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Special agreements in non-international armed conflicts: Lessons from the practice

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Abstract

The Geneva Conventions invite the parties to a non-international armed conflict (NIAC) to conclude special agreements (SAs) according to common Article 3(3). However, the lack of definition and insufficient coverage of such agreements by scholars and legal authorities increase the confusion between that mechanism and other agreements occurring in NIACs. This paper offers a contemporary and functional definition of SAs in order to better demonstrate their importance for NIAC regulation based on practice-informed lessons and, incidentally, to advocate for an increased use of those instruments. The data analyzed throughout this article reveal various lessons that will illustrate the potential of SAs. Among the teachings revealed by practice is the expanded material scope of these instruments or the possible ways in

which the parties can choose to draft their commitments. In addition, the records of practice reveal how SAs concretely improve the regime of NIACs, and the implementation approaches generally adopted. For a more complete study of the dynamics of SAs, the paper equally draws attention to their formal and personal characteristics. All these features turn SAs into powerful international humanitarian law (IHL) tools that are flexible enough to upgrade the applicable law of NIACs while respecting some necessary boundaries in order to guarantee the validity of the obligations embedded. This is an essential balance for IHL and international legal order consistency.

Keywords: special agreements, common Article 3, international humanitarian law, non-international armed conflict, organized armed groups.

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Introduction

Special or *ad hoc*[1] agreements (SAs) rank among the less documented and analyzed international humanitarian law (IHL) resources in jurisdictional and doctrinal releases compared to other instruments governing the regime of non-international armed conflicts (NIACs).[2] At least four reasons explain this fact. Firstly, the imprecisions of Article 3(3)[3] common to the four Geneva Conventions (common Article 3(3), CA 3(3)) on the features of SAs make them hard to identify among the mass

1 Special agreements and *ad hoc* agreements are synonymous. See Luisa Vierucci, "Applicability of the Conventions by Means of Ad Hoc Agreements", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015.

2 The literature addresses NIAC agreements broadly and not the specific category of SAs within them, apart from a few authors. See Ezequiel Heffes and Marcos D. Kotlik, "Special Agreements Concluded by Armed Opposition Groups: Where Is the Law?", *EJIL: Talk!*, 27 February 2014, available at: www.ejiltalk.org/special-agreements-concluded-by-armed-opposition-groups-where-is-the-law/ (all internet references were accessed in June 2025); Colin Smith, "Special Agreements to Apply the Geneva Conventions in Internal Armed Conflicts: The Lessons of Darfur", *Irish Yearbook of International Law*, Vol. 2, 2007; Anthea Roberts and Sandesh Sivakumaran, "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law", *Yale Journal of International Law*, Vol. 37, No. 1, 2012; Eva Kassoti, "The Normative Status of Unilateral Ad Hoc Commitments by Non-State Armed Actors in Internal Armed Conflicts: International Legal Personality and Lawmaking Capacity Distinguished", *Journal of Conflict and Security Law*, Vol. 22, No. 2, 2016; 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; Luisa Vierucci, "International Humanitarian Law and Human Rights Rules in Agreements Regulating or Terminating an Internal Armed Conflict", in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Research Handbooks in Human Rights Series, Edward Elgar, Cheltenham, 2013; Kasim Balarabe, *Special Agreements under International Humanitarian Law*, Lambert Academic Publishing, Saarbrücken, 2015; Junior Mumbala Abelungu, "Les accords spéciaux dans les conflits armés en la République Démocratique du Congo: Contribution à l'amélioration du droit international humanitaire?", *African Yearbook on International Humanitarian Law*, Vol. 2019, 2019.

3 For ease of reference, this contribution adopts the numeration of CA 3 paragraphs used by the International Committee of the Red Cross (ICRC) in its Commentaries. Following that numeration, SAs appear in the third paragraph of the provision. See ICRC, *Commentary on the Third Geneva Convention: Convention*

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of agreements arising during or after a NIAC. CA 3(3) does not give many hints on SAs' definition when it states 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". The early Commentaries on CA 3 are not of great help either.[4] The 2020 Commentary on Geneva Convention III (GC III) by the International Committee of the Red Cross (ICRC), for its part, underlines that SAs can restate applicable law ("declaratory")[5] or go beyond the Geneva Conventions ("constitutive")[6] to cover means of warfare and the conduct of hostilities[7] or even international human rights obligations when they "help to implement humanitarian law".[8]

However, these characteristics have little or no justification. For example, the fact that CA 3 stipulates that the agreement should bring about "all or part of the *other* provisions"[9] of the Geneva Conventions implies that SAs are not of a "declaratory" nature and do not restate applicable law. In the same vein, it is highly debatable that in a peace or ceasefire agreement, even "relevant provisions … may constitute special agreements under common Article 3", as claimed by the 2020 Commentary.[10] This claim challenges the ordinary meaning of the word "agreement" by assimilating it to specific provisions. Moreover, the Commentary suggests that a "peace agreement, ceasefire or other accord" can amount to an SA.[11] Of course, since the drafters of the Geneva Conventions did not provide for formal characteristics of SAs, nothing precludes that conclusion. Nevertheless, more caution must be taken to ascertain the qualification of an instrument as an *ad hoc* agreement.

Secondly, the doctrine struggles to capture the essence of SAs because discussions focus on NIAC agreements generally, and rarely on *ad hoc* agreements as a specific category. Accordingly, legal scholarship often dilutes those particular instruments within ordinary agreements; even direct technical questions (functioning,[12] legal

(III) relative to the Treatment of Prisoners of War, 2nd ed., Geneva, 2020 (2020 Commentary on GC III), Art. 3.

4 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; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (1958 Commentary on GC IV); Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 2: *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960; 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.

5 2020 Commentary on GC III, above note 3, paras 881, 885–886.

6 *Ibid.*

7 *Ibid.*, para. 885.

8 *Ibid.*, para. 851.

9 CA 3(3) (emphasis added).

10 2020 Commentary on GC III, above note 3, para. 889.

11 *Ibid.*

12 See e.g. Gérard Aïvo Akindayo, "Le rôle des accords spéciaux dans la rationalisation des conflits armés non internationaux", *Revue Québecquoise de Droit International*, Vol. 27, No. 1, 2015; Boško Jakovljević,

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status,[13] governing law[14] or implementation[15]) lack identification methodology or definition for most of them.[16] A third reason – explaining the preceding one – comes from the rare use of SAs in NIACs, as acknowledged by the ICRC,[17] partially because of States' reluctance to legitimize organized armed groups (OAGs) indirectly through the conclusion of SAs.[18] Indeed, in its 2020 Commentary, the ICRC refers to a dozen instruments that it considers SAs.[19] Even though the

"Memorandum of Understanding of 27 November 1991: International Humanitarian Law in the Armed Conflict in Yugoslavia in 1991", *Yugoslav Review of International Law*, No. 3, 1991; Cedric Ryngaert and Anneleen Van de Meulebroucke, "Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into some Mechanisms", *Journal of Conflict and Security Law*, Vol. 16, No. 3, 2011; Yves Sandoz, "Réflexions sur la mise en œuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en ex-Yougoslavie", *Swiss Review of International and European Law*, Vol. 3, No. 4, 1993; K. Balarabe, above note 2.

13 See e.g. Christine Bell, "Peace Agreements: Their Nature and Legal Status", *American Journal of International Law*, Vol. 100, No. 2, 2006; Christine Bell, "Lex Pacificatoria Colombiana: Colombia's Peace Accord in Comparative Perspective", *AJIL Unbound*, Vol. 110, 2016; Laura Betancur Restrepo, "The Legal Status of the Colombian Peace Agreement", *AJIL Unbound*, Vol. 110, 2016; E. Kassoti, above note 2; René Provost, "The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassòli and Yuval Shany", *International Review of the Red Cross*, Vol. 92, No. 882, 2011; S. Rondeau, above note 2; Luisa Vierucci, "The Colombian Peace Agreement of 24 November 2016 and International Law: Some Preliminary Remarks", *Monitoring Peace Processes*, No. 4, 2016–17; Luisa Vierucci, "'Special Agreements' between Conflicting Parties in the Case-Law of the ICTY", in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011.

14 See e.g. Ezequiel Heffes and Marcos D. Kotlik, "Special Agreements as a Means of Enhancing Compliance with International Humanitarian Law in Non-International Armed Conflicts: An Inquiry into the Legal Governing Regime", *International Review of the Red Cross*, Vol. 96, No. 895–896, 2015; E. Heffes and M. D. Kotlik, above note 2; L. Vierucci, above note 2; L. Vierucci, above note 1.

15 See e.g. Cecilia Giovannetti Lugo and Cristina Montalvo Velásquez, "Vulnerability of Special Agreements Signed by Non-State Armed Groups in Non-International Conflicts", *Anuario Mexicano de Derecho Internacional*, Vol. 1, No. 20, 2020; Boško Jakovljević, "The Agreement of May 22, 1992, on the Implementation of International Humanitarian Law in the Armed Conflict in Bosnia-Herzegovina", *Jugoslovenska Revija za Međunarodno Pravo*, No. 2–3, 1992; Boško Jakovljević, "Armed Conflict in Yugoslavia – Agreement in the Field of International Humanitarian Law and Practice", *Humanitäres Völkerrecht*, Vol. 5, No. 3, 1992; C. Sophia Müller, "The Role of Law in Enforcing Peace Agreements: Lessons Learned from Colombia", *Journal of Conflict and Security Law*, Vol. 26, No. 1, 2021; J. M. Abelungu, above note 2; 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.

16 Excluding L. Vierucci, above note 1.

17 The ICRC considers that "[e]xamples of special agreements are less common in practice than some other legal tools. One explanation is that States might be concerned that entering into such an agreement will grant a degree of legitimacy to an armed group." Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, Geneva, February 2008, p. 17.

18 Nils Melzer and Helen Durham, *International Humanitarian law: A Comprehensive Introduction*, ICRC, Geneva, 2016, p. 307.

19 In the 2020 Commentary on GC III, the ICRC lists the agreement signed during the Spanish Civil War (1936–39) in the form of separate parallel commitments by the parties; the *Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia* (27 November 1991); the Humanitarian Exchange between the government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP) (6 June 2001); the *N'Djamena Humanitarian Ceasefire Agreement on the Conflict in Darfur* (2004); the *Code of Conduct for Ceasefire* agreed between the government of Nepal and the Communist

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ICRC did not claim exhaustivity in its illustrations,[20] it was logical to expect more examples from the Commentary on CA 3, especially considering the seventy-one years that the 1949 Geneva Conventions had been in existence at that time.

Moreover, to confirm the scarcity of SAs, the parties to NIACs rarely label their commitments explicitly as a "special agreement" under the meaning of CA 3. Two notable exceptions lie in *Agreement No. 1 on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina* (Agreement No. 1), signed on 22 May 1992,[21] and the *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace* between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP), of 24 November 2016.[22]

This does not mean that an agreement needs the explicit title of "*ad hoc*" or "special agreement" to reach that status; CA 3(3) does not make it a validity condition. The fact that SAs can bear any label upon which the signatories decide adds to the confusion with other or ordinary NIAC agreements. Still, from what precedes, SAs definitely stand out in a certain way that legal doctrine fails to capture – otherwise, CA 3 would not have provided for such a mechanism. Under the appellation of "NIAC agreements" stand any written (or verbal) understandings occurring during or relating to the armed conflict. Such understandings may not even be between the parties to the conflict, since the latter can conclude agreements with third parties and make those agreements address any matter of concern for the involved actors. In addition, the commitments are not necessarily legally binding, and if they are, only a case-by-case approach can indicate the legal order they belong to.

Hence, without a proper identification method, many NIAC agreements could mistakenly be regarded as SAs. Indeed, the latter have binding force under international law and stand above national legislation as international agreements,[23]

Party of Nepal (2006); the *Comprehensive Agreement on Respect of Human Rights and International Humanitarian Law* (1998); the *Cotonou Agreement* on Liberia (1993); and the parallel declarations of the government of the Democratic Republic of the Congo and the M23 (2013). 2020 Commentary on GC III, above note 3, paras 884 fn. 825, 888 fn. 827–831, 889 fn. 832, 891 fn. 833 respectively. In addition, the ICRC indirectly includes the SAs that it contributed to drafting during the Yugoslav wars, between 1991 and 1992. *Ibid.*, para. 898 fn. 845.

20 See *ibid.*, para. 898 fn. 845. Also indirectly mentioned in footnote 827 is Agreement No. 1, an openly labelled SA that the ICRC contributed to drafting.

21 Bosnia and Herzegovina (BiH) *et al., Agreement No. 1 on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina*, 22 May 1992, Art. 2.

22 Government of the Republic of Colombia and FARC-EP, *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, 24 November 2016. See the penultimate paragraph of the Preamble.

