive effects such courts might have on the implementation of international humanitarian law rules.

2.1.1 International humanitarian law

There are two conventional provisions in international humanitarian law relevant to armed groups' courts: Common Article 3(1)(d) of the 1949 Geneva Conventions (GC) and Article 6 of Additional Protocol II to the Geneva Conventions (Additional Protocol II, AP II). Moreover, Rule 100 of the Customary Law Study of the International Committee of the Red Cross (ICRC) also prescribes that fair trial guarantees apply by means of customary international law (Henckaerts/Doswald-Beck 2005: 352).

International humanitarian law contains no rule that explicitly prohibits courts by armed groups. Only Common Article 3 GC, which requires a 'judgment pronounced by a regularly constituted court', makes one hesitate. By its ordinary meaning, this would seem to mean something along the lines of the human rights standard 'established by law'. If 'law' is interpreted as State law only, this could be interpreted as prohibiting armed groups to operate courts.⁸ In particular in the context of humanitarian law, the term 'law' could also include law by an armed group. Similarly, a court could be 'regularly constituted' within the law of the armed group.

⁸ It will be discussed below whether this is actually the case under human rights law. See Section 2.1.3.

At any rate, according to the principles of effectiveness and good faith, it would not make sense to also apply a norm to non-state actors⁹ which they cannot possibly comply with. The phrase ‘regularly constituted court’ has not been reused in Article 6 AP II which indicates that States did not place much emphasis on how a court of an armed group is established but were much more concerned about fair trial guarantees.

Customary international humanitarian law does not – according to the ICRC – prohibit armed groups’ courts, either. Rule 100 of the ICRC Customary Law Study is formulated in a general fashion and does not require a regularly constituted court. The Rule simply reads: “No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.” (Henckaerts/Doswald-Beck 2005: 352) Similarly, the Manual of Non-International Armed Conflict sets out fair trial guarantees that armed groups in principle can meet (Dinstein et al. 2006: 51-52).

The above-mentioned US condemnation of the MLC’s too light punishment implicitly supports the conclusion that armed groups’ courts are not illegal under international humanitarian law.¹⁰ Otherwise, the US would absurdly be demanding an act that violates humanitarian law in order to punish a violation of the same body of law. The same reasoning can be applied, *mutatis mutandis*, to the following statements. The Security Council urged that “RCD [Rally for Congolese Democracy]-GOMA must [...] ensure an end to all violations of human rights and to impunity in all areas under its control.”¹¹ The Special Rapporteur for the Sudan demanded that two armed groups operating in South Sudan “should take the necessary measures without delay to prevent future violations by investigating the cases brought to their attention and holding the perpetrators responsible.”¹² The Commission of Inquiry for Libya (at a time in which the non-international armed conflict was still ongoing¹³) recommended to the Libyan National Transitional Council “to conduct exhaustive, impartial and public investigations into all allegations of international human rights law and international humanitarian law violations [...] with full respect of judicial guarantees.”¹⁴ These calls on consolidated armed groups

⁹ It can hardly be doubted that Common Article 3 GC including its rules on courts formally applies to armed groups since the chapeau of that Article is addressed to ‘each Party’. This formal application is dealt with in more detail by Sivakumaran (2009: 495-498).

¹⁰ See above note 6 and corresponding text.

¹¹ UNSC Presidential Statement 22 (23 July 2002), para. 4.

¹² Report of the Special Rapporteur on the situation of human rights in Sudan (20 February 1996) UN Doc. E/CN.4/1996/62, para. 87.

¹³ It is not necessary to dwell on the question of the qualification of the conflict. In order to identify the Commission’s opinion on the applicability of human rights law to armed groups, it is sufficient to note that the Commission qualified the conflict as non-international and referred to the National Transitional Council as a ‘dissident armed group’ in the sense of Additional Protocol II. Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya (1 June 2011) UN Doc. A/HRC/17/44, paras. 60-65. At any rate, as Dapo Akande (2011) rightly pointed out, the recognition of the NTC as the ‘legitimate governing authority in Libya’ did not take place before 15 July 2011.

¹⁴ Commission of Inquiry Libya, above note 13, para. 269.

to investigate crimes in situations of armed conflict support the conclusion that international humanitarian law does not prohibit such courts.

2.1.2 Rome Statute of the International Criminal Court

Since Article 8(2)(c)(iv) of the Statute of the International Criminal Court (ICC) is by and large simply a criminalized version of common Article 3, it is not surprising that Article 8(2)(c)(iv) does not forbid armed groups' courts, either. In the ICC Elements of Crimes a "regularly constituted court" is defined as a court "affording the essential guarantees of independence and impartiality"; and independence and impartiality are standards that courts by armed groups are in principle able to meet. Whilst this interpretation in the ICC Elements of Crimes seems to confuse regular constitution with fair trial guarantees, it is the most authoritative interpretation. The ICC's jurisprudence in the *Bemba* case also confirms that armed groups' courts are not illegal. Before the decision on confirming or declining charges, Amnesty International submitted Amicus Curiae observations. Therein Amnesty argued that Bemba could not use a court of an armed group in order to avoid command responsibility. Amnesty reasoned that such a court does not meet the human rights standard 'established by law' and is not able to provide for a fair trial.¹⁵ Pre-Trial Chamber II did not share this view. On the contrary, it established command responsibility on the basis that Bemba's armed group *had* a 'functional military judicial system' which was not used.¹⁶ This clearly confirms the interpretation that armed groups are able to meet the requirements in Article 8(2)(c)(iv) ICC Statute. Otherwise, the ICC would encourage war crimes.

2.1.3 Human rights law

Courts of armed groups are not prohibited under international humanitarian law. But what is the status of these courts under human rights law? The first question that arises is whether armed groups are bound by human rights law at all. Although still very controversial, there is growing international practice and an increasing tendency in literature that speaks in favour of such an application, especially for *jus cogens* norms¹⁷ as well as in cases where armed groups control territory and/or exercise quasi-governmental authority.¹⁸ This is supported by a variety of arguments. One is in essence functional: "[A]s an insurrectionary movement takes control over territory and establishes an administration, it [...] automatically assumes the human

¹⁵ *Prosecutor v. Bemba Gombo* (Amicus Curiae Observations on Superior Responsibility submitted pursuant to Rule 103 of the Rules of Procedure and Evidence) ICC-01/05-01/08-406 (20 April 2009), paras. 22-23.

¹⁶ *Prosecutor v. Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/05-01/08 (15 June 2009), para. 501.

¹⁷ First Report of the Committee on Non State Actors, 'Non-state Actors in International Law: Aims, Approach and Scope of Project and Legal Issues' in International Law Association Report on the Seventy Fourth Conference (The Hague 2010) para. 3.2; Bellal et al. (2011: 72-73).

¹⁸ This view is found in a large number of UN reports. See e.g. The Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009) UN Doc. A/HRC/12/48, para. 305; Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya (1 June 2011) UN Doc. A/HRC/17/44, para. 72.

rights obligations resting on the territory.” (Hessbruegge 2005: 40-41)¹⁹ Others base themselves on State practice and *opinio juris* (Tomuschat 2004). It cannot be said with certainty whether practice has crystallized into a clear-cut obligation of armed groups to respect human rights. However, such a duty is developing.