23 As indirectly conceded by the ICRC Commentary on Article 3: see 2020 Commentary on GC III, above note 3, para. 899 fn. 848. See also Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, 2nd ed., Edward Elgar, Cheltenham, 2024, p. 44, para. 4.22. Furthermore, Article 3 of the Vienna Convention on the Law of Treaties acknowledges the application of some rules of the Convention to international agreements between States and other subjects of international law. Therefore, an agreement successfully qualifying as an SA can benefit from the rules under Articles 46, 47 and 60(5). Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980). See also Aristide Evouna Evouna, "Special Agreements in Non-International

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but with less implementation burden than treaties in terms of prior domestic reception (dualism). Thus, to determine the importance of these instruments for IHL, a definition is capital. The characteristics of an SA flow from its function: CA 3 shows that an SA's objective is to enhance the law applicable to the NIAC by including "other" provisions from the concerned Geneva Convention. However, considering the evolution of IHL, that functional approach leads to a broader scope of obligations. This is discussed in the first substantive section of the article below.

Accordingly, the practice resulting from the above definition will help us to decrypt and understand the lessons that such agreements provide for IHL. The main argument is to demonstrate why SAs represent suitable tools to regulate NIACs and deserve more attention from battlefield actors and beyond. The SAs' legal contribution lies in their enriching nature, their dynamics and their flexibility, which this article will address at three levels. Firstly, in terms of content or substance, they extend the scope of the law of armed conflict (LOAC) as they bring about other regimes of international obligations that share the protective aim of the Geneva Conventions regarding armed conflicts – that is, international human rights and refugee law. This is examined in the second section. To go further, the study of the drafting practices informs on various approaches for streaming IHL obligations into the instrument (third section); moreover, to confirm the functional value of SAs, it is capital to explain how they improve the law applicable to NIACs as required by the provision under analysis (fourth section). Secondly, in terms of implementation, the silence of CA 3 leaves an open choice to the parties (fifth section). Thirdly, the formal and personal features of SAs confirm their openness and accessibility (sixth section).

While these lessons will highlight the potential of SAs, the paper will not evaluate their effective execution. Each conflict narrative is specific and too variable to capture a global trend, even if low compliance with SAs is an acknowledged weakness.[24] The study does not claim exhaustivity either, as the data used for illustration are only a glimpse of a potentially wider practice yet to be uncovered. Nevertheless, in lieu of an analysis of their effectiveness, an account of the specific boundaries applicable to SAs will complete the study. Indeed, as discussed in the seventh section, the validity of SAs depends on imperative and necessary limits to safeguard the essence of IHL and the coherence of the international legal order.

What characterizes a special agreement?

In its Commentary on CA 3 with regard to SAs, the ICRC gives some illustrations and identification clues.[25] However, the ICRC does not justify the characteristics that it raises, and their combination does not constitute a comprehensive and consistent

Armed Conflicts: Identification and Legal Qualification", doctoral diss., UCLouvain, 11 December 2024, pp. 366–367.

24 C. G. Lugo and C. M. Velásquez, above note 15, pp. 216–227.

25 2020 Commentary on GC III, above note 3, paras 881, 885–886, 889–895.

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method for distinguishing SAs from *ordinary* agreements between (or with) the parties to a NIAC. The distinction matters for two reasons. The first is treaty clarification: since the features of SAs do not directly appear from a reading of CA 3, careful interpretation will help to identify such instruments and translate the meaning of that provision into recognizable agreements whose drafting composition could inspire actors involved in other existing or future NIACs.

The second reason lies in the legal status and effects of SAs. Not all NIAC agreements are legal instruments anchored on the international plane;[26] in contrast, SAs are legally binding because "each Party to the conflict shall be bound to apply, as a minimum", the rules laid down in CA 3(1) regardless of the fact that SAs "bring into force" further provisions from the Geneva Conventions. Hence, such additional obligations will compel the parties all the more. Moreover, unlike SAs, not every peace or ceasefire agreement is binding under international law,[27] nor does it necessarily reflect relevant rules of the Vienna Convention on the Law of Treaties, the quality of "State" notwithstanding.[28]

Bearing these elements in mind, the letter of CA 3, as well as the objects and purposes of the Geneva Conventions,[29] authorizes some deductions to reach a coherent definition and identification method. A functional interpretation of CA 3 discloses the expected content of SAs. Primarily, they are agreements relating to issues governed by the Conventions because the aim of SAs is "to bring into force all or part of the other" Conventions' provisions. Secondly, the IHL obligations they channel must have an exclusive humanitarian finality, which means that they must not serve to achieve another result or have a conditional construction. This preserves the non-reciprocal nature that these obligations enjoy under customary law and guarantees a necessary functional autonomy. Yet, IHL has evolved beyond the framework of the 1949 Conventions, implying a contemporary reading of CA 3 following the functional approach previously introduced. Thus, SAs can also serve to include other sources of IHL.

26 Government of El Salvador and Frente Farabundo Martí para la Liberación Nacional, *Agreement on Human Rights (San José Agreement)*, 26 July 1990.

27 A. Evouna Evouna, above note 23, pp. 364–366; Sandesh Sivakumaran, "Binding Armed Opposition Groups", *International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006, p. 389; Luisa Vierucci, *Gli accordi fra governo e gruppi armati di opposizione nel diritto internazionale*, La ricerca del diritto nella comunità internazionale, No. 6, Editoriale Scientifica, Naples, 2013, pp. 157–159; Luisa Vierucci, "'Special Agreements' between Conflicting Parties", above note 13, pp. 404–409; L. Vierucci, above note 1, p. 517, para. 30. Some *ad hoc* agreements are binding under municipal law, such as Republic of Colombia and FARC-EP, *Acuerdo entre el Gobierno Nacional y las FARC-EP (Acuerdo Humanitario)*, 2 June 2001. This agreement is concluded under Colombian Congress Law 418/97, whose Article 8 authorizes the executive to sign agreements with OAGs on specific matters, including IHL. See Congress of Colombia, Law 418 on Coexistence, Effectiveness of Justice and Other Provisions, *Colombia Official Gazette*, 26 December 1997, p. 4, Art. 8.

28 See Antonio Cassese, "The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty", *Journal of International Criminal Justice*, Vol. 2, No. 4, 2004. The author argues that the Lomé Agreement bears the features of a treaty.

29 According to the interpretation methods outlined in the Vienna Convention on the Law of Treaties, above note 23, Art. 31.

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Humanitarian matters

CA 3 discloses the function of SAs. Firstly, they are instruments expected to improve the IHL regime of NIACs through "other provisions" of the Geneva Conventions – that is, those obligations which would not apply to that type of armed conflict otherwise and which will thereby enhance the level or the nature of rights and duties between the parties. Secondly, the expression "other provisions" means that SAs must deal with issues handled by the Geneva Conventions – in short, *humanitarian concerns*. A contextual fact supports this deduction. Since the Geneva Conventions were the only instruments drafted during the 1949 Diplomatic Conference,[30] State delegates necessarily envisioned SAs to have a material connection only with the treaties whose provisions would be "copied".

Accordingly, the function and content of SAs imply that they are NIAC agreements between the parties to the conflict and pertain to one or multiple humanitarian matters. Any question regarding the amelioration of the condition of the wounded, sick or shipwrecked in the field or at sea, the condition of persons detained because of armed conflict, or the protection of civilians in time of armed conflict amounts to a humanitarian concern. These issues must be distinguished from other questions appearing in agreements occurring in NIACs, such as military (e.g., demobilization and reintegration matters), political (e.g., power-sharing, political participation, constitutional organization) or economic issues (e.g., wealth-sharing, farming or rural policies). Of course, many agreements mix those issues with humanitarian concerns, but only agreements where the latter are predominant or exclusive should be considered. Otherwise, the agreement would depart from the legitimate expectation of the Geneva Conventions' drafters that a "material connection" should exist between SAs and the objects of the Conventions. Thus, CA 3 instils a requirement that sets an additional criterion for SAs.

The purpose of the obligations

IHL obligations must be non-reciprocal and keep their functional autonomy from any other purpose. Non-reciprocity can be inferred from the relevant expressions of CA 3. When the provision invites the parties to "bring into force" the other provisions of the Geneva Conventions, it suggests that NIAC actors have to make them effective or implement them. However, the text of CA 3(1) adds an implicit condition on how to make obligations applicable: "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat …, shall *in all circumstances* be treated humanely" (emphasis added). The phrase "in all circumstances" calls for unreserved respect of IHL. In other words, no condition should hinder compliance with the Geneva Conventions,

30 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2(B), Federal Political Department, Bern, 1950.

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be it by requesting a treatment similar to the right conceded to the other party or by imposing a specific deed in return.[31]

IHL obligations must also be autonomous in that they must not be subject to or pursue a parallel or competing finality or result. Instead, they must aim for their own implementation only. Otherwise, it would create confusion about the motives of their execution by the parties to the NIAC, and there would be no guarantee that those parties would comply in order to fulfil their IHL obligations exclusively. When drafting the obligation, it is important to secure its unconditional nature and functional autonomy.

Indeed, a party could escape the IHL obligation under the pretext that the condition or the result associated with the commitment is not met or achieved. While NIAC actors must respect the LOAC regardless, in practice, framing the obligations of that body of law to reach other goals or submitting them to conditions that entail reciprocity can have the opposite effect. Instead, humanitarian obligations drafted without any link to an expected outcome or a given requirement guarantee an unequivocal humanitarian purpose.

The importance of an IHL-compliant formulation finds justification, again, in the drafting context of CA 3. Since the States expected material connection with the Geneva Conventions and thus IHL, it follows that SAs must contain obligations reflecting that body of law along with the appropriate formulation. Indeed, many NIAC agreements cannot qualify as SAs because of misleading formulations of IHL pledges. This is the case, for instance, with the *Agreement on a Temporary Cease-Fire and the Cessation of Other Hostile Acts on the Tajik–Afghan Border and within the Country for the Duration of the Talks*.[32] In Article 2(b)–(c), the parties defined "cessation of hostilities" as encompassing "[t]he cessation by the Parties of acts of terrorism and sabotage" and "[t]he prevention by the Parties of murders, the taking of hostages, unlawful arrest and detention, and acts of pillage against the civilian population and servicemen in the Republic and other countries". Although the prohibited behaviours are also forbidden under IHL,[33] the "cessation of hostilities" depends on those conducts, as the provision title indirectly suggests. Therefore, the conflict could erupt again if a NIAC actor infringes on the listed behaviours.

In this configuration, the cessation of hostilities is the broad objective, and IHL undertakings are instrumental. The drafting approach adopted in the above example creates two problems. Firstly, while a breach of IHL by a party normally

31 There is an equivalence with Rule 140 of the ICRC Customary Law Study, which states that "[t]he obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity". Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 140, available at: https://ihl-databases.icrc.org/en/customary-ihl/rules.

32 Republic of Tajikistan and Tajik Opposition, *Agreement on a Temporary Cease-fire and the Cessation of Other Hostile Acts on the Tajik–Afghan Border and within the Country for the Duration of the Talks*, 17 September 1994.

33 For equivalences in treaty law, see, notably, CA 3, in relation to the "taking of hostages" and "unlawful arrest and detention", which relate to paragraphs 1(b) and 1(d) respectively.

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has no consequences as per the other participant's obligations, here, violating the listed conducts could provoke a return to the fighting, following the terms of the agreement. In this configuration, non-compliance with IHL entails armed reactions. Secondly, it is not the role of IHL to end (or contribute to ending) hostilities; rather, it is the role of IHL to regulate them, even if, indirectly, IHL contributes to peace.[34]

The practice of NIAC agreements reveals more cases where the parties have combined IHL undertakings with an expected result or conditioned their performance.[35] Nevertheless, when IHL obligations operate to maintain the validity of a "ceasefire", to be instrumental for the "cessation of hostilities" or to safeguard the agreement itself, it creates an ambiguity that contrasts with the implicit requirement that they must be executed *for themselves* – that is, without connection to any other requirement. NIAC agreements displaying such drafting approaches should not be regarded as SAs. Thus, to secure non-reciprocity and the autonomy of IHL obligations, and as the second definition criterion, only NIAC agreements whose provisions have mainly humanitarian aims may qualify as *ad hoc* or special agreements. In conclusion, to simplify the definition, an SA is an agreement addressing humanitarian concerns with a humanitarian purpose.

However, a contemporary reading of CA 3 needs to update this functional view. The material scope of the provision can no longer limit itself to the Geneva Conventions due to the evolution of the IHL regime of NIACs after 1949.[36] In coherence with the Conventions' purpose of protecting the human life and dignity of those not or no longer taking part in hostilities, it is safe to consider other IHL sources as material for SAs because they have the same aim as those four treaties.

34 Cordula Droege, "International Humanitarian Law and Peace: A Brief Overview", *International Review of the Red Cross*, Vol. 106, No. 927, 2024, p. 990.

35 See e.g. Government of Sierra Leone and Revolutionary United Front of Sierra Leone, *Agreement of Ceasefire and Cessation of Hostilities*, Annex to UN Doc. S/2000/1091, 10 November 2000, Art. 8(3); Transitional Government of Burundi and Conseil National pour la Défense de la Démocratie – Forces pour la Défense de la Démocratie, *Ceasefire Agreement*, Annex I to UN Doc S/2002/1329, 2 December 2002, Art. 2(1)(5), 2(1)(7).

36 To mention a few treaties, consider Additional Protocol II (AP II), but also treaties from the Hague branch of IHL pertaining to the means and methods of warfare. See, notably, Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 215, 14 May 1954 (entered into force 7 August 1956) (Cultural Property Convention); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1015 UNTS 163, 10 April 1972 (entered into force 26 March 1975) (Biological Weapons Convention); Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151, 10 December 1976 (entered into force 5 October 1978) (ENMOD Convention); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983) (Convention on Certain Conventional Weapons, CCW). And not to forget customary rules of international armed conflict (IAC) deemed applicable to NIACs.

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Updated material scope of special agreements

There is no need for a detailed examination of the number of provisions of the Geneva Conventions that SAs can bring into force. Instead, it is interesting to note that the Conventions contain model *ad hoc* agreements for international armed conflicts (IACs) which NIAC actors can copy and adapt to their situation, and that there are other sources of IHL which provide a wide range of possibilities for enhancing the regime of NIACs.

Special agreements embedded in the Geneva Conventions

Some provisions of the Geneva Conventions provide a protective regime or status for areas, zones or facilities to offer shelter and safeguard human dignity. Such "protected zones" were already a concern before the Conventions,[37] and the drafters deemed it necessary to secure them because they would contribute to shielding the individuals listed in CA 3(1)[38] from the effects of hostilities. Three kinds of protected zones may serve as examples: on the one hand there are "hospital zones and localities", eventually combined with "safety zones and localities",[39] while on the other hand there is the "neutralized zones" regime.[40]

"Hospital zones and localities" protect not only the wounded and sick from the effects of hostilities[41] but also the "personnel entrusted with the organisation and administration of such zones and localities".[42] If referring strictly to the Geneva Conventions, this is an IAC-based regime,[43] and there is a *Draft Agreement Relating to Hospital Zones and Localities* as Annex I of Geneva Convention I (GC I), pursuant

37 To give three examples, consider the zone established during the siege of Madrid in 1936, the neutral zone in Shanghai in 1937 and the safety zones in Palestine in 1948, as reported by François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC, Geneva, and Macmillan Education, Oxford, 2003, pp. 749–752.

38 That is, "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause".

39 For clarification, scholars explain that "[t]he term 'locality' refers to specific, well-delimited places, such as buildings or camps, whereas the term 'zone' refers to a relatively large area and may include one or several localities". N. Melzer and H. Durham, above note 18, p. 150.

40 The doctrine also draws attention to the less common expression of "place of refuge", "used to denote any piece of territory so laid out as to afford shelter to certain categories of persons, and recognized as such. It may therefore cover hospital zones and localities, safety zones and neutralized zones. Since the time this definition was formulated, the term 'safety zone' has come to be used in the same general sense." F. Bugnion, above note 37, p. 753.

41 *Ibid.*, p. 752.

42 N. Melzer and H. Durham, above note 18, p. 149.

43 The Geneva Conventions distinguish between two types of SAs for IACs in Article 6/6/6/7. On one side stand the SAs already mentioned by the Geneva Conventions in a list of limited provisions. The articles at stake vary from one treaty to the next. GC I enumerates Articles 10, 15, 23, 28, 31, 36, 37 and 52. In GC II, Article 6 lists Articles 10, 18, 31, 38–40, 43 and 53. For GC III, the relevant provisions are Articles 10, 23, 28, 33, 60, 65–67, 72, 73, 75, 109, 110, 118, 119, 122 and 132. Finally, in GC IV, Article 7 refers to Articles 11, 14, 15, 17, 36, 108, 109, 132, 133 and 149. On the other side, there are those SAs that Article 6/6/6/7 invites the parties to conclude "for all matters concerning which they may deem it suitable to make separate provision".

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to Article 23.[44] However, the ICRC implemented that regime in relation to a NIAC through the *Agreement on the Jaffna Hospital and Safety Zone around It*.[45] The government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) adopted that SA on 6 November 1990.

"Safety zones and localities" are areas that benefit from the same protection as the previous zones defined above but with a greater focus on vulnerable groups among the civilians, like the infirm, the elderly, children under 15, expectant mothers, and mothers of children under 7.[46] Furthermore, practice reveals that both protected zones can merge to form "hospital and safety zones and localities",[47] whose regime is explained in Geneva Convention IV (GC IV), with a draft agreement as Annex I (consistent with Article 14).[48] Taken separately, "hospital zones and localities" and "safety zones and localities" are protected zones usually set in safe and peaceful areas far from the battlefield before or after the hostilities, and they may last as long as need be.[49] Such zones should preferably be created through written agreements despite the silence of Articles 23 and 14 of GC I and GC IV respectively.[50]

As regards "neutralized zones", they create a sheltered area within the hostilities perimeter and even during the fighting. They have the same protective objective as the previous zones for the wounded, sick and peaceful civilians.[51] However, there is no "neutralized zones" template agreement in the Geneva Conventions, through a framework is laid down in Article 15 ("Neutralized Zones") of GC IV. As an example of the implementation of that regime, the Yugoslav federal army and Croatia once

44 Article 23 of GC I pertains to one of the *ad hoc* agreements acknowledged by the Convention pursuant to Article 6.

45 ICRC, Government of the Democratic Socialist Republic of Sri Lanka and Liberation Tigers of Tamil Eelam (LTTE), *ICRC Agreement on the Jaffna Hospital and Safety Zone around It*, 6 November 1990. See ICRC press release of 6 November 1990, available at: https://casebook.icrc.org/case-study/sri-lanka-jaffna-hospital-zone.

46 N. Melzer and H. Durham, above note 18, pp. 149–150; F. Bugnion, above note 37, p. 752.

47 N. Melzer and H. Durham, above note 18, pp. 149–150; F. Bugnion, above note 37, p. 752. See also ICRC, "Hospital Zones and Localities, Hospital and Safety Zones and Localities", *How Does Law Protect in War?*, available at: https://casebook.icrc.org/glossary/hospital-zones-and-localities-hospital-and-safety-zones-and-localities.

48 The content is almost equivalent to the provisions of Annex I of GC I, but not entirely because of the broader scope of hospital and safety zones and localities. For example, in GC IV, Article 1 of Annex I refers to Article 23. The same goes for GC I, Annex I, Article 1. Nonetheless, there are some slight changes owing to the extended scope in GC IV. For example, Articles 2–8 and 10–13 simply expanded the content of the provision to "safety zones" instead of only "hospital zones and localities" as in GC I, Annex I. In addition, both zones are marked differently: "[W]hereas provision is made for hospital zones and localities reserved solely for military and civilian wounded or sick to be indicated by the red cross or red crescent emblem on a white ground, it is recommended that hospital and safety zones be marked by oblique red bands on a white ground, placed on the buildings and outer precincts." F. Bugnion, above note 37, p. 753.

49 N. Melzer and H. Durham, above note 18, pp. 149–150; F. Bugnion, above note 37, p. 752. See also ICRC, above note 47.

50 1958 Commentary on GC IV, above note 4, p. 127; 2020 Commentary on GC III, above note 3, para. 892 fn. 835. The ICRC has brokered many agreements on different types of zones on various occasions, notably in Dacca in 1971, Nicosia in 1974, Saigon and Phnom-Penh in 1975, Nicaragua in 1979 and the Falkland Islands/Malvinas in 1982, as reported Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 697, para. 2261.

51 N. Melzer and H. Durham, above note 18, p. 150; F. Bugnion, above note 37, pp. 752–753.

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granted the status of "neutralized zone" to the Vukovar hospital in an agreement witnessed by the ICRC, the Maltese Red Cross and Médécins Sans Frontières on 18 November 1991.[52] On that occasion, the parties stated that they would "recognise the neutrality of Vukovar hospital during a period covering the evacuation. The hospital will be put under the protection of the ICRC who will advise both parties of the period of neutrality which they require."[53]

Furthermore, data records evidence that a combination of the "hospital zones and localities" and "neutralized zones" regimes is possible in NIACs. This occurred in Croatia, with the *Agreement Relating to the Establishment of a Protected Zone around the Hospital of Osijek*.[54] The signatories to this agreement regarded "the hospital of Osijek and a zone around it as drawn on the annexed map" as "a protected zone according to the principles of Article 23 of the First Geneva Convention of 1949 and of Articles 14 and 15 of the Fourth Geneva Convention".[55] In that sense, they adapted the annexed model agreement of GC I/IV to their needs. This combination shows how the practice of SAs can witness configurations beyond the framework that the Geneva Conventions sought to anticipate with their templates.

Other sources of IHL

The updated interpretation of the invitation to bring into force "all or part of the provisions of the present Convention" leads to the understanding that SAs can embrace all IHL customary rules and treaties.[56] Concretely, for the ICRC, there are three supplementary sources that an SA can enforce.[57] The first are customary norms,[58] which

52 Yugoslav People's Army (Jugoslovenska Narodna Armija, JNA) and Republic of Croatia, *Decisions on Humanitarian Convoy to Evacuate Wounded and Sick from Vukovar Hospital*, 18 November 1991.

53 *Ibid.*, Art. 6.

54 Federal Executive Council of the Socialist Federative Republic of Yugoslavia, JNA, Serbia and Croatia, *Agreement Relating to the Establishment of a Protected Zone around the Hospital of Osijek*, 27 December 1991.

55 *Ibid.*, Art. 1.

56 2020 Commentary on GC III, above note 3, para. 885.

57 *Ibid.*

58 See e.g. Georgia, Russian Federation, UN High Commissioner for Refugees (UNHCR) and the Abkhaz Side, *Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons*, Annex II of UN Doc. S/1994/397, 4 April 1994, where Articles 2, 3(d) and 3(j) match with Rule 132 ("Return of Displaced Persons") of the ICRC Customary Law Study, above note 31. See also Government of the Republic of Sudan and Sudan People's Liberation Movement (SPLM), *Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack*, 31 March 2002, Art. 1(1)(a) and 1(1)(d), reflecting Rules 1 ("The Principle of Distinction between Civilians and Combatants") and 15 ("Principle of Precautions in Attack") respectively. In addition, consider Sudan Peoples' Liberation Movement/Army (SPLM/A), Government of the Democratic Republic of Sudan and Justice and Equality Movement (JEM), *Protocol on Establishing a Humanitarian Assistance in Darfur*, 4 April 2004; and Government of the Republic of Sudan, Sudan Liberation Movement/Army (SLM/A) and JEM, *Humanitarian Ceasefire Agreement on the Conflict in Darfur*, 8 April 2004. In both of these two latter agreements, Articles 2 and 8 relate to Rule 55 ("Access for Humanitarian Relief to Civilians in Need").

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comprise those exclusively applicable to IACs.[59] The second are provisions from Additional Protocol I (AP I), as seen in some SAs of the 1990s Yugoslav wars, notably a Memorandum of Understanding (MoU) in 1991,[60] Agreement No. 1,[61] and the separate but identical undertakings of Bosnia and Herzegovina (BiH), the Croatian entity of Herzeg-Bosna and the Serbian Democratic Party (Srpska Demokratska Stranka, SDS) in the London Conference's *Programme of Action on Humanitarian Issues* of 27 August 1992.[62] Thirdly, the parties can resort to customary principles[63] and treaties[64] of Hague law,[65] as in the 2016 *Humanitarian Appeal for Benghazi*,[66] among other cases.[67]

To summarize, going beyond "the present Convention", CA 3(3) can be applied by analogy to non-Geneva Conventions sources of IHL. Hence, an SA pertains to any humanitarian concern regulated by the LOAC, assuming it keeps a humanitarian purpose. This means that the key determinants of an SA are the content and purpose of the instrument. Based on that

59 See ICRC Customary Law Study, above note 31, Rules 114 ("Return of the Remains and Personal Effects of the Dead"), 124(A) ("ICRC Access to Persons Deprived of Their Liberty") or 147 ("Ensuring Respect for International Humanitarian Law Erga Omnes").

60 The signatories referred to Articles 72–79 and then Articles 35–42 and 48–58 of AP I. See JNA, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, and Croatia, *Memorandum of Understanding*, 27 November 1991, Arts 4(2) and 6 respectively.

61 Wherein Article 2(3) mentions Articles 72–79 of AP I regarding the treatment of civilians.

62 On that occasion, the parties indicated that they were "bound to comply with their obligations under International Humanitarian Law and in particular the Geneva Conventions of 1949 and the *Additional Protocols* thereto, and that persons who commit or order the commission of grave breaches are individually responsible". BiH, Croatian Entity of Herzeg-Bosna and SDS, *The London Conference: Programme of Action on Humanitarian Issues Agreed between the Co-Chairmen to the Conference and the Parties to the Conflict*, 27 August 1992, Art. 3(i) (emphasis added).

63 For instance, the principle of distinction, explained by Rules 1–24 of the ICRC Customary Law Study, above note 31; the principle of precaution, through Rules 15 and 22; and the principle of proportionality, through Rule 14.

64 See e.g. Cultural Property Convention, above note 36; Biological Weapons Convention, above note 36; ENMOD Convention, above note 36; AP I; AP II; CCW (with Protocols I, II and III), above note 36; Protocol I on Non-Detectable Fragments, 10 October 1980, Annexed to the CCW, above note 36; Protocol IV on Blinding Laser Weapons, 13 October 1995, Annexed to the CCW, above note 36; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (as amended 3 May 1996), Annexed to the CCW, above note 36 (CCW Protocol II).