Assuming, *arguendo*, that the right to a fair trial applies to armed groups’ courts, the courts would have to be ‘competent’ or ‘established by law’.²⁰ Whilst the Human Rights Committee declined to pronounce itself on the constitutionality of a court,²¹ Nowak states the following:

“Both conditions [‘competent’ and ‘established by law’] are to ensure that the jurisdictional power of a tribunal is determined generally and independent of the given case, i.e. not arbitrarily by a specific administrative act. The term ‘law’ is [...] to be understood in the strict sense of a parliamentary statute or an equivalent unwritten norm of common law, which must be accessible to all persons subject to it.” (2005: 319)²²

Especially where armed groups wish to pass their own laws, many of them find it impossible to meet the requirement of a ‘parliamentary statute’. If armed groups were bound by a human rights norm they were not able to meet “such a rule [...] [would] not be complied with and it [...] [would] undermine the credibility and protecting effect of other rules.”²³ This would run counter to the principal reason that motivates deliberations on how armed groups could be bound by human rights law, i.e. the protection gap for populations living under its control (Bellal et al. 2011: 70). It would therefore seem reasonable to functionally interpret the requirement of a parliamentary statute for new laws of armed groups. Indeed, the ‘established by law’ condition has been flexibly interpreted outside the domestic law context.²⁴ The European Court of Human Rights held that courts of a non-state entity unrecognized by the international community could in principle meet the ‘established by law’ condition:

¹⁹ This is a very expansive interpretation of General Comment 26. It is stated in the Comment that the “rights enshrined in the Covenant belong to the people living in the territory of the State party.” However, in all cases enumerated thereafter States still have the authority. See General Comment on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights (General Comment 26), Human Rights Committee, 8 December 1997, UN Doc. CPR/C/21/Rev.1/Add.8/Rev. 1, para. 4.

²⁰ Article 14(1) ICCPR; Article 7(1)(a) African Charter on Human and Peoples’ Rights. The African Court for Human and Peoples’ Rights has not dealt with the right to a competent court yet.

²¹ *Fals Borda et al. v. Colombia*, (46/1979) Human Rights Committee, 27 July 1982, para. 13.3.

²² For a similar definition see the jurisprudence of the European Court of Human Rights: *Coëme et al. v. Belgium* (Judgment) Application No. 32492/96 (18 October 2000) para. 98.

²³ Sassòli makes this point in the context of international humanitarian law (2010: 16).

²⁴ In *Tadić* ‘established by law’ was held to mean ‘established according to the rule of law’ in an international law context. *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995), para. 45.

“In certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal ‘established by law’ provided that it forms part of a judicial system operating on a ‘constitutional and legal basis’ reflecting a judicial tradition compatible with the Convention, in order to enable individuals to enjoy the Convention guarantees.”²⁵

Admittedly, the European Court of Human Rights held this with regard to consolidated *de facto* regimes with a higher degree of organization than most armed groups (Turkish Republic of Northern Cyprus and the Moldavian Republic of Transdniestria). However, it is still remarkable that the European Court of Human Rights which can only adjudicate human rights violations attributable to States allows at all for that possibility. Moreover, the Commission of Inquiry for Libya²⁶ and the Security Council²⁷ considered that human rights law applied to the Libyan National Transitional Council and the Rally for Congolese Democracy GOMA, respectively, and called for accountability measures by these armed groups. Hence, if human rights law applied to armed groups, it would not per se prohibit that they have courts.

2.2 The possible duty of armed groups to investigate and prosecute

We have seen that international law rules on the protection of individuals do not prohibit armed groups to operate courts. The next question, then, is whether armed groups are obliged to investigate and prosecute war crimes. If armed groups were under a duty to investigate and prosecute, this would strengthen the role of their courts as a tool for implementation. The duty to investigate and prosecute is enshrined in international humanitarian and international criminal law but can also be deduced from human rights law.²⁸

²⁵ *Ilaşcu et al. v. Moldova and Russia* (Judgment) Application No. 4877/99, European Court of Human Rights, 8 July 2004, paras. 455-464. See also *Cyprus v. Turkey* (Judgment) Application No. 25781/94, European Court of Human Rights, 10 May 2001, paras. 231, 236-237. For criticism of this interpretation see in particular *Cyprus v. Turkey*, this note, Partly Dissenting Opinion of Judge Palm Joined by Judges Jungwiert, Levits, Pantiru, Kovler and Marcus-Helmons, 101, at 101-105 and *Cyprus v. Turkey*, this note, Partly Dissenting Opinion of Judge Marcus-Helmons, 119, at 119-124.

²⁶ Report Commission Libya, above note 13, paras. 72 (human rights), 269 (accountability).

²⁷ UNSC Presidential Statement 22, above note 11, and corresponding text.

²⁸ If we accepted that it applied to armed groups, an obligation to investigate a certain human rights law violation could also be basis for a duty to investigate a particular war crime if the two crimes have the same underlying offence. The Human Rights Committee has for example developed the obligation to investigate violations of the right to life: *Amirov v. Russian Federation* (1447/2006), Human Rights Committee, 2 April 2009, paras. 11.2-11.4. A violation of the right to life during armed conflict could at the same time be a violation of international humanitarian law. However, there is no obligation to investigate under human rights law that specifically encompasses all war crimes. Moreover, the relationship between international humanitarian and human rights law needs to be borne in mind, although there seem to be no inherent conflicts between the duties to investigate in both branches of law. For the last point see the Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law to Monitor and Assess any Domestic, Legal or Other Proceedings Undertaken by Both the Government of Israel and the Palestinian Side, in the Light of General Assembly Resolution 64/254, Including the Independence, Effectiveness, Genuineness of these Investigations and their Conformity with International Standards (23 September 2010) UN Doc. A/HRC/15/50, para. 29; Schmitt (2011: 54).

Treaty-based international humanitarian law only obliges States to investigate war crimes.²⁹ Similarly, it would not be easy to contend that customary international humanitarian law imposes a duty to investigate and prosecute for all armed groups. Even the ICRC Customary Law Study, sometimes criticized for demanding too much of non-state actors (Sassòli 2010: 17), finds an obligation to investigate and prosecute in Rule 158 only for States (Henckaerts/Doswald-Beck 2005: 558).³⁰ George Abi-Saab's contention in his separate opinion in the *Tadić* case that the grave breaches provisions applied in non-international armed conflict³¹ did not include an explicit claim that armed groups should be bound by it. It might also be that he only considered States and *de facto* regimes, like those that operated in the former Yugoslavia, to be the addressees of the grave breaches provisions.

However, the examples quoted above³² could indicate a trend towards an obligation to investigate and prosecute for well-consolidated armed groups that control territory. The Goldstone Report even held (at least for Gaza) that any *de facto* authority exercising government-like functions was under an obligation to prosecute the members of armed groups in the territory under its control, seemingly regardless of whether they are affiliated to the *de facto* authority or not:

“[T]he Gaza authorities are responsible for ensuring that effective measures for accountability for violations of IHRL [international human rights law] and IHL [international humanitarian law] committed by armed groups acting in or from the Gaza Strip are established. The Mission points out that such responsibility would continue to rest on *any* authority exercising government-like functions in the Gaza Strip.”³³

This somewhat limited practice does not allow to claim with certainty whether or not an obligation to investigate and prosecute exists for armed groups, let alone whether armed groups are obliged to set up courts. Arguably, such a rule would not be realistic for all armed groups.³⁴

²⁹ See in particular the grave breaches regime. Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146.