65 For example, according to Agreement No. 1, hostilities should "be conducted in the respect of the laws of armed conflict, particularly in accordance with Articles 35 to 42 and Articles 48 to 58 of Additional Protocol I". BiH *et al.*, above note 21, p. 1, Art. 2(5).

66 The parties pledged "[to] commit and call upon all others to … avoid collateral damage induced by the war and fighting". See Community Leaders (list enclosed at the end of the instrument), *Humanitarian Appeal for Benghazi*, 16 March 2016, Art. 2(2).

67 Other indirect references to Hague law include Democratic Republic of Sudan and Liberation and Justice Movement (LJM), *Ceasefire Agreement between the Government of Sudan and the LJM*, 18 March 2010, Art. 2(a)(1), 2(a)(6), 2(a)(9). To be even more explicit on the means of certain kinds of weapons, see Government of the Republic of the Philippines and Moro Islamic Liberation Front (MILF), *Guidelines for the Implementation of the Philippine Campaign to Ban Landmines: Fondation Suisse de Déminage Project Pursuant to the Joint Statement of the GRP-MILF Peace Panels Dated 15 November 2007*, 5 May 2010, Art. 2(1)–(2). Moreover, Article 9 provides for definitions of "mine", "unexploded ordnance", "explosive remnant of war" and "abandoned explosive ordnance", to cite a few.

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definition, many agreements concluded during or because of a NIAC qualify as SAs, such as in BiH,[68] Colombia,[69] Croatia,[70] Georgia,[71] Indonesia,[72] Libya,[73] the Philippines,[74] Somalia,[75] South Sudan,[76] Sri Lanka,[77] Sudan[78]

68 BiH, Croatian Entity of Herzeg-Bosna and SDS, above note 62; BiH *et al.*, above note 21; BiH *et al., Agreement on the Release and Transfer of Prisoners*, 1 October 1992; Party of Democratic Action (Stranka Demokratske Akcije, SDA), SDS and Croatian Democratic Community (Hrvatska Demokratska Zajednica, HDZ), *Sarajevo Declaration on the Humanitarian Treatment of Displaced Persons*, 11 April 1992; BiH and Croatian Defence Council (Hrvatsko Vijeće Obrane, HVO), *Agreement on the Passage of Humanitarian Convoys*, 10 July 1993.

69 Government of the Republic of Colombia and FARC-EP, *Joint Communiqué No. 62*, 17 October 2015; Government of the Republic of Colombia and FARC-EP, above note 27; Government of the Republic of Colombia and FARC-EP, above note 22.

70 Croatia, Serbia, Slovenia, Montenegro and Macedonia (and, possibly, the Federal Executive Council of the Socialist Federative Republic of Yugoslavia), *The Hague Statement on Respect of Humanitarian Principles*, 5 November 1991; JNA, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, and Croatia, above note 60; Federal Executive Council of the Socialist Federative Republic of Yugoslavia, JNA, Serbia and Croatia, above note 54; ICRC, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, JNA and Croatia, *Joint Commission to Trace Missing Persons and Mortal Remains: Rules of Procedure and Plan of Operation*, 16 December 1991.

71 Georgia, Russian Federation, UNHCR and the Abkhaz Side, above note 58.

72 Government of the Republic of Indonesia and Leadership of the Free Aceh Movement, *Joint Understanding on Humanitarian Pause for Aceh*, 12 May 2000.

73 Community Leaders, above note 66.

74 Government of the Republic of the Philippines and MILF, *Guidelines on the Humanitarian, Rehabilitation and Development Component of International Monitoring Team*, 3 June 2010; Government of the Republic of the Philippines and MILF, *Terms of Reference of the Civilian Protection Component of the International Monitoring Team*, 5 May 2010; Government of the Republic of the Philippines and MILF, above note 67; Government of the Republic of the Philippines and MILF, *Agreement on the Civilian Protection Component of the International Monitoring Team*, 27 October 2009; Government of the Republic of the Philippines and MILF, *Implementing Guidelines on the Humanitarian Rehabilitation and Development Aspects of the GRP-MILF Tripoli Agreement on Peace of 2001*, 7 May 2002; Government of the Republic of the Philippines and National Democratic Front of the Philippines (NDFP), *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 (CARHRIHL).

75 Somalian Political Parties, *The Bahir Dar Agreement on the Somali Humanitarian Issues*, 2 June 1992.

76 Transitional Government of National Unity (TGoNU), Armed Opposition Groups and Political Parties, *Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access Republic of South Sudan*, 21 December 2017; Government of the Republic of South Sudan and SLM/A (in Opposition), *Recommitment to Humanitarian Matters of the Cessation of Hostilities Agreement between the Government of the Republic of South Sudan and the Sudan People's Liberation Movement/Army in Opposition*, 5 May 2014; Government of the Republic of South Sudan and SPLM/A (in Opposition), *Agreement on Cessation of Hostilities*, 23 January 2014.

77 ICRC, Government of the Democratic Socialist Republic of Sri Lanka and LTTE, above note 45.

78 Government of the Democratic Republic of Sudan and JEM, *Ceasefire Agreement between the Government of Sudan and the Justice and Equality Movement – Sudan*, 10 February 2013; Government of the Democratic Republic of Sudan and LJM, above note 67; Government of the Democratic Republic of Sudan, SLM/A and JEM, *Protocol between the Government of Sudan, the Sudan Liberation Movement/Army and the Justice and Equality Movement on the Enhancement of the Security Situation in Darfur*, 9 November 2004; Government of the Democratic Republic of Sudan, SLM/A and JEM, *Protocol between the Government of Sudan, the Sudan Liberation Movement/Army and the Justice and Equality Movement on the Improvement of the Humanitarian Situation in Darfur*, 9 November 2004; Government of the Republic of Sudan and SPLM, above note 58; Government of the Democratic Republic of Sudan, UN Assistant Emergency Relief Coordinator (on behalf of the UN) and SPLM, *Agreement on the Implementation of Principles Governing the Protection and Provision of Humanitarian Assistance to War Affected Civilian Populations*, 15 December 1999; Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76.

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or Syria.[79] These will serve as examples[80] to underline the potential of SAs and the lessons they can deliver, among which an extension of the material scope of SAs besides IHL.

Complementary bodies of law

Practice shows that the function of SAs attracts other regimes of obligations that share the IHL objective of protecting human life and dignity from threats that occur during or because of a NIAC. Indeed, some legal regimes can enhance or develop the protection standards of IHL in NIAC – namely, international human rights law (IHRL)[81] and international refugee law, including the treatment of internally displaced persons (IDPs). To simplify, the undertakings originating from these regimes, including IHL, can be regarded as *humanitarian obligations* with an undeniable legal nature, although they have specific fields of application.

Human rights obligations

In the context of NIAC, human rights obligations could incidentally contribute to implementing IHL if contained in an SA. The combination of IHRL with IHL finds justification on many grounds. Firstly, they both cover vulnerable groups: children,[82] girls and women,[83] and people with disabilities,[84] to name a few. In the same vein,

79 Syrian Arab Republic, Armed Opposition and Homs Local Administrative Council, *Homs Agreement Mediated by the UN*, 7 February 2014.

80 The SAs listed under above notes 68–79 do not exhaust the number of SAs that were signed in the corresponding NIACs; the examples presented in this article are only a glimpse of the practice. They and others can be retrieved on various online platforms and databases, although not under the straight classification of "CA 3 special agreements". This includes resources from international organizations like the UN's Peace Agreements Search (https://peacemaker.un.org/en/areas-of-work/peace-agreements-database-and-language-of-peace-tool/peace-agreements-search) and Language of Peace (https:nguageofpeace.org/#/search) databases, as well as university platforms like the University of Edinburgh's PA-X Agreements Database (https://pax.peaceagreements.org/agreements/search/) and the University of Notre Dame's Peace Accords Matrix (https://peaceaccords.nd.edu/search-pam). Some non-governmental organizations have also compiled agreements in NIACs, notably Geneva Call, in its Their Words repository (http://theirwords.org/). Neither the author nor the *Review* guarantee faithful translation where the instrument was not initially drafted in English by the parties.

81 As the ICRC comments, "[a]n agreement may contain obligations drawn from human rights law and help to implement humanitarian law. For instance, it may aim to make the obligation to conduct fair trials more precise or may draw on international human rights law in another way." 2020 Commentary on GC III, above note 3, para. 890.

82 International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976) (ICCPR), Art. 24; Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990), Arts 38, 39; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 UNTS 222, 25 May 2000 (entered into force 12 February 2002).

83 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 1, 18 December 1979 (entered into force 3 September 1981).

84 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008), Art. 11.

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issues of common interest necessarily create connexions between both regimes,[85] like the problem of child soldiers.[86] Many SAs prohibit that practice, sometimes through reference to human rights instruments. In Sudan, an SA concluded by the government and two OAGs condemned the practice, invoking the African Charter on the Rights and Welfare of Children, the Convention on the Rights of the Child (CRC) and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.[87] A joint ceasefire agreement between the Sudanese government and the Liberation and Justice Movement (LJM) contains a similar restriction,[88] while another ceasefire agreement with the Justice and Equality Movement (JEM) had a more explicit formulation.[89] Cases of prohibition of the recruitment of child soldiers also extend to the NIAC in South Sudan.[90]

A third reason favouring the complementarity of IHL and IHRL is the protective standard developed by the latter regime regarding torture,[91] enforced disappearances,[92] detention[93] and unfair judicial proceedings.[94] Some agreements have presented a detailed distinction between IHRL issues and IHL matters, like the *Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law* (CARHRIHL) between the government of the Philippines and the National Democratic Front of the Philippines (NDFP).[95] However, from a more general perspective, a few agreements address both regimes of obligations as a combined or indistinctive package. For example, in the *Implementing Guidelines on the Humanitarian Rehabilitation and Development Aspects of the Tripoli Agreement on Peace of 2001*, the government of the Philippines and the Moro Islamic Liberation

85 For the ICRC, "[i]n some cases, a rule under human rights law and humanitarian law may be identical, such that it is immaterial whether the Parties to the agreement have referred to the rule as stemming from one or the other body of law". 2020 Commentary on GC III, above note 3, para. 890.

86 Some IHRL treaties cover that question, such as the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, or Article 22 of the African Charter on the Rights and Welfare of the Child. IHL adopts a similar focus through Article 4(3)(c)–(d) of AP II. Likewise, two IHL customary rules prohibit the practice: see ICRC Customary Law Study, above note 31, Rules 136 ("Recruitment of Child Soldiers"), 137 ("Participation of Child Soldiers in Hostilities").

87 Government of the Democratic Republic of Sudan, SLM/A and JEM, *Enhancement of the Security Situation*, above note 78, Art. 8.

88 Government of the Democratic Republic of Sudan and LJM, above note 67, Art. 2(a)(11).

89 See Government of the Democratic Republic of Sudan and JEM, above note 78. In that agreement, Article 4(j) prevents the "recruitment and use of boys and girls under age of 18 by armed forces and armed groups in hostilities, in accordance with Sudan's obligations under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and obligations under Protocol II (1977) of the Geneva Conventions of 1949". See also Art. 5(h)–(i).

90 TGoNU, Armed Opposition Groups and Political Parties, above note 76, Art. 3(2)(f). The parties further agreed to "unconditionally demobilize any child recruited or enlisted by their group to the United Nations Children's Fund (UNICEF)". *Ibid.*, Art. 9(1). See also Art. 10(a).

91 ICCPR, above note 82, Art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987), Art. 2(2).

92 International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010), Art. 1.

93 ICCPR, above note 82, Arts 9, 10.

94 *Ibid.*, Arts 14, 15.

95 Government of the Republic of the Philippines and NDFP, above note 74.

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Front (MILF) committed themselves to "safeguard[ing] the observance of the international humanitarian laws, respect for internationally recognised human rights and fundamental freedoms for all persons within Mindanao".[96] Accordingly, the parties decided to "cooperate in the investigation and prosecution of serious violations of international humanitarian laws and human rights as well as violations of this Agreement".[97]

Data analysis also reveals particularities in using IHRL in SAs, like acknowledging rebels' commitment to respecting and protecting human rights. In the *Humanitarian Appeal for Benghazi*, for example, OAG groups' leaders in Libya claimed that "[w]ithin the limits of [their] power and influence, [they] commit and call upon all others to … respect IHL and Human Rights".[98] The government of the Republic of South Sudan and an OAG went further by considering that the rebels could be on a par with the State in protecting human rights,[99] whereas the latter is usually the duty bearer.[100] Despite the singularity of that last example, practice shows IHRL's contribution to enriching the scope of SAs, as confirmed by some scholars.[101]

International refugee law

Although IHL does not seem to address the condition and treatment of refugees and IDPs directly,[102] several sources prove its interest in the fate of those categories of individuals.[103] In its Commentary on CA 3(2), the ICRC recognizes that the "protection" mentioned in that provision must (also) cohere with refugee law.[104] Equally, Article 17 of Additional Protocol II (AP II) defines the restrictive conditions under which a population displacement can occur. Finally, the ICRC Customary Law Study also covers those questions under Rules 129 and 131–133.

96 Government of the Republic of the Philippines and MILF, *Implementing Guidelines*, above note 74, Art. 4(1).

97 *Ibid.*, Art. 4(5). In a later agreement, in 2009, the same actors "reconfirm[ed] their obligations under humanitarian law and human rights law to take constant care to protect the civilian population and civilian properties, against the dangers arising in armed conflict situations". Government of the Republic of the Philippines and MILF, *Agreement on the Civilian Protection Component*, above note 74, Art. 1.

98 Community Leaders, above note 66, Art. 2(1).

99 Indeed, the parties stated that they would both "commit to the protection of human rights, life and property as provided by various national, continental and international instruments". Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76, Art. 3(1).

100 To give a counter or more tempered example, in an SA with the government of Sudan, the SPLM admitted that it was "not legally responsible for protecting and promoting the legal rights and entitlements of the civilian populations in areas under its control pursuant to international treaties and conventions. However, the SPLM and the other Parties to this Agreement recognize that the SPLM is legally bound by customary human rights law and has a moral and ethical obligation to protect and promote the rights of the civilian population living in areas under its control." Government of the Democratic Republic of Sudan, UN Assistant Emergency Relief Coordinator and SPLM, above note 78, Art. 3.

101 See above note 81.

102 N. Melzer and H. Durham, above note 18, p. 232.

103 See GC IV, Art. 44; AP I, Art. 73.

104 2020 Commentary on GC III, above note 3, para. 852.

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Considering all these connections, it is unsurprising that SAs serve to protect refugees and IDPs as well, sometimes to the point that those agreements seem to cover the material scope of international refugee law in some respect. The parties to a NIAC can address the situation of refugees and IDPs as a whole, notably in the wake of the conflict. This was the case in the NIAC within BiH, with the London Conference *Programme of Action on Humanitarian Issues* stipulating that "refugees and displaced persons should be allowed to return voluntarily and safely to their places of origin".[105] Likewise, consider the *Protocol on the Improvement of the Humanitarian Situation in Darfur* between the government of Sudan, the Sudan Liberation Movement/Army (SLM/A) and the JEM,[106] among other examples.[107]

In a few situations, an SA can address the fate of IDPs within specific provisions. For instance, in Agreement No. 1, Article 2(3)(4)[108] is very close to the text of Article 17 of AP II. SAs involving the government of Sudan further illustrate this trend, whether with the LJM[109] or the JEM.[110] Of course, nothing precludes an SA from dealing entirely with refugees and IDPs, and the *Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons* signed by Georgia and the Abkhaz side on 4 April 1994 is an excellent example in that respect.[111]

The additional obligation regimes illustrated so far increase the importance of SAs for IHL. Indeed, such agreements enhance the applicable law of NIACs and embrace other dimensions of human dignity in armed conflicts. Accordingly, they surpass the expectations of CA 3 as initially designed by the drafters of the Geneva

105 BiH, Croatian Entity of Herzeg-Bosna and SDS, above note 62, Art. 3(3). This is also a customary obligation in IHL, under Rule 132 ("Return of Displaced Persons") of the ICRC Customary Law Study, above note 31. The next paragraph of the SA also prohibited "all practices involving forcible displacements [and] all forms of harassment, humiliation or intimidation. Confiscation and destruction of property and all acts involved in the practice of ethnic cleansing are abhorrent and should cease forthwith." *Ibid.*, Art. 3(4).

106 The parties to this SA agreed to "[p]rotect the rights of IDPs and refugees in their areas of origin in order to enable them to return, should they choose to do so". Government of the Democratic Republic of Sudan, SLM/A and JEM, *Improvement of the Humanitarian Situation*, above note 78, Art. 2. This obligation also intersects with customary IHL: see above note 85. Furthermore, in the same SA, the signatories pledged to guarantee that "all forces and individuals involved or reported to be involved in violations of the rights of IDPs, vulnerable groups and other civilians will be transparently investigated and held accountable to the appropriate authorities". *Ibid.*, Art. 2.

107 See e.g. the case of South Sudan, where the government and the SPLM/A decided "to assist displaced persons and refugees who wish to return to their original areas of abode within the Republic of South Sudan or elsewhere". Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76, Art. 4(3). Equally, see TGoNU, Armed Opposition Groups and Political Parties, above note 76, Art. 8(3) .

108 The SA states that "the displacement of the civilian population shall not be ordered unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition." BiH *et al.*, above note 21, Art. 2(3)(4).

109 Government of the Democratic Republic of Sudan and LJM, above note 67, Art. 2(a)(1).

110 Government of the Democratic Republic of Sudan and JEM, above note 78, Art. 5(g). As a supplementary illustration see Government of the Republic of the Philippines and NDFP, above note 74, Part IV, Art. 9, stating that "[i]nternally displaced families and communities shall have the right to return to their places of abode and livelihood, to demand all possible assistance necessary to restore them to their normal lives and to be indemnified for damages suffered due to injuries and loss of lives".

111 Georgia, Russian Federation, UNHCR and the Abkhaz Side, above note 58.

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Conventions. This first lesson justifies the consideration of SAs as *humanitarian agreements* based on their content, though this general label does not mean that they all mobilize humanitarian obligations similarly.

Approaches for streaming IHL obligations into special agreements

SAs help regulate NIACs by using the Geneva Conventions as their first resource, which the parties may refer to differently. The parties can expressly list the relevant provisions that they seek to apply in their SA, or only make a general reference to the treaties. The *Agreement on the Release and Transfer of Prisoners* during the Yugoslav wars is a good example of the former practice:[112] this SA cites Articles 50, 51, 130 and 147 of GC I, II, III and IV respectively to define the conditions for releasing prisoners in Article 3 of the agreement.[113] As regards the approach of general reference to the Geneva Conventions, the aforementioned MoU of 1991 provides a clear illustration.[114] The signatories agreed that "[a]ll wounded and sick on land shall be treated in accordance with the provisions of [GC I]", that "[a]ll wounded, sick and shipwrecked at sea shall be treated in accordance with the provisions of [GC II]", and that "[c]aptured combatants shall enjoy the treatment provided for by [GC III]", pursuant to Articles 1–3 of the MoU respectively.[115] Of course, the practice also applies to other IHL treaties like AP I.[116]

Furthermore, from an extensive interpretation of CA 3(3), it is not compulsory for the parties to expressly link the obligation to an IHL treaty; silent or unreferenced matches with treaties and customary rules are commonplace. However, even within this perspective, there are variations. To begin with, the SA can effectively match an initial treaty obligation. In the SA between the Republic of the Philippines and the MILF introduced previously,[117] the parties adopted

112 BiH *et al.*, above note 68.

113 In addition, to address the case of "[p]risoners not entitled to be released" following Article 4, the parties invoked the "the judicial guarantees set out in Arts 82–108 of the Third Geneva Convention if they are captured combatants, and Arts 71–76 of the Fourth Geneva Convention if they are civilians". *Ibid.*

114 JNA, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, and Croatia, above note 60.

115 It is noteworthy that the agreement illustrating this practice also highlights specific provisions of the Geneva Conventions. For example, Article 5 states that "[t]he civilian population is protected by Articles 13 to 26 of the Fourth Geneva Convention of August 12, 1949". *Ibid.*, Art. 5.

116 See e.g. Agreement No. 1, which underlines that "[a]ll civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I". BiH *et al.*, above note 21, Art. 2(3)(2). See also JNA, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, and Croatia, above note 60, Art. 4(2), which stipulates that "[a]ll civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I". The signatories also decided that "[h]ostilities shall be conducted in accordance with Articles 35 to 42 and Articles 48 to 58 of Additional Protocol I", pursuant to Article 6.

117 Government of the Republic of the Philippines and MILF, above note 67.

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a definition of "mine"[118] which espouses the formulation used in Protocol II to the Convention on Certain Conventional Weapons (CCW), the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.[119] Equally, the parties conferred the same meanings to "explosive remnants of war" and "abandoned explosive ordnance" (AXO) as are used in Protocol V to the CCW.[120]

Alternatively, the SA can indirectly match IHL treaty obligations when their substance is the same despite a different formulation. For example, an equivalent rephrasing of CA 3(2) and Article 18 of AP II in the agreement could consist of committing "to respect the rules of operation of the [ICRC] and the United Nations High Commissioner for Refugees and the organization of the delivery and distribution of humanitarian aid, [and] to facilitate the delivery of such assistance".[121] Likewise, as the Geneva Conventions' common Article 1 commands parties "to respect and to ensure respect for the present Convention in all circumstances", the actors of a NIAC could choose to reformulate that obligation by agreeing "to undertake all necessary measures to prevent any violations of international humanitarian law".[122]

Finally, an updated reading of CA 3(3) suggests that SAs' provisions can also validly reflect customary rules, even if some have a treaty nature in parallel, especially through AP II. An agreement on cessation of hostilities between the government of South Sudan and the Sudan People's Liberation Movement/Army (SPLM/A)[123] gives some examples of this practice. In Article 3, paragraphs 1 to 4 match various customary rules. For example, the second paragraph forbids "acts of rape, sexual abuse and torture", which is a combination of the rules on the prohibition of rape

118 *Ibid.*, Art. 9(a). More precisely, they understood the term "mine" to mean "a munition designed to be placed under, on or near the ground or other surface area and to be exploded in the presence, proximity or contact of a person or a vehicle".

119 CCW Protocol II, above note 64, Art. 2(1): "'Mine' means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle". The Anti-Personnel Mine Convention shares the same definition: see Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 2056 UNTS 211, 18 September 1997 (entered into force 1 March 1999), Art. 2(2).

120 Protocol V on Explosive Remnants of War, 28 November 2003, Annexed to the CCW, above note 36 (CCW Protocol V), Art. 2(4) and 2(3) respectively. Indeed, for the SA, according to Article 9(e), explosive remnants of war means "unexploded ordnance (UXO) and abandoned explosive ordnance (AXO)". As for AXO, it refers to an "explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed or otherwise prepared for use", pursuant to Article 9(f). To give another example of SAs sharing links with the Hague law, see Government of the Democratic Republic of Sudan and LJM, above note 67, Art. 2(a)(1), 2(a)(6), 2(a)(9). See also Government of the Democratic Republic of Sudan and JEM, above note 78, Art. 4(a), 4(h).

121 BiH and HVO, above note 68, Art. 2. However, the formulation of the parties is more demanding than the treaty rules that the quoted obligations mirror because it obliges the parties to additionally respect and facilitate the work of two specific organizations.

122 *Ibid.*, Art. 4.

123 Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76.

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and other forms of sexual violence,[124] but also a reference to the ban on torture and cruel, inhuman or degrading treatment.[125]

It is not rare to mention customary principles regarding the conduct of hostilities, such as distinction, precaution and proportionality. In Article 3(1) of the same South Sudan SA, the signatories agreed to prohibit "attacks on the civilian population", reflecting the principle of distinction.[126] To refer to the principles of proportionality and precautions in attack, the participants of the 2016 Humanitarian Appeal for Benghazi pledged, "[w]ithin the limits of [their] power and influence, [to] commit and call upon all others to … avoid collateral damage induced by the war and fighting".[127]

The lessons from these different modalities of incorporating humanitarian obligations demonstrate the freedom of the parties to draft their agreement. These teachings will ease our understanding of the functional value of SAs regarding regime enhancement.

How do special agreements improve the law of NIACs?

SAs compensate for the imbalance of IHL regulation for NIACs[128] compared to IACs. CA 3(3) does not explicitly impose that all of the provisions of an SA go beyond the applicable law in order for the instrument to become "constitutive"[129] of IHL; thus, a few obligations or even a single obligation may suffice to that effect. There are two approaches to regime enhancement disclosed by practice, each based on a specific interpretation of the CA 3 expression "the present Convention". Firstly, the parties may insert obligations from treaty or customary law that do not apply to the NIAC (yet). The most straightforward interpretation of the CA 3 wording "the present Convention" favours that meaning. Nevertheless, since treaty and customary IHL have evolved after the 1949 Geneva Conventions, the expression could be equivalent to "any non-Geneva Conventions source of IHL". This is an *external* upgrade because the obligations brought into force originate outside of CA 3.

However, SAs show that the parties can equally reinforce the existing IHL regime for NIACs. In that case, the improvement is *internal*. In this interpretation, "the present Convention" obliges parties to consider "any IHL obligation

124 ICRC Customary Law Study, above note 31, Rule 93 ("Rape and Other forms of Sexual Violence").

125 *Ibid.*, Rule 90 ("Torture and Cruel, Inhuman or Degrading Treatment").

126 *Ibid.*, Rule 1 ("The Principle of Distinction between Civilians and Combatants").

127 Community Leaders, above note 66, Art. 2(2).

128 IHL regulations for NIACs include CA 3, AP II, Hague law treaties and customary rules applicable to NIACs.

129 The ICRC describes as such an SA that brings about obligations beyond the standard of NIACs, and it describe as "declaratory" an SA that only recalls the applicable regime. M. Mack, above note 17, p. 16; 2020 Commentary on GC III, above note 3, para. 886.

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more favourable or protective than CA 3". For a better understanding of both interpretations, the practice offers different examples.