³⁰ For support of the Rule see Schmitt (2011: 44-45).

³¹ *Prosecutor v. Tadić*, above note 24, Separate Opinion of Judge Abi-Saab. For a sceptical view of Abi Saab's opinion see Moir (2009: 787).

³² See above notes 4 and 11 through 14 and corresponding text. Admittedly, the practice with regard to Libya (above note 13) and Sudan (above note 12) are only recommendations.

³³ Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009) UN Doc. A/HRC/12/48, p. 509 (emphasis added). It is not clear whether the Goldstone Report imposes a duty to investigate for all *de facto* authorities (or regimes). The case of Gaza is particular, especially since the hostilities are often classified as an international armed conflict. The Goldstone Report is ambiguous in that regard and seems to acknowledge that the armed conflict has both international and non-international elements (Ibid.: 87). However, the subsequent Tomuschat Report claims that the armed conflict had clearly been classified as international in nature; Report of the Committee of Independent Experts, above note 28, para. 18.

³⁴ In a similar context, Sassòli doubts whether armed groups are able to conduct *habeas corpus* proceedings (2010: 17).

Assuming that the ICRC is correct in claiming that States are always under an obligation to investigate in non-international armed conflicts, whereas armed groups are not necessarily obligated to do so, would that not violate the principle of equality of belligerents?³⁵ If States engage in practice by which they bind themselves with a duty to investigate and prosecute in non-international armed conflict without at the same time compelling armed groups to do so, those States would be inconsistent when subsequently criticizing this variance in obligations. There might be exceptions for States that did not participate in the practice and that persistently objected to their duty to investigate and prosecute.³⁶

From a *lex ferenda* point of view, the principle of equality of belligerents is of very high importance and should be defended against those who generally question its relevance.³⁷ However, it would not necessarily be detrimental to the observance of humanitarian law if a State were under a duty to investigate and prosecute, whereas an armed group that is unable to meet such an obligation were not.

So far, it has only been considered whether a primary rule exists that compels armed groups to investigate and prosecute war crimes. Let us now turn to the question whether a secondary rule, i.e. command responsibility, obligates commanders to use courts. Pursuant to Article 28 of the ICC Statute military commanders in any kind of armed conflict incur responsibility for core crimes committed by their subordinates if he or she failed “to take all necessary and reasonable measures within his or her power to prevent or repress” them and provided that the respective commander knew or ought to have known about them.³⁸ This mode of liability is accepted as customary international law in Rule 153 of the ICRC Customary Law Study (Henckaerts/Doswald-Beck 2005: 607). How a subordinate must be punished depends on the gravity of the crime³⁹ and on what is materially possible.⁴⁰ However, even for grave crimes, it is, depending on the capacities of the armed group, not always reasonable to expect a criminal trial. Pre-Trial Chamber II of the ICC seems to have adopted such a functional approach. It considered ‘the availability of a functional military judicial system’ and that this system was not properly

35 For an affirmative answer see Sassòli (2010: 16-17) and Somer (2007: 684). For the opinion that the principle of equality of belligerents does not apply to non-international armed conflicts see Doswald-Beck (2006: 890).

36 For a discussion of the legal consequences of mixed messages (though in another context than here) see Nolte/Aust (2009: 1).

37 In the context of international armed conflict, see Mandel (2011), in particular at page 649 where Mandel simply overlooks that an aggressor has no incentive to respect international humanitarian law if every act in pursuance of armed conflict is illegal anyway.

38 See also Article 7(3) of the Statute of the International Tribunal for the Former Yugoslavia, annexed to UNSC Resolution 827 (25 May 1993) and Article 6(3) Statute of the International Tribunal for Rwanda, annexed to UNSC Resolution 955 (8 November 1994).

39 Even where it is materially possible, a criminal trial is not always necessary. An ICTY Trial Chamber held that disciplinary punishment was sufficient for pillage: *Prosecutor v. Hadžihasanović* (Judgment) IT-01-47-T (15 March 2006), paras. 2056-2058. On the other hand, the Appeals Chamber added that a disciplinary sanction not exceeding sixty days would have been insufficient to punish murder and cruel treatment; *Prosecutor v. Hadžihasanović* (Judgment) IT-01-47-A (22 April 2008), paras. 149-155.

40 *Prosecutor v. Bemba Gombo* (Decision), above note 16, para. 434.

used as one aspect leading to a violation of Bemba's command responsibility.⁴¹ Hence, there does not seem to be a clear obligation to set up courts, neither on the armed group nor on the commander. The *Bemba* decision may even be a disincentive for armed groups to set up courts because then a commander must ensure that subordinates are tried by these courts if that commander intends to avoid command responsibility for the subordinates' crimes.

3. Armed groups' courts and the *ne bis in idem* principle

Another argument that could be advanced against armed groups' courts is the *ne bis in idem* principle. The argument could run as follows: if after a sham trial by a court of an armed group, the *ne bis in idem* principle makes a new trial for the same offence by a state or international court illegal,⁴² this would undermine efforts towards accountability. However, is the basis for this argument actually correct? Does international law oblige State and/or international courts to apply the *ne bis in idem* principle to trials by armed groups' courts? The four following bodies of law speak against such an obligation.

3.1 International humanitarian law

None of the two instruments that regulate fair trial guarantees in non-international armed conflicts (Common Article 3 GC and Article 6 AP II) contain the *ne bis in idem* principle. Theoretically, one could interpret the phrase "judicial guarantees which are recognized as indispensable" to include the *ne bis in idem* principle. However, this would be an expansive interpretation. First, there is no basis in the *travaux préparatoires* for such an interpretation. Indeed, the European Convention on Human Rights in the form it was originally adopted only a year after the Geneva Conventions does not contain a prohibition of double jeopardy. Second, the fair trial guarantees enumerated in Additional Protocol II, which do not contain the *ne bis in idem* principle, are used to interpret the meaning of 'indispensable' judicial guarantees in Common Article 3 GC (Sivakumaran 2009: 501-502). It is arguable, but not without controversy, that the *ne bis in idem* principle applies as a norm of customary international humanitarian law to non-international armed conflict.⁴³ Assuming, *arguendo*, that the prohibition of double jeopardy in Article 75(4)(h) of Additional Protocol I to the Geneva Conventions (Additional Protocol I, AP I)

⁴¹ *Prosecutor v. Bemba Gombo* (Decision), above note 16, para. 501.

⁴² Peter Rowe makes this point with regard to the ICC (2004: 227).