The external regime upgrade with new obligations generally describes two situations. The first case is where the parties bring the IAC treaty or customary law into force. The SA achieves its function if the signatories invoke those sources or their relevant obligations – if, for example, the SA indicates that the signatories will address "'graves breaches' as defined in the 1949 Geneva Conventions",[130] it becomes clear that they welcome a concept usually invoked in IAC instruments.[131] It indicates that the signatories have decided to embrace the four treaties, some of them, or other conventions that apply to IACs exclusively.[132]

A second option of external regime improvement is when the agreement bears obligations from conventions fitted for NIACs but which the State has not (yet) ratified, like AP II or a treaty of Hague law that is also applicable to NIACs. In the earlier example of an SA about the ban on landmines in the Philippines,[133] the parties addressed mines and UXO. However, the State did not ratify Protocol V of the CCW, an international instrument on UXO and AXO that also applies to NIACs.[134]

Following the approach of internal enhancement, the SA can go beyond the applicable law if it offers more protective standards than the NIAC regime without necessarily copying the rules applicable to IACs. It could consist of a tighter interpretation of an existing concept to strengthen the obligation. For example, "incidental loss" ("collateral damage") in IHL is acceptable only when the attack is not excessive in relation to the concrete and direct military advantage anticipated.[135] In contrast, if the SA states that the parties "commit themselves to … avoid[ing] acts that would cause collateral damage to civilians",[136] it leaves no exceptions for incidental losses. This formulation creates a higher standard than the classical LOAC.

130 Government of the Republic of Sudan and SPLM, above note 58, Art. 2(1)(a).

131 A definition and a list of offences covered by that expression is provided in Articles 50, 51, 130 and 147 of GC I, II, III and IV respectively, and Articles 11(4) and 85 of AP I.

132 See e.g. JNA, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, and Croatia, above note 60. Article 4(1)–(2) provides that "[c]ivilians who are in the power of the adverse party and who are deprived of their liberty for reasons related to the armed conflict shall benefit from the rules relating to the treatment of internees laid down in the Fourth Geneva Convention of August 12, 1949 (Articles 79 to 149). … All civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I." In complement, Article 5 states that "[t]he civilian population is protected by Articles 13 to 26 of the Fourth Geneva Convention of August 12, 1949", and according to Article 6, "[h]ostilities shall be conducted in accordance with Articles 35 to 42 and Articles 48 to 58 of Additional Protocol I, and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices annexed to the 1980 [CCW]".

133 Government of the Republic of the Philippines and MILF, above note 67.

134 CCW Protocol V, above note 120, Art. 1(3); CCW, above note 36, Art. 1(2) (as amended 21 December 2001). On a related subject, see Government of the Democratic Republic of Sudan, SPLM and UN Mine Action Service, *Memorandum of Understanding between the Government of Sudan, the Sudan People's Liberation Movement and the United Nations Regarding United Nations Mine Action Support to Sudan*, 19 September 2002.

135 S. Sivakumaran, above note 15, pp. 471–472.

136 Government of the Republic of the Philippines and MILF, *Agreement on the Civilian Protection Component*, above note 74, Art. 1(a). Of course, this obligation also has its source in Article 51(5) of AP I, which would

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Another way to strengthen applicable law is by providing more elaborated definitions of some notions than treaty law. Consider, for example, the definition of "explosive ordnances" in the 2010 SA between the Philippines and the MILF, which is more extensive than its description in Protocol V of the CCW.[137]

A last trend appears halfway between the two approaches detailed above – namely, the creation of new (legal) concepts by the SA. A good example of this is the Philippines–MILF agreement mentioned above; this SA defines "victim-activated mines", "humanitarian mine action" and "joint mine/UXO clearance",[138] but classical IHL does not acknowledge these notions.[139] As a final remark, the above improvement scenarios can of course be combined in the same SA. For example, in their Recommitment to Humanitarian Matters, the government of South Sudan and the SPLM/A (in opposition) pledged that they would "[t]ake all possible measures to respect human rights and protect the civilian population from indiscriminate attacks, rape or any other form of abuse".[140] Regarding regime improvements, firstly, the parties to this SA refer to the legal corpus of human rights, which does not belong to the regime of NIACs. Secondly, the signatories commit indistinctly to human rights, while OAGs are not the traditional addressees of that body of law. As for classical IHL obligations, the above quotation reflects the principles of precaution and distinction, and compliance with the spirit of CA 3(1) generally.

While the divide between "external" and "internal" helps to structure the above analysis, what really matters in practice is the enhancement of the NIAC regime as illustrated. These scenarios shed light on the role of SAs as vectors of (new) humanitarian obligations. This background understanding allows us to examine SAs' functioning more deeply, starting with an explanation of the approaches that the signatories can choose to bring the obligations of their SA into force.

Implementation patterns

CA 3 does not specify how the parties to an SA must perform their undertakings. Practice shows different types of implementation, the most simple form remaining direct enactment by the signatories of the SA. However, indirect or remote execution can also occur when the parties create and empower an entity or mechanism to achieve some humanitarian obligations on their behalf. In either case, nothing precludes the invitation of a third party to assist them in the same task by granting rights or imposing duties on the new actor. The ICRC is an interesting example in this regard.

make it an external upgrade. However, it also stands as a customary rule applicable to NIACs: see ICRC Customary Law Study, above note 31, Rule 14 ("Proportionality in Attack").

137 Government of the Republic of the Philippines and MILF, above note 67, Art. 9(g). The parties added, notably, "nuclear fission or fusion material and biological and chemical agents".

138 *Ibid.*, Art. 9.

139 More specifically, CCW Protocol II, above note 64, and CCW Protocol V, above note 120.

140 Government of the Republic of South Sudan and SLM/A (in Opposition), above note 76, Art. 5.

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Direct implementation

A plain reading of the CA 3(3) wording "[t]he parties to the conflict" makes it logical to consider those actors as the principal addressees of the invitation to form an SA. In that sense, they can draft their agreement to perform humanitarian obligations themselves, with no or very few intermediaries. Practice discloses two combinatory configurations in this respect. The first and most simple is when the State and an OAG commit themselves to achieving certain deeds. For example, they can ensure the "[p]rotection of humanitarian workers",[141] guarantee humanitarian access[142] or pledge that "[t]he wounded and the sick shall be collected and cared for".[143] Simultaneously, they can also abstain from adopting certain behaviours, like acts of violence against civilians,[144] including IDPs and refugees,[145] or civilian objects – that is, their belongings or goods, civilian facilities and the resources necessary for the survival of those categories of protected persons.[146]

A second and more complex composition is where many actors come into play. For example, in the context of the South Sudan NIAC, three groups of actors formed the signatories of the 2017 *Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access*. First, there was the Transitional Government of National Unity (TGoNU), then many armed opposition groups like the SPLM/A (in opposition), the National Salvation Front, the National Democratic Movement and the Federal Democratic Party/South Sudan Armed Forces, among others.[147]

141 See e.g. Government of the Democratic Republic of Sudan and LJM, above note 67, Art. 2(b)(3); Government of the Democratic Republic of Sudan, UN Assistant Emergency Relief Coordinator and SPLM, above note 78, Art. 2; Government of the Democratic Republic of Sudan, SLM/A and JEM, *Improvement of the Humanitarian Situation*, above note 78, Art. 1(3)–(4).

142 See e.g. Government of the Republic of South Sudan and SLM/A (in Opposition), above note 76, Arts 1, 2; Government of the Democratic Republic of Sudan and JEM, above note 78, Arts 2(e), 5(b); BiH, above note 21, Art. 2(6); Croatia, Serbia, Slovenia, Montenegro and Macedonia, above note 70, para. 2(6); Somalian Political Parties, above note 75, Art. 1.

143 See e.g. Government of the Republic of the Philippines and NDFP, above note 74, Part IV, Art. 4(2). See also BiH *et al.*, above note 21, Art. 2(1); JNA, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, and Croatia, above note 60, Arts 1, 2; Government of the Republic of Colombia and FARC-EP, above note 27, Preamble; Croatia, Serbia, Slovenia, Montenegro and Macedonia, above note 70, para. 2(1); Syrian Arab Republic, Armed Opposition and Homs Local Administrative Council, above note 79, para. 5.

144 See e.g. TGoNU, Armed Opposition Groups and Political Parties, above note 76, Arts 5(5), 9; Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76, Art. 3; Government of the Republic of Sudan and SPLM, above note 58, Art. 1(1); Government of the Republic of the Philippines and NDFP, above note 74, Part IV, Art. 3; Government of the Democratic Republic of Sudan and JEM, above note 78, Art. 4(a); Croatia, Serbia, Slovenia, Montenegro and Macedonia, above note 70, para. 2(4).

145 See e.g. Government of the Democratic Republic of Sudan and JEM, above note 78, Art. 5(g); Government of the Republic of the Philippines and NDFP, above note 74, Part IV, Art. 3(7); BiH, Croatian Entity of Herzeg-Bosna and SDS, above note 62, Art. 3(4); Government of the Democratic Republic of Sudan and LJM, above note 67, Art. 2(a)(1).

146 See e.g. Croatia, Serbia, Slovenia, Montenegro and Macedonia, above note 70, para. 2(4); BiH *et al.*, above note 21, Art. 2(2); Government of the Republic of Sudan and SPLM, above note 58, Art. 1(b), 1(d); Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76, Art. 3(4).

147 Also, the South Sudan National Movement for Change, the South Sudan United Movement/Army, the South Sudan Liberation Movement/Army and the South Sudan Patriotic Movement/Army. TGoNU, Armed Opposition Groups and Political Parties, above note 76, p. 2, para. 1.

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Finally, political parties participated – notably, as listed in the agreement, the "SPLM Leaders – Former Detainees (SPLM-FDs), Civil Society, Umbrella Party and Faith Based leaders in the High Level Revitalization Forum". Regardless of their differences, the parties exchanged humanitarian obligations jointly ("Each Party shall",[148] "the Parties shall"[149]), with no intermediary; however, records show that this is not always the case.

Entities or mechanisms set up by the agreement

As an alternative to a direct exchange of rights and obligations in their SA, the parties to the conflict can resort to an intermediary to achieve (some of) their obligations on their behalf. Following this approach, the signatories generally create a joint body or mechanism to handle their commitments. In this framework, the object of the agreement is exclusively the setting up of such an entity and the assignment of its humanitarian functions by the parties to the NIAC. It is essential to clarify that agreements dealing with the internal rules and the functioning of such entities still qualify as SAs because they indirectly help the parties to bring other humanitarian obligations into force. Indeed, the vagueness of CA 3 leaves space for creativeness and adaptation as long as the *ad hoc* agreement keeps its functional purpose. This is why indirect enforcement can take different forms and apply to various humanitarian issues.

Concretely, forming a specific body or mechanism can help to prepare, secure and coordinate humanitarian relief, as was the case with the Indonesian government and the Free Aceh Movement in 2000. They created a Joint Committee on Security Modalities to enact their SA, the *Joint Understanding on Humanitarian Pause for Aceh*.[150] From a different perspective, the protagonists of the 1991 armed conflict in Croatia established a Joint Commission to Trace Missing Persons and Mortal Remains (Joint Commission) along with its *Rules of Procedure and Plan of Operation*.[151] In that double-sided SA, the parties assigned their obligations regarding the missing, the dead, and mortal remains to a body created for that mission, the Joint Commission. While the object of the instrument fulfils IHL requirements,[152] its sixteen rules explain the regime of the Joint Commission, from membership

148 See e.g. *ibid.*, Arts 1(4), 2(1)–(2), 8 (1), 10 (4).

149 *Ibid.*, Arts 3(1), 3(3), 3(5), 4, 5(1), 5(2), 5(4), 6.

150 Government of the Republic of Indonesia and Leadership of the Free Aceh Movement, above note 72.

151 ICRC, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, JNA and Croatia, above note 70. The agreement establishes a Joint Commission of all of the parties, with a central role given to the ICRC. In the opening paragraphs, the signatories selectively pick some provisions from the Geneva Conventions as the legal basis for their commitments: Articles 16–17 of GC I; Articles 19–20 of GC II; Articles 118–123 of GC III; and Articles 26, 129–134 and 136–140 of GC IV. They also invoke Articles 32 and 34 of AP I.

152 More precisely, Article 8 of AP II and Rules 112 ("Search and Collection of the Dead"), 114 ("Return of the Remains and Personal Effects of the Dead"), 115 ("Disposal of the Dead"), 116 ("Accounting for the Dead") and 117 ("Accounting for Missing Persons") of customary IHL. See ICRC Customary Law Study, above note 31.

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conditions to the charging of expenses. The Annex to the *Rules of Procedure* details an explicit *Plan of Operation* to effectively address situations of deceased and missing persons by indicating which information to record and how to archive files. It is a set of technical guidelines completing the main agreement, with the same compelling value as the latter.

The complexity of SAs' configurations can go even further, however. On 22 June 2001, the government of the Philippines and the MILF concluded a peace agreement providing for a mechanism to monitor their undertakings, the International Monitoring Team (IMT), but they also conferred IHL missions to a sub-organ, the Civilian Protection Component (CPC), attached to that monitoring entity. The latter was the object of two SAs, the *Agreement on the Civilian Protection Component of the International Monitoring Team*[153] and the *Terms of Reference of the Civilian Protection Component of the International Monitoring Team*.[154]

In Article 6 of the *Terms of Reference*, the parties entrusted the CPC with ensuring "that [they] respect the sanctity of places of worship namely mosques, churches and religious places and social institutions including schools, madaris, hospitals and all places of civilian nature".[155] In addition, based on the same provision, the CPC was to assess "the needs of the IDPs and the delivery of relief and rehabilitation support efforts in conflict affected areas in Mindanao", pursuant to Article 6(2)(c), and "acts of violence against civilians in conflict affected areas", according to Article 6(2)(e). Following the model of the CPC, the parties added another body within the IMT, the Humanitarian, Rehabilitation and Development Component, tasked with the self-explanatory mission to "[m]onitor the observance of international humanitarian law and respect human rights".[156]

Because all the missions attributed to those mechanisms relate to treaty or customary IHL obligations, the agreements fulfil the objective of CA 3. Using IHL compliance mechanisms is consistent with the Geneva Conventions' rationale.[157] Indirect and direct implementation SAs differ from one another even if they have the same purpose. The object of the former is to create and empower executive bodies, while in the latter, the parties commit themselves and can, in addition, set up an implementation entity for some of their obligations or a monitoring body for the whole agreement.[158] In both cases, there is always the possibility of calling upon a third party.

153 Government of the Republic of the Philippines and MILF, *Agreement on the Civilian Protection Component*, above note 74.

154 Government of the Republic of the Philippines and MILF, *Terms of Reference*, above note 74.

155 *Ibid.*, Art. 6(2)(b).

156 Government of the Republic of the Philippines and MILF, *Guidelines on the Humanitarian, Rehabilitation and Development Component*, above note 74, Art. 1(b).

157 2020 Commentary on GC III, above note 3.

158 See e.g. Government of the Republic of the Philippines and NDFP, above note 74, Arts 1–6; Government of the Democratic Republic of Sudan, UN Assistant Emergency Relief Coordinator and SPLM, above note 78, Arts 6, 7; Government of the Democratic Republic of Sudan and LJM, above note 67, Art. 4(i); Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76, Art. 5.

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Acknowledgement or participation of a humanitarian actor: The example of the ICRC

An *ad hoc* agreement can support or extend the mandate of a humanitarian actor like the ICRC.[159] In many situations, the parties to a NIAC have assigned rights and obligations to the ICRC. However, the demonstration will be limited to SAs. Returning to the example of the SA on the Joint Commission and its *Rules of Procedure and Plan of Operation*,[160] it appears that the signatories gave essential roles to the ICRC: notably, it was the permanent adviser of the Joint Commission (Rule 1), which it chaired (Rule 17), and it was allowed to schedule extraordinary meetings (Rule 6), permit exceptional disclosure of confidential deliberations (Rule 10), and determine the admission of any external members to the meetings (Rule 10).[161]

The *Agreement Relating to the Establishment of a Protected Zone around the Hospital of Osijek* is evidence of an identical practice. The signatories entrusted the ICRC with (almost) the entire functioning of the zone.[162] Likewise, an SA in the form of a joint communiqué between the government of Colombia and the FARC-EP called upon the participation of the ICRC "to locate, identify and respectably deliver the remains of persons deemed as missing within the context [of] and due to the armed conflict".[163]

That said, the warring parties can also pledge their active cooperation with and protection of the ICRC's mandate in their SA in order to guarantee unhindered achievement of the operations of that humanitarian actor.[164] To give an example, this was the position of Croatia, Serbia, Slovenia, Montenegro and

159 F. Bugnion, above note 37, p. 389.

160 See the main text at above notes 151–152.

161 Furthermore, Rule 18(1) of the SA states that "[t]he ICRC shall bring to the Joint Commission's attention, on its own initiative, any communication, proposal, plan of work or information which might contribute to the efficiency of the Joint Commission's work. Any such contribution by the ICRC shall be dealt with as a matter of priority in the agenda of each meeting, if the Commission so decides." In complement with the annexed *Plan of Operation Designed to Ascertain the Whereabouts or Fate of the Military and Civilian Missing*, the ICRC acted as intermediary between the parties so that they could transmit information about deceased, pursuant to Article 1. ICRC, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, JNA and Croatia, above note 70.

162 Federal Executive Council of the Socialist Federative Republic of Yugoslavia, JNA, Serbia and Croatia, above note 54, Art. 5.

163 Government of the Republic of Colombia and FARC-EP, above note 69, para. 1 of the opening title. To complete with other examples, see *Homs Hudna Agreement*, 2 February 2014. In the second paragraph of their commitments, the parties plan the evacuation of "the first batch of the civilians … with the participation and attendance of … [the ICRC], preferably". See also the 1991 MoU (above note 60), whereby the signatories bestowed the ICRC with some obligations for tracing missing persons pursuant to Article 8, and for confidentially channelling informed allegations of IHL violations following Article 11. The agreement on the evacuation of the Vukovar hospital equally witnessed the granting of duties to the ICRC since, according to the parties, "[t]he hospital will be put under the protection of the ICRC who will advise both parties of the period of neutrality which they require". JNA and Republic of Croatia, above note 52, Art. 6.

164 Even if this is already the materialization of CA 3(2)'s stipulation that "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict".

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Macedonia when they jointly agreed to "unconditional support for the action of the ICRC in favour of the victims" in the *Hague Statement on Respect of Humanitarian Principles*.[165]

In conclusion, *ad hoc* agreements show great potential for flexibility, adaptation and even the creation of humanitarian obligations either by the parties, through built-in mechanisms or via (humanitarian) third parties. There are also noteworthy features that practice shows in terms of formal requirements and the signatories of SAs.

Format and participants

The text of CA 3 does not provide information about an SA's form or external features. Hence, the identification and validity of SAs are disconnected from their format, their title or the number of instruments composing them. As regards the participants, CA 3 only stipulates that the parties to the conflict are invited to conclude SAs. This requirement is confirmed in practice, even if it constitutes only a minimal condition.

Multi-form agreements

As noted earlier, the key determinants of an SA are its content and purpose.[166] The Geneva Conventions do not impose the need to have written agreements[167] or a particular written format;[168] however, paper-based agreements are usually preferred for apparent clarity, transparency and evidence reasons in case of claims, especially when the content is dense.[169] Moreover, the Geneva Conventions expected some SAs to assume a written form – notably, agreements on "safety zones or hospital zones".[170] Indeed, Article 23 of GC I indirectly orients the parties to a specific format for agreements on establishing hospital zones and localities, as the Convention contains a draft agreement for that purpose.

165 Croatia, Serbia, Slovenia, Montenegro and Macedonia, above note 70.

166 See above subsection on "Other Sources of IHL".

167 2020 Commentary on GC III, above note 3, para. 892.

168 As confirmed in the Commentary on CA 3: *ibid.*, para. 891. See also ICRC, "Special Agreements", *How Does Law Protect in War?*, available at: https://casebook.icrc.org/glossary/special-agreements.

169 2020 Commentary on GC III, above note 3, para. 892.

170 *Ibid.* Although the Geneva Conventions contain provisions tailored for IACs on neutralized zones (GC IV, Art. 15), hospitals and safety zones (GC I/IV, in Arts 23/14 and their common Annex I), customary IHL acknowledges the validity and the functioning of those mechanisms in NIACs as well: see ICRC Customary Law Study, above note 31, Rule 35 ("Hospital and Safety Zones and Neutralized Zones"). A practical illustration lies in the setting up of a neutralized and a protected zone in two agreements during the Yugoslav wars: see JNA and Republic of Croatia, above note 52; Federal Executive Council of the Socialist Federative Republic of Yugoslavia, JNA, Serbia and Croatia, above note 54. As for the creation of a hospital and a safety zone, see ICRC, Government of the Democratic Socialist Republic of Sri Lanka and LTTE, above note 45.

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As far as written agreements are concerned, practice in NIACs reveals that, formally, an agreement can qualify as an SA regardless of the number of instruments it combines. Hence, it could be a single piece[171] or a main agreement completed by protocols.[172] Practice also highlights that SAs do not exclusively pertain to agreements concluded during armed conflict – pauses, ceasefires or post-conflict written undertakings can amount to *ad hoc* agreements content-wise.[173] This fact challenges some positions claiming that only agreements concluded during an armed conflict can be regarded as SAs, because they pertain to "active hostilities".[174] Even if this argument makes sense, it describes an incomplete scope of IHL obligations, as agreements aiming to end, resolve or address the causes of the conflict can also channel humanitarian commitments covering post-hostilities questions like de-mining,[175] exchange or release of persons detained because of the armed conflict,[176] the dead, the missing and mortal remains.[177] More generally, this also means that the denomination of the instrument as a "humanitarian agreement", "ceasefire agreement" or "peace agreement" does not matter. Thus, regarding format, structure or composition, SAs can take the shape of any instrument. The distinction with other NIAC agreements lies in the humanitarian content and purpose.

Of course, the signatories can explicitly use the title "special agreement", as observed on rare occasions.[178] However, that subjective perception does not prevent a close perusal of the agreement's content. For example, among the six articles of Agreement No. 1, only Article 2, "Special Agreement", seems to reflect the invitation of CA 3. However, that drafting choice may mislead us into thinking that the other provisions of the SA (Article 3, "Red Cross Emblem", Article 4, "Dissemination", and Article 5, "Implementation") do not contribute to increasing the applicable law. In fact, the status of *ad hoc* agreement can extend to the whole instrument and not only Article 2. The identification of an SA must rely on an objective appraisal.

171 See e.g. ICRC, Government of the Democratic Socialist Republic of Sri Lanka and LTTE, above note 45; SDA, SDS and HDZ, above note 68; Government of the Republic of Colombia and FARC-EP, above note 27; Syrian Arab Republic, Armed Opposition and Homs Local Administrative Council, above note 79.

172 See e.g. BiH *et al.*, above note 68; Government of the Democratic Republic of Sudan, SLM/A and JEM, *Enhancement of the Security Situation*, above note 78; Government of the Democratic Republic of Sudan, SLM/A and JEM, *Improvement of the Humanitarian Situation*, above note 78; ICRC, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, JNA and Croatia, above note 70.

173 See e.g. Croatia, Serbia, Slovenia, Montenegro and Macedonia, above note 70; Government of the Democratic Republic of Sudan and LJM, above note 67; Government of the Republic of South Sudan and SPLM/A (in Opposition, above note 76.

174 See L. Vierucci, above note 1.

175 See e.g. Government of the Republic of the Philippines and MILF, above note 67.

176 See e.g. BiH *et al.*, above note 68; Government of the Republic of Colombia and FARC-EP, above note 27.

177 See e.g. ICRC, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, JNA and Croatia, above note 70; Government of the Republic of Colombia and FARC-EP, above note 69.

178 NIAC actors rarely acknowledge the qualification of their deal as an *ad hoc* agreement in the sense of CA 3. See the exceptions of BiH *et al.*, above note 21; Government of the Republic of Colombia and FARC-EP, above note 22.

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Open participation

Generally, the executive branch concludes the SA with an OAG, but more complex compositions may occur, as discussed earlier.[179] *Ratione personae*, CA 3 establishes the minimum requirement for the existence of an SA: to be a party to the NIAC. The double political and military leadership of some OAGs does not affect that requirement, however. A government (or an OAG) can validly conclude an SA with the political branch of a rebel movement,[180] its military side,[181] or both subdivisions of the OAG[182] because each wing is presumed to engage the whole entity when signing the agreement (though this does not mean that dissidence cannot occur). This unified subjecthood prevents legal insecurity in the event of a breach of the SA: if only the branch that made the deal were bound by the agreement, it would lessen the responsibility of the whole entity towards IHL. Regardless, in practice, there is no specific divide as to the nature of the undertakings pledged by the respective organs of an OAG: the military wing does not exclusively conclude agreements on military questions and vice versa.[183]

Two observations arise from this minimal personal scope. Firstly, CA 3 excludes agreements concluded only between one actor in the armed conflict and a third party. There must be a connection with the opposing actor on the battlefield, even if the SA takes the form of a separate but parallel agreement with the same third party.[184] Secondly, nothing precludes the involvement of other entities (e.g., humanitarian actors, States, international organizations), either as active participants[185] or simply as witnesses or moral guarantors,[186] and without limit of number. Therefore, practice proves SAs to be an open tool for both parties and third parties, especially

179 See the main text at above notes 147–158.

180 See e.g. Croatia, Serbia, Slovenia, Montenegro and Macedonia, above note 70; Government of the Democratic Republic of Sudan, UN Assistant Emergency Relief Coordinator and SPLM, above note 78; Government of the Democratic Republic of Sudan and LJM, above note 67; Government of the Democratic Republic of Sudan and JEM, above note 78.

181 See e.g. ICRC, Government of the Democratic Socialist Republic of Sri Lanka and LTTE, above note 45; Government of the Republic of Colombia and FARC-EP, above note 69; Government of the Republic of Colombia and FARC-EP, above note 27.

182 See e.g. Somalian Political Parties, above note 75; Government of the Republic of South Sudan and SLM/A (in Opposition), above note 76; Community Leaders, above note 66; BiH and HVO, above note 68.

183 Some SAs prove to have mixed content regardless of the political or military side of the OAGs that engaged the entity. See e.g. Government of the Republic of the Philippines and NDFP, above note 74; Government of the Republic of Colombia and FARC-EP, above note 22; TGoNU, Armed Opposition Groups and Political Parties, above note 76.