⁴³ Rule 100 of the ICRC Customary Law Study on fair trials includes the *ne bis in idem* principle also for non-international armed conflicts. However, the Study does not include much (although some) practice specifically pointing to such an obligation in non-international armed conflict. It is therefore not surprising that the Manual of Non-International Armed Conflict does not include the *ne bis in idem* principle in its list of fair trial guarantees (Dinstein et al. 2006: 51-52). In literature, Article 75 of Additional Protocol I is often considered customary international law although this is usually said in the context of an international armed conflict. See e.g. Dörmann/Colassis (2004: 323). The opinion of a plurality of four US Supreme Court judges in the *Hamdan* case is not relevant here. This is because the plurality only considered the provision of Article 75 of Additional Protocol I customary international law 'that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him'; *Hamdan v. Rumsfeld*, 548 US 557 (2006), *per* Stevens J., p. 71 (pinpoint as on <http://www.law.cornell.edu/supct/pdf/05-184P.ZS>, last accessed 21 September 2012).

applies as custom to non-international armed conflicts, it will not apply to trials conducted by the adverse party. This clearly follows from the ordinary meaning of the Article: “[N]o one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure.”⁴⁴ Hence, international humanitarian law does not prohibit trials by a State or international criminal court for an offence which was already adjudicated by a court of an armed group.

3.2 Customary international criminal law

In theory, an obligation of States to apply the principle of double jeopardy to trials by armed groups could have developed as a rule of customary international law from national criminal procedures or cases. Unsurprisingly, however, there is no significant amount of State practice to confirm this⁴⁵ and many States do not even recognize that the *ne bis in idem* principle applies to trials conducted in other States.⁴⁶ The Italian delegate to the discussion on the item “Draft Code of Offences against Peace and Security of Mankind” explained why:

“[O]utside some bilateral or limited multilateral circles of States, there is not sufficient trust in the administration of justice by other States, especially when offences with political aspects are concerned. States are concerned that a person having committed a heinous crime against peace and security of mankind might find protection from prosecution in the rest of the world in an acquittal or a mild sentence given in a given State for reasons of political sympathy.”⁴⁷

Another rationale for not applying the prohibition of double jeopardy in international contexts is the sovereign right of a State (provided the State has jurisdiction) to try a suspect on its territory. If a State declined to conduct a trial because another State has already done so, this would undermine the former State’s sovereignty (van den Wyngaert/Stessens 1999: 782). The above-mentioned arguments apply *a fortiori* to trials conducted by armed groups because States are very well entitled to assert their sovereignty over such groups and do not trust them. However, many States make use of the so-called *Anrechnungsprinzip* (the principle of deduction) meaning that a prison sentence already served for the same offence (or conduct) in another

44 The ICRC implicitly confirms this interpretation. See Sandoz et al. (1987: 884).

45 States have of course *discretion* to recognize the judgments of unrecognized entities. Following the defeat of the Southern Confederate States in the American Civil War the Supreme Court developed a test according to which certain acts not “in furtherance of the [Confederate] rebellion” continued to be valid: *Texas v. White*, 74 US 700, 733 (1868).

46 See State practice quoted in van den Wyngaert/Stessens (1999: 783ff); Antonio Cassese also holds that while the internal *ne bis in idem* principle is a rule of customary international law, it does not apply to trials in different States. However, he argues that such “a customary rule is arguably evolving, *at least with regard to international crimes*.” He concedes, however, that he can only cite “vertical” practice on the relations between international and national courts (Cassese 2003: 319-321).

47 Tullio Treves, Sixth Committee of the United Nations General Assembly (XLII session), 10 November 1987, reproduced in M. Gestri et al (1996: 196-197).

State is deduced from the sentence awarded in the second trial. This principle should also be applied to sentences imposed by armed groups' courts.

3.3 Human rights law

That most States do not apply the prohibition of double jeopardy to previous trials by other States (and *a fortiori* not to previous trials by armed groups) is in conformity with human rights law. In light of the focus on Africa, the African Charter for Human and Peoples' Rights and the International Covenant for Civil and Political Rights (ICCPR) are applicable. Whilst the African Charter does not contain a prohibition of double jeopardy, Article 14(7) ICCPR reads: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." Although the text is ambiguous, the reference to "each country" only makes proper sense if understood to mean that the person may not be tried again under the jurisdiction of the same State.⁴⁸ The Human Rights Committee shares this interpretation and considers new trials in States other than that of the first trial to be in accordance with Article 14(7) ICCPR.⁴⁹

3.4 Rome Statute of the International Criminal Court

Finally, is the ICC obliged to apply the prohibition of double jeopardy in relation to trials by armed groups? The relevant paragraph, Article 20(3) of the ICC Statute reads as follows:

"No person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

The term '(an)other court' in the *chapeau* of this paragraph on so-called 'upward' *ne bis in idem* (i.e. first trial national court, second trial ICC) could by its ordinary meaning apply to armed

⁴⁸The German translation refers to "jeweiligen Landes" and hence supports this point (although German is not one of the authentic languages).

⁴⁹*A.P. v. Italy*, (204/1986), Human Rights Committee, 1990, UN Doc. CCPR/C/OP/2 at 67: "The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State." (Ibid., para. 7.3) The Committee confirmed this interpretation in *A.R.J. v. Australia*, Human Rights Committee, 11 August 1997, UN Doc. CCPR/C/60/D/692/1996. Again, the Committee repeated its interpretation in General Comment 32 but added that this should not "undermine efforts by States to prevent retrial for the same criminal offence through international conventions." General Comment on Article 14: The Right to Equality before Courts and Tribunals and to a Fair Trial (General Comment 32), Human Rights Committee, 24 July 2007, UN Doc. CCPR/C/GC/32, para. 57. Manfred Nowak criticized this approach as "fairly general and too absolute" (2005: 356).

groups' courts.⁵⁰ However, many delegations at the 1998 Rome Conference implicitly did not share such an interpretation (e.g. by referring to 'national' courts).⁵¹ Moreover, participants never discussed whether a trial by a court of an armed group could trigger the *ne bis in idem* principle.⁵² Since many States do not apply the prohibition of double jeopardy to previous trials by other States, one would at least have expected a discussion about the even more controversial application of the principle to trials conducted by armed groups. At any rate, even if Article 20(3) of the ICC Statute applied to judgments by armed groups' courts, an armed group could not use this to shield a person from jurisdiction. Article 20(3) foresees a new trial based on the same conduct in case the previous trial was unfair or meant to protect the defendant from prosecution.

The second sentence of Article 78(2) ICC Statute states that the ICC "may deduct any time otherwise spent in detention in connection with conduct underlying the crime." The phrase "otherwise spent in detention" is sufficiently broad to include prison sentences ordered by armed groups' courts. It is indeed regrettable that the deduction of sentence is only discretionary (van den Wyngaert/Ogena 2002: 742; Finlay 2009: 242-243).

To sum up, international or regional *ne bis in idem* standards in the constellations relevant for Africa do not prohibit that persons already tried by a court of an armed group are retried in a State's court or via international jurisdiction. This is somewhat ambiguous in the case of the ICC but the ICC may retry persons whose previous processes were unfair or a sham. Hence, if courts of armed groups try persons with the intention to shield them from prosecution, they can subsequently still be held accountable.

4. Implementation of humanitarian law by armed groups' courts

So far this paper dealt with the legal questions relevant for the role of armed groups' courts as a tool for implementation. Let us now move to the contribution of armed groups' courts to the enforcement of humanitarian law from a more empirical point of view.

4.1 The priorities of courts established by African armed groups

There is only a small sample of armed groups that operated courts in Africa whose penal codes on military matters are available to the public. For example, Bemba's Mouvement de Libération du Congo (1998-2002) had courts but did not have a publicly available penal code. Others, such as the Revolutionary United Front in Sierra Leone (1991-2002) only have brief

⁵⁰ This also seems to be the basis of Peter Rowe's conclusion (2004: 227).

⁵¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, UN Doc. A/CONF.183/13 (Vol. II), p. 73 (Mr. Muladi, Indonesia), p. 214 (Mr. Holmes, Canada), p. 215 (Mr. Corthout, Belgium). Recourse to the preparatory works may be had because the ordinary meaning is ambiguous. Article 32(a) Vienna Convention on the Law of Treaties.

⁵² Ibid.

codes of conduct and not a proper penal code. The only *African* armed groups with publicized penal codes were: the former armed wing of the African National Congress (ANC) (1961-1990),⁵³ Museveni's former National Resistance Army (NRA) in Uganda (1981-1986) and the Sudanese People's Liberation Army (SPLA) in South Sudan (1983-2011).

Except for some provisions not directly related to fighting, such as political education, the codes established by these former armed groups are mandatory. Therein mainly two types of laws are distinguishable: rules designed to protect individuals (including international humanitarian law) and, much more prominently, provisions aimed at enhancing the military capacity of the armed group. The rules on defections, desertions, disrespect for officers and mutiny are the greatest in number and sophistication, at least with regard to the SPLA and NRA.⁵⁴ Before independence, the SPLM/A in South Sudan already had 33 sophisticated laws. This includes the SPLA Act from 2003 with all sorts of rules on military discipline (e.g. insubordinate behaviour, intoxication, malingering) and procedural laws (composition, convening, powers, sentence of court martial; procedure in case of concurrent jurisdiction; oath by witnesses). Of almost 130 paragraphs, there is only one that in part contains rules on the protection of individuals. It somewhat vaguely penalizes pillage and "cruel, indecent and unnatural" behaviour.⁵⁵ The annexed SPLA Code of Conduct contains more rules on good relations with the public, but they are not criminalized.⁵⁶ Similarly, the NRA had a very basic code of conduct and a much more elaborate operational code of conduct. The operational code of conduct almost exclusively contained offences concerned with loyalty and commitment, such as leaking of operational information, mutiny, desertion and cowardice in action which were all very broadly defined.⁵⁷ Only the offence of "undermining the relationship with the civilian population" comprised rules for the protections of civilians.⁵⁸

53 Though not necessarily all activities of the armed wing of the ANC were governed by international humanitarian law, the Truth and Reconciliation Commission considered that the ANC was in an armed conflict with South Africa to which humanitarian law applied (TRC 1998: chapter 4). Before the end of apartheid the ANC was also considered a national liberation movement. Since South Africa only acceded to Additional Protocol I in 1995, it is not clear whether the ANC had been such a movement in the sense of Article 1(4) AP I. This would only have been the case if Article 1(4) AP I and Article 96(3) AP I had been customary international law at the time of ANC's armed struggle. Antonio Cassese argued that this was indeed the case, but conceded that South Africa was not bound because it did not participate at the Diplomatic Conference preceding the adoption of the Protocols (1984: 70-71). Even if South Africa were bound, the ANC's vague declaration did not formally give it the status of a national liberation movement in the sense of Article 1(4) AP I. Article 96(3) AP I requires that the declaration of adherence to the Geneva Conventions is deposited with the Swiss Federal Council, but the latter refused to accept the deposit. It is for these reasons adequate to refer to the ANC's armed wing as an armed group.

54 Umkhonto We Sizwe Military Code of the ANC released 1985; The SPLA Act 2003; both in Bangerter (forthcoming); Code of Conduct of the National Resistance Army, Legal Notice No. 1 (23 August 1986); Operational Code of Conduct of the National Resistance Army, Legal Notice No. 1 (23 August 1986). Although published only after the NRA took over the power in Uganda, the Code of Conduct and the Operational Code were already in force before when the NRA still acted as an armed group. See e.g. Kasfir (2005: 284).

55 The SPLA Act 2003, Chapter V, above note 54, paras. 33(f), 33(g).

56 Code of Conduct for the SPLA, above note 54, para. 1-2.

57 NRA Operational Code of Conduct, above note 54, part III.

58 Ibid., part III, para. 12.

The codes of conduct only contain very basic rules of international humanitarian law such as the prohibition to kill the adversary in custody⁵⁹ and the prohibition to pillage civilians.⁶⁰ Very importantly, all three of them prohibit attacks against civilians.⁶¹ The ANC and the NRA prohibited rape explicitly,⁶² whereas the SPLA did so implicitly.⁶³ However, none of the codes prohibits the conscription of child soldiers.

Any conclusions derived from the codes have to be treated with caution, as it may well be that the codes are not properly enforced in the actual practice of armed groups. However, information on this *actual* practice of armed groups' courts is particularly scarce. There do not seem to be any written judgments by armed groups' courts, at least none that are public. However, there is some indication on the basis of NGO reports that armed groups' courts were very much resolved to enforce military discipline, loyalty, bravery and cohesion within the armed group. For example, an SPLA court martial sentenced 33 of its members to death for refusing an ambush (HRW 1994: 327-328). At the same time, the SPLA did not hold its members accountable for violations of international humanitarian law during combat including indiscriminate shootings of civilians, looting and burning of civilian belongings. The SPLA record for non-combat related offences was mixed and allegedly varied depending on the ethnic origin of the defendant (HRW 1994: 330-331). The ANC sentenced persons to death suspected of mutiny (TRC 1998: paras. 153-158). Its members including commanders routinely tortured suspected spies without being held accountable (TRC 1998: paras. 159-180). However, it has also been reported that murder and rape were punished with the death penalty (TRC 1998: para. 158).

It seems fair to say that the courts were primarily intended to establish and maintain military discipline, loyalty, bravery and cohesion within the armed group. Ultimately, therefore, they were meant to enhance the military capacity of the armed group and only to a lesser degree to implement international humanitarian law. However, the lack of humanitarian law in the codes of the NRA and ANC – both from the mid 1980's – can also be explained by the lacking criminalization of humanitarian law applicable in non-international armed conflicts at the time. The last version of the SPLA Act, however, is from 2003 when many international criminal law rules were already accepted as customary. At any rate, it should also be borne in mind that military discipline may well favour compliance with humanitarian law. Only through military discipline can the observance of the rules for the protection of the individual be ensured among the lower ranks.

⁵⁹ ANC Military Code, General Regulations, para. 3(h); Code of Conduct for the SPLA, para. 2(h); NRA Code of Conduct, para. 4, all above note 54.

⁶⁰ ANC Military Code, General Regulations, para. 3(b); Code of Conduct for the SPLA, para. 2(b); NRA Code of Conduct, para. 11(iv), all above note 54.

⁶¹ ANC Military Code, General Regulations, para. 3(e); Code of Conduct for the SPLA, para. 2(a); NRA Code of Conduct, para. 1, all above note 54.