184 As explained in the Commentary on CA 3, "[p]arallel declarations or 'triangular agreements' between each Party to the conflict and a third Party such as a State or an international organization may also be special agreements, depending on the circumstances". 2020 Commentary on GC III, above note 3, para. 891.

185 See e.g. Government of the Democratic Republic of Sudan, UN Assistant Emergency Relief Coordinator and SPLM, above note 78; ICRC, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, JNA and Croatia, above note 70; ICRC, Government of the Democratic Socialist Republic of Sri Lanka and LTTE, above note 45; Georgia, Russian Federation, UNHCR and the Abkhaz Side, above note 58.

186 These can be representatives from States, public institutions, international organizations or non-governmental organizations. See e.g. Government of the Republic of the Philippines and NDFP, above note 74; Government of the Republic of the Philippines and MILF, *Implementing Guidelines*, above note

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considering the teachings on indirect enforcement explained above.[187] However, this account of SAs' functional, formal and personal characteristics commends a balanced appraisal. Indeed, the agreements must respect some essential conditions.

The necessary boundaries of special agreements

While an SA aims to enhance the regime of NIACs, its validity depends on some restrictions from IHL and the international legal order for the instrument to keep its value. That said, CA 3(4)[188] introduces a limitation that deserves clarification to avoid confusion with a denial of OAGs' international legal personality.

The limited regime upgrade

From a general perspective, NIAC SAs are subject to the same limitations as in IACs, as expressed in Article 6/6/6/7 of the Geneva Conventions.[189] More specifically, SAs' function of improving the IHL regime of NIACs is subject to four conditions. Firstly, they do not override the standards applicable; they only exist in complement or development thereof. Further, "even if the Parties have agreed to a more limited number of additional provisions, they nevertheless remain bound by all applicable humanitarian law norms".[190] Also, since SAs incorporate further obligations, it is not (always) necessary for the parties to recall those which already compel them. Accordingly, the absence of fundamental rules does not mean that the agreement lowers the ordinary IHL regime in force or takes over. What the SA does not mention still applies as the minimal regime.

Secondly, the humanitarian undertakings and the agreement, in general, should not derogate the standards (i.e., relevant treaties and customs) by weakening the regime in force, as underlined by the ICRC.[191] In other words, the commitments should not infringe or lower the minimal protection guaranteed to some categories of persons or their belongings in NIACs. For example, the agreement should not set abusive or unlawful exclusions from the basic NIAC protection regime. Likewise, when the applicable law unequivocally commands an indiscriminate treatment of an issue at stake, the humanitarian obligation in the agreement should not create abusively restrictive and burdensome procedures or requirements. Another possible downgrading of the IHL regime could include imposing deadlines or conditional

74; Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76; Government of the Republic of South Sudan and SLM/A (in Opposition), above note 76.

187 See the above subsections on "Entities or Mechanisms Set Up by the Agreement" and "Acknowledgement or Participation of a Humanitarian Actor: The Example of the ICRC".

188 The last sentence of CA 3 states that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict".

189 Article 6/6/6/7 of the Geneva Conventions stipulates that "[n]o special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them".

190 2020 Commentary on GC III, above note 3, para. 893.

191 *Ibid.*, para. 893 fn. 837.

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requirements for performing an obligation falling under NIAC applicable law while that regime does not require so.[192]

In parallel, the non-derogatory character must apply to the Geneva and Hague law.[193] Even if there are no explicit provisions or principles in the law of warfare to prevent an adverse impact of SAs on the conduct of hostilities, those agreements should not be the way to derogate to the Hague law. It would be odd to draw a permissive pretext from the silence on possible derogations in Hague law, whereas the prohibition on derogations holds for the Geneva law. Even though there is no positive law to prevent such derogations for the conduct of hostilities, it is not easy to establish what would justify a different fate for SAs under the Hague law. Therefore, we consider that an analogous restriction must apply, and it is even more justified as the *travaux préparatoires* of the Geneva Conventions did not specify which branch of IHL SAs would apply.[194]

Finally, *ad hoc* agreements cannot derogate from or oppose *jus cogens*.[195] IHL is a branch of international law, and it seems coherent that agreements promoting IHL and the relevant obligations therein obey the same limitations that the international legal order imposes upon its norms.

The denied upgrade of status for organized armed groups

A superficial reading of CA 3(4)[196] seems to prevent OAGs from reaching an international legal status,[197] including in the advent of an SA. The signatories of some SAs have even recalled that provision in their agreements.[198] The ICRC Commentary on CA 3 can help clarify paragraph 4's objective to shed light on its meaning. The aim was to avoid potential claims of rebels to the status of "belligerents", especially if the

192 L. Vierucci, above note 1, p. 513.

193 See, *contra*, Robert Kolb, *Advanced Introduction to International Humanitarian Law*, Edward Elgar, Cheltenham, 2014, p. 57. This scholar believes that "[t]he Hague Law does not make clear to what extent it can be derogated from by way of special agreements. The Geneva Law, on the contrary contains specific rules ensuring that the provisions it contains will not be displaced by all sorts of ingenious devices invented by the States parties: see articles 6/6/6/7 and 7/7/7/8 of Geneva Conventions I–IV, and article 47 of Geneva Convention IV. Thus the Geneva Law considers itself as a public order or public policy law, not to be derogated from in any circumstance." *Ibid.*

194 State delegates remained silent on the question. See *Final Record*, above note 30, pp. 46–47.

195 See L. Vierucci, above note 1, p. 513.

196 CA 3(4) states that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict".

197 Gentian Zyberi, "Non-State Actors from the Perspective of the International Law Commission", in Jean D'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, Routledge, London, 2013, p. 169.

198 See e.g. JNA, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, and Croatia, above note 60. Pursuant to Article 14(2), "[t]he application of the preceding provisions shall not affect the legal status of the parties to the conflict". In parallel, consider the agreement binding BiH *et al.*, above note 21. The parties insist, in the forewords, that the agreement be "without any prejudice to the legal status of the parties to the conflict or to the international law of armed conflict in force", despite a full copy of CA 3 under Title 1, "General Principles". The CARHRIHL repeats the same warning: see Government of the Republic of the Philippines and NDFP, above note 74, Part IV, Art. 3. Likewise, as a final example, see Government of the Republic of Colombia and FARC-EP, above note 27, under the "General" heading.

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agreements allowed the enforcement of all the Geneva Conventions.[199] The treaty drafters did not want OAGs to enjoy the benefits of the status that such a regime would entail – notably, the status of prisoner of war.[200]

The ICRC also explains that CA 3(4) is not intended to resolve the broader question of rebels' (international) legal personality.[201] In other words, preventing the attribution of a status of belligerent to outlaws does not necessarily equate to a bar from any international legal standing.[202] OAGs can enjoy legal subjectivity on the international plane without reaching the level of belligerent; CA 3(4) only precludes them from being on a par with States, notably thanks to SAs. A lower standing remains possible, as supported by many scholars.[203] Therefore, the CA 3(4) only clarifies that IHL compliance is separate from any claim to a (new) legal status by a party due to the conclusion of an SA or the application of the whole of CA 3.[204] Bearing that clarification in mind, an SA can validly produce its effects.

199 2020 Commentary on GC III, above note 3, paras 900, 902.

200 *Ibid.*, para. 902 fn. 853.

201 More precisely, "[t]he fact that the application of humanitarian law has no impact on the legal status of the Parties must thus be understood in the narrower sense relating to the status of belligerents, and not the wider question of the existence (or not) of the international legal personality of non-State armed groups". *Ibid.*, para. 902 fn. 853.

202 Some authors have equally questioned the objective of the drafting States: "Est-ce à dire que cette clause traduisait également l'opposition des Etats à la reconnaissance d'une personnalité juridique internationale dans le chef des groupes armés ? S'il est vrai que l'objet premier de la reconnaissance de belligérance n'est pas de conférer le statut de sujet du droit des gens aux insurgés faisant l'objet de la reconnaissance mais plutôt de prévoir l'application d'un régime spécifique relatif au droit de la guerre, cette reconnaissance implique nécessairement l'attribution d'un tel statut. Elle est donc indissociablement liée à la question de l'attribution d'une personnalité juridique internationale dans le chef des insurgés." Raphaël van Steenberghe, "Théorie des sujets", in Raphaël van Steenberghe (ed.), *Droit international humanitaire: Un régime spécial de droit international?*, Bruylant, Brussels, 2013, p. 53.

203 See, notably, S. Sivakumaran, above note 27, p. 109; Christine Bell, "Peace Agreements", above note 13; Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, Oxford University Press, New York, 2008; L. Vierucci, "'Special Agreements' between Conflicting Parties", above note 13, pp. 409–410; Luisa Vierucci, *Gli accordi fra governo e gruppi armati di opposizione*, above note 27, p. 24; L. Vierucci, above note 1; L. Betancur Restrepo, above note 13; Jann K. Kleffner, "The Applicability of International Humanitarian Law to Organized Armed Groups", *International Review of the Red Cross*, Vol. 93, No. 882, 2011; Eva Kassoti, "Ad Hoc Commitments by Non-State Armed Actors: The Continuing Relevance of State Consent", in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement*, Brill Nijhoff, Boston, MA, 2018; Pieter Hendrik Kooijmans, "The Security Council and Non-State Entities as Parties to Conflicts", in Karel C. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy*, Kluwer Law International, The Hague, 1998; William Thomas Worster, "Relative International Legal Personality of Non-State Actors", *Brooklyn Journal of International Law*, Vol. 42, No. 1, 2016; Marco Sassòli, "Transnational Armed Groups and International Humanitarian Law", Occasional Paper Series No. 6, Program on Humanitarian Policy and Conflict Research, 2006, pp. 35–36; Malcolm Nathan Shaw, *International Law*, Cambridge University Press, Cambridge, 2021, p. 239; Zakaria Daboné, "Le droit international public relatif aux groupes armés non étatiques", doctoral thesis, University of Geneva, 17 January 2011, p. 149.

204 R. van Steenberghe, above note 202, p. 52.

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Conclusion

To address the lack of analysis of CA 3 agreements in legal theory, this paper has tried, under a functional approach, to capture their features. This was necessary for the ultimate aim of explaining their dynamics for framing humanitarian obligations and engaging the parties to NIACs. What type of commitments can SAs cover? From which sources? Under which forms? How do SAs improve applicable law, and how are they implemented? The answers to these questions represent the lessons that this paper has tried to highlight. In addition, the fact that SAs can embody any NIAC agreement (e.g., "ceasefire", "peace agreement", "pause") makes them formally attractive to every party on the battlefield, since their (distinctive) essence lies in their humanitarian content and purpose. Finally, while CA 3 calls upon the participation of NIAC actors, SAs remain open to third parties.

Therefore, *ad hoc* agreements are essential instruments for fostering IHL compliance and streaming humanitarian obligations in various ways beyond the frameworks of the Geneva Conventions and even IHL. Indeed, SAs have a valuable impact on beneficiaries in the humanitarian field, notably children,[205] persons deprived of their liberty,[206] refugees and IDPs,[207] and civilians in general,[208] but also (families of) the dead and the missing.[209] Third parties, especially humanitarian actors, can also rely on *ad hoc* agreements. Furthermore, some agreements contribute to the performance of UN peacekeeping[210] or humanitarian missions.[211]

Of course, the functionality of SAs is guaranteed only under certain conditions regarding the betterment of applicable law and the status of the parties, mainly OAGs. That said, the above teachings from the practice could enlighten the parties to ongoing NIACs and any actor involved in conflict areas such as humanitarian professionals or negotiators. The examples provided could inspire the drafting of more SAs, given their flexibility, and generate (more) IHL "good practices" with more protective standards.

205 See e.g. Government of the Democratic Republic of Sudan, SLM/A and JEM, *Enhancement of the Security Situation*, above note 78, Art. 8; Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76, Art. 3(4).

206 See e.g. BiH *et al.*, above note 21, Art. 2(4); Government of the Democratic Republic of Sudan, SLM/A and JEM, *Enhancement of the Security Situation*, above note 78, Art. 4(1)(2).

207 See e.g. Georgia, Russian Federation, UNHCR and the Abkhaz Side, above note 58, Arts 2, 3(a)–(j); Government of the Democratic Republic of Sudan, UN Assistant Emergency Relief Coordinator and SPLM, above note 78, Art. 5; Government of the Democratic Republic of Sudan, SLM/A and JEM, *Improvement of the Humanitarian Situation*, above note 78, Art. 2(8).

208 See e.g. Government of the Republic of Sudan and SPLM, above note 58.

209 See e.g. ICRC, Federal Executive Council of the Socialist Federative Republic of Yugoslavia, Serbia, JNA and Croatia, above note 70; Government of the Republic of Colombia and FARC-EP, above note 69; Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76, Art. 4(2).

210 See e.g. Government of the Democratic Republic of Sudan and LJM, above note 67, Art. 2(a)(6); Government of the Democratic Republic of Sudan and JEM, above note 78, Art. 4(e), 4(l); Government of the Republic of South Sudan and SPLM/A (in Opposition), above note 76, Art. 4(6).

211 See e.g. Georgia, Russian Federation, UNHCR and the Abkhaz Side, above note 58, Art. (d).

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