⁶² ANC Military Code, General Regulations, para. 3(e); NRA Operational Code of Conduct, part III, para. 12, all above note 54.

⁶³ The prohibition of rape falls under the prohibition to "abuse, insult, shout at, beat or in any way annoy any member of the public." Code of Conduct for the SPLA, above note 54, para. 2(a).

4.2 The level of compliance with humanitarian law by armed groups having courts

The subject of the last subchapter was whether the leadership of the three armed groups under discussion *intended* to implement humanitarian law. But what was the actual degree of compliance with international humanitarian law (other than fair trial guarantees) of the ANC, NRA and SPLA? None of these three former armed groups under discussion attained a level of compliance that is fully satisfactory. All even violated basic prohibitions in Common Article 3 GC and other Geneva law provisions. The ANC was particularly harsh with suspected spies and tortured them (TRC 1998: paras. 158-180). The NRA⁶⁴ and SPLA⁶⁵ tortured and made use of child soldiers.⁶⁶ However, all of them showed a degree of respect for civilians that compares favourably to the outright disrespect for humanitarian law by other armed groups that are primarily made up of child soldiers and that commit systematic and widespread atrocities against the whole civilian population: mass rapes, burning down of entire villages, murder and often mutilations.⁶⁷ In comparison, the SPLA, NRA and ANC were more disciplined, pursued discernible military objectives and used violence against civilians more selectively.⁶⁸

Is this all due to the courts? There is a methodological problem for this claim because it cannot be ascertained whether other factors than the courts are determinative for a higher standard of compliance. In fact, if a responsible leadership installs courts to genuinely prosecute violations of international humanitarian law, it is quite likely to also take other measures that are apt to lead to a higher degree of compliance, such as careful recruitment, training and close supervision of subordinates.

⁶⁴The NRA introduced a severe torture method called *Kandoya* to Uganda in the early 1980s whereby the elbows are tightly tied behind the back. It causes damage to the neuromuscular function of the upper limbs; victims of *Kandoya* report extreme weakness in the upper arms and cannot work manually (IRCT 2004). There are various personal accounts of former child soldiers forcibly recruited and used by the NRA. For a summary of the account of China Keitetsi see Meshberg (2007). The account of Kassim Ouma abducted at the age of five and forced to torture is subject of the film 'Kassim the Dream' and is summarized by Großekathöfer (2007). After the NRA consolidated its power in Uganda, human rights organizations started to interest themselves for the continuing violations (AI 1991).

⁶⁵HRW 1994: 195-218, 226-227; HRW 2009: 3, 24, 38.

⁶⁶It is not entirely clear, however, whether there was a customary prohibition to use child soldiers in 1986 when operations of the NRA as an armed group ended.

⁶⁷Two of the most infamous examples for this sort of armed group are the Lord's Resistance Army (LRA) as it is currently behaving and the Revolutionary United Front (RUF). Mutilations of civilians by the latter are well documented. Whilst the Lord's Resistance Army was not always as violent as it is presently, it engages at the time of writing in extremely cruel practices that have not been reported about the SPLA, NRA and ANC. Such practices include hacking unarmed civilians to death or forcing children to do so. Many armed groups will compare favourably to the Revolutionary United Front and the current Lord's Resistance Army, but even when the comparator spectrum is broadened, the three armed groups under discussion are among those that commit less humanitarian law violations. In that regard, Jeremy Weinstein compares the NRA to the Resistência Nacional Moçambicana (RENAMO) and finds that the NRA shows more respect for civilians and their property. He argues that this is due to the NRA's lack of resources which meant that members were more strongly committed to the NRA's cause than the opportunistic joiners of the Resistência Nacional Moçambicana. Though Weinstein's thesis may be part of the explanation, it is plausible that the NRA's courts also played a role (2005: 609-614); Human Rights Watch found that "[s]ome observers rate the SPLA factions as more disciplined than many other African insurgents" – although it rightly added that "this [was] not an acceptable standard." (HRW 1994: 330).

⁶⁸ANC: Lodge (1987: 11, fn. 37); SPLA: Kok (1996: 599); NRA: Weinstein (2005: 612); Kasfir (2005).

The SPLA, ANC and NRA continuously pursued political goals and were ultimately successful in achieving them. In light of these aspirations, these groups needed to show that their power was to the local population's advantage, giving their leaders good reasons to ensure comparatively high respect for civilians. Hence, it would be an overstatement to explain the higher degree of discipline and respect for international humanitarian law exclusively by their operation of courts. However, it is plausible to assume that the courts were one factor that helped the leadership to install more discipline and a relatively high respect for the civilian population.

4.3 The potential of armed groups' courts to implement humanitarian law

The potential of a court of an armed group to implement humanitarian law depends largely on the armed group's current normative views. A court is only a means to enforce a certain prescribed behaviour, a behaviour which might – depending on the 'law' of the armed group – be incompatible with international humanitarian law. In other words, armed groups' courts are more likely to be a means rather than the cause for higher compliance.

However, where the leadership of an armed group is willing to enforce international humanitarian law, the potential of armed groups' courts to do so is comparatively high. Sanctions imposed by the armed group are likely to be more effective than sanctions by States or international criminal tribunals. This is because sanctions by armed groups are immediate, more visible to other members of the armed group and installed by an institution which members of the armed group respect. Moreover, the deterrent effect of such sanctions may well be stronger because any member of the armed group knows that the punishment may also be applied to them. Fighters of armed groups will usually be within the reach of the sanctioning system of the armed group, whereas they will in most cases not be within the direct reach of State or international prosecution authorities.

Apart from being more effective, armed groups' courts may also be the only reasonably available forum for prosecution. An armed group is very unlikely to be willing to transfer its suspects to the State against which it fights. An armed group might also be unwilling to hand the person over to another State and in many cases no other State might even wish to open an investigation. International courts are not an option for prosecuting low ranking fighters, due to jurisdictional and resource limitations (Sivakumaran 2009: 510). Pre-Trial Chamber II of the ICC has implicitly taken the same view. In its Amicus Curiae Observations, Amnesty International argued that Bemba was obliged to submit the violations allegedly committed by his subordinates to a State court or the ICC.⁶⁹ When dealing with the command responsibility of Bemba, Pre-Trial Chamber II did not entertain that possibility. However, it affirmed command responsibility *inter alia* on the basis that Bemba did not use the judicial system of the MLC.⁷⁰ Thus, it considered a trial by an MLC court more plausible than a trial by a State jurisdiction.

⁶⁹ *Prosecutor v. Bemba Gombo* (Amicus Curiae), above note 15, paras. 21-25.

⁷⁰ *Prosecutor v. Bemba Gombo* (Decision), above note 16, para. 501.

Often, the only feasible alternative for the armed groups is to punish an offender without court trial. This would be a viable option in case of small disciplinary infractions which attract lenient punishments. However, a lenient penalty would not be sufficient in case of serious violations of humanitarian law where a penalty must be adequate to avoid command responsibility.⁷¹ Since serious crimes require a severe penalty, they should be adjudicated in a fair trial and not administratively. But do courts of armed groups offer fair trial guarantees?

5. Fair trial guarantees

Why are fair trial guarantees even relevant for the question whether armed groups' courts can be a tool for implementation? Admittedly, even an unfair trial may still enforce international humanitarian law effectively. However, the violation of due process guarantees undermines such contributions to implementation. In other words, if enforcing a humanitarian law rule means the violation of another such rule, the net humanitarian impact of the enforcement is questionable.

Fair trial guarantees in humanitarian law of non-international armed conflict⁷² apply only to "criminal offences related to the armed conflict."⁷³ Thus, in practice, such fair trial guarantees will be most relevant for trials of 'fighters'.⁷⁴ It is less likely that humanitarian law of non-international armed conflict applies to trials of civilians,⁷⁵ although it would apply if a civilian is accused of spying, for example. In case due process guarantees laid down in humanitarian law are not applicable, the question whether human rights law applies is most relevant. It has been noted above that there is a growing consensus that armed groups in control of territory exercising quasi-governmental functions are bound by human rights law.⁷⁶ Even if only peremptory human rights norms were applicable to armed groups, fair trial guarantees would in the opinion of the Human Rights Committee be covered by this definition.⁷⁷

⁷¹ In the *Hadžihasanović* Appeals Chamber Judgment (above note 39, para. 152) disciplinary punishment of a maximum of sixty days was not considered sufficient in light of the gravity of the crime of murder.

⁷² These are in essence Common Article 3(1)(d) GC and Article 6 AP II. For an excellent interpretation of fair trial guarantees applicable to armed groups' courts see Sivakumaran (2009: 500-509).

⁷³ Explicitly, Article 6 AP II. The application of international humanitarian law more generally presupposes a link to the armed conflict which follows from its conditions of application more generally and which has been affirmed by international criminal tribunals on a number of occasions, e.g. *Prosecutor v. Milutinović* (Judgment) IT-05-87-T (26 February 2009), paras. 127-128.

⁷⁴ In non-international armed conflict fair trial guarantees also apply to persons tried by the armed group of which they are members. See Sivakumaran (2012). I am also grateful to Jean-Marie Henckaerts, Krisztina Huszti-Orban, Jelena Pejic, Marco Sassòli, Jonathan Somer and Cornelius Wiesener for sharing their views with me on this issue.

⁷⁵ In the territory under occupation in the course of an international armed conflict, the occupying power must guarantee a fair trial to every accused including civilians (Article 71 Geneva Convention IV). For the opinion that some rules of the law of occupation could also apply to non-international armed conflicts see Fleck (2008: 628).

⁷⁶ See above note 18 and corresponding text.

⁷⁷ General Comment on States of Emergency (General Comment 29), Human Rights Committee, 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11 which states that peremptory norms include 'funda-

5.1 Fair trial guarantees granted by courts of African armed groups

Whilst some penal codes of armed groups in Africa contain a penal procedure, many important due process guarantees are missing.⁷⁸ It is therefore not surprising that armed groups' courts have often been criticized for not respecting due process guarantees. The criticism of the MLC has been mentioned above.⁷⁹ The Truth and Reconciliation Commission held that court martials of the ANC were flawed and until 1986 were held without any legal representation of the defendants (TRC 1998: 352). The courts that operate in SPLA-held territory have serious faults, but judges had started to emancipate themselves more and more from the SPLA even before Southern Sudan attained statehood (HRW 2009: 32).⁸⁰ Admittedly, courts in Southern Sudan after 2005 were not in all aspects representative for armed groups' courts anymore. This is because they received support from the UN and were tolerated by the North after the SPLA signed the Comprehensive Peace Agreement. Nevertheless, it is an example that shows that courts are able to slowly become independent from an armed group that controls the court's area of jurisdiction and hence fulfill a very important requirement for a fair trial.

5.2 The capability of courts by armed groups to respect fair trial guarantees

Insufficient fair trial guarantees have been an issue with armed groups' courts. This raises the more general question of whether armed groups' courts are generally unable or unwilling to conduct fair trials.

Regarding their ability, most armed groups, in particular less organized ones, have less potential than States to guarantee a fair trial. Inability to conduct a fair trial is likely owed to a lack of resources of an armed group. Armed groups have to devote a lot of their existing resources to their military since States usually try to defeat armed groups on their territory. Foreign States and the UN are in most cases not willing to provide aid in order to improve the judiciary of armed groups.⁸¹

It can also be doubted whether leaders of armed groups are in all cases willing to observe due process guarantees. They are likely to see their courts as an instrument to implement their policy and are therefore likely to interfere with the trials. However, armed groups are more likely to be willing to conduct a fair trial in humanitarian law cases than in those concerning mutiny, defections or spying. The passing of sensitive military information to the enemy

mental principles of fair trial, including the presumption of innocence'.

⁷⁸ This is particularly striking in the penal code of the SPLA that has detailed procedural provisions but no right to a defence counsel, for example. SPLA Act 2003 in Bangertter (forthcoming).

⁷⁹ See above note 6 and corresponding text.

⁸⁰ It is already a sign of growing independence of judges that they take action against SPLA soldiers (even though the judges' decisions are often not carried out).

⁸¹ This does not necessarily apply for more consolidated *de facto* regimes like Somaliland. UNDP in Somalia, Judiciary Strengthened as First Batch of Judges Graduate from Legal Training, <http://www.so.undp.org/index.php/Somalia-Stories/Judiciary-strengthened-as-first-batch-of-judges-graduate-from-legal-training.html>, last accessed 21 September 2012.

may seriously endanger the survival of the armed group, whereas a violation of international humanitarian law by its own members will usually not have this effect. It is simply less risky to provide for a fair trial (which may result in an acquittal) to suspected humanitarian law offenders than to those that are suspected of not being loyal to the armed group.

6. Empirical legitimacy of armed groups

Closely connected to loyalty is empirical legitimacy.⁸² Indeed, according to Max Weber empirical legitimacy is the perceived obligation of the governed to follow a particular authority. Weber observed relationships of legitimacy not only between the authority and the population but also between the authority and its administration (Weber 2005: 158-159).⁸³ Transposed to our case empirical legitimacy denotes that the armed group's members feel obliged to follow the armed group's leadership. In case an armed group also seeks to rule over the local population empirical legitimacy also means that the local population perceives a duty to follow the rule of the armed group.

What is the effect of courts on this? Do courts of an armed group increase the empirical legitimacy of that armed group? Courts can help to secure justice and security, which are widely shared social goals,⁸⁴ often directly associated with legitimate institutions (Bakonyi/Stuvøy 2005: 374). This is not only the case for the OECD countries but also in many traditional African and South-American societies where so-called Chiefs apply the local customary law. In the Islamic world, Sharia courts are also a means to assert legitimacy. So if armed groups operate courts and if in the eyes of the local population these courts contribute to more justice, this is likely to increase an armed group's empirical legitimacy.⁸⁵

Does it matter if armed groups manage to increase their empirical legitimacy? Higher empirical legitimacy of an armed group in the eyes of the local population is above all problematic

⁸²I am indebted to Zeljko Branović, Anke Draude and Cord Schmelzle for discussing different concepts of legitimacy with me and for providing comments on this section.

⁸³Max Weber's sociology of domination or authority laid the foundations for the empirical concept of legitimacy that is still favoured by political scientists and sociologists today. In contrast, political theorists and philosophers regard legitimacy not as the perceived but as the actual normative status of a political order which can in their view be impartially determined (Schmelzle 2011: 7). It seems that most law scholars use the term 'legitimacy' in the normative sense closely connected to legality (Sivakumaran 2009: 509-511). For a definition with empirical elements on the legitimacy of international law, an issue beyond this article, see Franck (1990: 24).

⁸⁴Aside from the sharing of social goals between the governance actor and the governance addressee, Schmelzle identifies three more conditions under which the effective delivery of governance leads to higher empirical legitimacy: the governance addressee must hold an instrumental legitimacy belief (i.e. believe that effectiveness leads to legitimacy), associate the governance service with the governance actor and generalize the specific support for a policy into general support for the governance actor (2011: 13-15). Schmelzle did not call the second to last condition 'association' but 'transparency'. However, in my view it is sufficient that a governance actor is somehow associated with the governance service, rightly or wrongly, based on transparency or propaganda. It is fair to assume that these conditions are often met in areas of limited statehood.

⁸⁵Justice is also often said to be necessary for normative legitimacy (Keohane 2007: 6).

for the State on the territory of which the armed group operates. The State loses the loyalty of its population. Ultimately, empirical legitimacy is an important factor – among many others – that may lead to the recognition of secession,⁸⁶ but this is rare and only possible for well consolidated entities. Since the overall administration of justice vis-à-vis the civilian population is associated with legitimacy in many societies, States oppose courts by armed groups on their territory. On the other hand, States may more readily accept the judicial enforcement of international humanitarian law vis-à-vis *the members* of the armed group.⁸⁷ Any club in a peaceful society may sanction the violation of its norms for example by dismissing members. Although sanctions by armed groups go further than that, this has less implications for the legitimacy of the territorial State than cases where courts judge over civilians and seriously ‘out-administer’ the State.

The international community⁸⁸ is interested in stability, in not being associated with armed groups that systematically violate basic norms granting the protection of individuals and (in particular OECD States) in the protection of their nationals. Thus, the international community is opposed to the legitimization of armed groups that cooperate with transnational terrorist networks or which systematically disregard basic norms for the protection of individuals. Where an armed group does not fall under either of these categories, the international community may be willing to accept that it gains empirical legitimacy in order to prevent chaos.

Concerning the local population, it is easily understood that higher empirical legitimacy by definition leads to higher compliance (Levi/Sacks 2009: 314). If the members of armed groups comply with the leadership of an armed group and if the leadership is committed to international humanitarian law, an armed group’s higher empirical legitimacy may be in favour of the population. If the population generally succumbs to the armed group’s rule, this may mean stability and hence more security from ordinary criminals, too (Sivakumaran 2009: 509-510). However, the price paid for such stability may be high. The Taliban and Al Shabab enforce *their* law and order. Their sanctions often abuse human rights (although they are more foreseeable than violence in more chaotic circumstances). It should not be overlooked, however, that it would be very difficult for an armed group to gain empirical legitimacy if its norms were diametrically opposed to those of the local population. Hence, in order to acquire empirical legitimacy an armed group will have to show some degree of respect for the population’s normative views unless it manages to fundamentally change them over time.

86 Consent by the seceding State’s population as a form of empirical legitimacy is an essential criterion for the international community to accept the creation of a new State. The respect for a minimum of human rights and democratic principles as a form of normative legitimacy are also relevant.

87 Weber held that legitimacy could also be observed between the leader and its administration (2005: 158-159), here: the leadership of the armed group and its members.

88 The term is used here to refer to the interests that are shared among the majority of international actors. For a good discussion of the term see Paulus/Simma (1998).

7. Conclusion: How should the international community react?

Summing up the arguments regarding the question whether or not armed groups' courts can be effective tools for implementation, an essential condition is met: International humanitarian law and human rights law do not prohibit the operation of such courts. Moreover, the prohibition of double jeopardy does not impede subsequent accountability in case armed groups' courts conducted unfair or sham trials. Their courts increase the empirical legitimacy of the armed group, but this may – depending on the norms that the armed group enforces – have advantages for the local population such as higher compliance with international humanitarian law. If the leadership is genuinely willing to enforce humanitarian law, armed groups' courts have a relatively high potential to be a successful tool for implementation. Whilst the armed group's courts discussed were mostly concerned with military discipline, they also enforced rules that protect individuals. The armed groups under scrutiny committed serious humanitarian law violations including violations of due process guarantees, but they showed more respect for civilians than many armed groups without courts. So, it would seem that armed groups' courts can be a tool for implementation, but one that is far from perfect.

What can be done to improve the situation? Opening up the dialogue with armed groups that possess courts comes to mind. Where important humanitarian law or fair trial provisions are missing in the penal codes, it may for example be possible to persuade the armed group to insert them. Such dialogue could also improve the level of 'ownership' of the armed group over international law norms and hence improve the compliance record of the armed group (Sivakumaran 2009: 512-513).

It has been claimed that engaging with armed groups' courts would legitimize them.⁸⁹ However, the effect of international involvement on empirical legitimacy depends largely on how society regards communication with and influence of a particular external actor and on the perceived degree of influence of these external actors. Armed groups may often be able to shape the population's belief about what is legitimate. It would be odd if armed groups tried to present their relations with international actors as a source of their legitimacy as they would make themselves dependent on actors beyond their control. In fact, armed groups are much more likely to rely on charismatic or traditional forms of legitimacy or to gain legitimacy through effectiveness.⁹⁰ It is also hard to see how the international involvement of an armed group could in itself increase its normative legitimacy. Contact with external actors is not inherently moral. However, the possible consequence of such interaction in the form of a higher standard of justice and security would enhance its normative and probably also empirical legitimacy.

⁸⁹Sandesh Sivakumaran, who considers that armed groups' courts have the potential to be a tool for implementation, makes this point, but his underlying understanding of legitimacy is apparently broader (2009: 512).

⁹⁰For the example of UNITA see Bakonyi/Stuvøy (2005: 370).

What is often meant by 'legitimacy' is the entitlement to govern as perceived by international actors ('international entitlement'). It is true that dialogue with armed groups can lead to international entitlement. However, this point should not be overstated, either. Is it realistic that an armed group is taken from a terrorist list because an impartial humanitarian organization involves it in a dialogue about certain issues? The reverse is more likely, i.e. that the State prohibits the activities of the humanitarian organization. States make their own judgments about the entitlement of an actor to govern and do not rely on whether non-governmental organizations or the UN involved them.⁹¹ NGOs and the UN often involve actors irrespective of the actor's deeds or normative views and hence even involvement does not mean any form of approval.

Somalia is an extreme example which indicates that attempts to only involve States at the expense of non-state actors is not always a viable option. It would be absurd to ignore Somaliland's courts only because it is not recognized as State. After all, the relatively well-consolidated *de facto* regime Somaliland is in a better position to install justice and security than the seriously threatened rump State of Somalia.

⁹¹ See US Patriot Act and subsequent proceedings held constitutional in *Holder v. Humanitarian Law Project* 130 S Ct 2705 (2010).

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