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Equality of belligerents between States and armed groups: Proposal for a new definition of the principle of equality in non-international armed conflicts

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Abstract

The principle of equality of belligerents mandates that the rules of international humanitarian law (IHL) apply equally to each party in an armed conflict, regardless of the legality of their use of force under jus ad bellum. *This principle has been extensively analyzed in academic literature; its importance is universally recognized and its legal foundations and effects are well defined. However, this is primarily true with respect*

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to its application in international armed conflicts (IACs) – in contrast, the principle does not receive equivalent recognition in situations of non-international armed conflict (NIAC), where at least one party is a non-State armed group. The issue arises from the lack of an accepted definition of the principle in NIACs, given the absence of any applicable international jus ad bellum *in such conflicts. The present paper will try to remedy this issue by proposing that the principle is composed of two elements: symmetry of application and symmetry of substance. It will introduce this definition as it applies to IACs and NIACs and argue that the principle in NIACs is primarily defined by its symmetry of substance component. It will also evaluate the principle's nature as a general principle of IHL and explore some of its concrete effects on IHL rules.*

Keywords: equality of belligerents, non-international armed conflict, *jus ad bellum*, symmetry, general principle of international humanitarian law.

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Introduction

The principle of equality of belligerents (hereinafter referred to simply as "the principle") is a consequence of the separation between *jus ad bellum*, on the one hand, and *jus in bello*, otherwise known as international humanitarian law (IHL), on the other. It mandates that the rules of IHL apply equally to each party in an armed conflict, regardless of the legality of their use of force under *jus ad bellum*. For example, a State which considers itself a victim of an aggression by another State cannot disregard IHL simply because it is the victim of an illegal armed attack. The fifth paragraph of the preamble to Additional Protocol I to the Geneva Conventions (AP I) clarifies the scope of the principle. It states that the rules of IHL

> must be fully applied in all circumstances to all persons who are protected by [the Geneva Conventions and their Additional Protocols], without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.[1]

The principle has been extensively analyzed in academic literature; its importance is universally recognized and its legal foundations and effects are well defined.[2] However, this is primarily true with respect to its application in international armed

1 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), preambular para. 5.

2 See, for example, Adam Roberts, "The Equal Application of the Laws of War: A Principle under Pressure", *International Review of the Red Cross*, Vol. 90, No. 872, 2008; Vaios Koutroulis, "And Yet It Exists: In Defence of the 'Equality of Belligerents' Principle", *Leiden Journal of International Law*, Vol. 26, No. 2, 2013.

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conflicts (IACs), which typically involve two or more States – indeed, the principle was conceived with this type of conflict in mind. In contrast, the principle does not receive equivalent recognition in situations of non-international armed conflict (NIAC), where at least one party is a non-State armed group. The issue arises from the lack of an accepted definition of the principle in NIACs, which then creates uncertainty around its application in such conflicts.[3] *Jus ad bellum* indeed does not apply in a NIAC taking place within the territory of a single State, and this deprives the principle of a key element of its accepted definition in IACs. In this context, international law does not regulate the authorization or prohibition of the use of force: Article 2(4) of the United Nations (UN) Charter, which prohibits the use of force, is applicable only to States "in their international relations".[4]

While there have been attempts to define the principle in academic literature,[5] no unified or coherent proposal has emerged. Some authors refer to the notion of "equal application" of IHL to the parties in a NIAC but do not clearly define this concept or do not apply it in the same manner as in IACs. Other authors use the principle to argue for the binding nature of IHL on non-State parties to the conflict. Sometimes, multiple interpretations of the principle coexist within a single doctrinal work[6] or are indistinctly combined, leaving the exact meaning of the principle unclear.[7]

3 See, for example, Keiichiro Okimoto, *The Distinction and Relationship between* Jus ad Bellum *and* Jus in Bello, Studies in International Law, Vol. 33, Hart, Oxford and Portland, OR, 2011, pp. 258, 297.

4 A doctrinal controversy exists concerning the application of the notion of self-defence by a State (Article 51 of the UN Charter) against an armed group situated in the territory of another State. This question, however, does not concern the scope of Article 2(4) of the UN Charter and the prohibition of the use of force. On this issue, see, for example, Federica D'Alessandra and Robert Heinsch, "Rethinking the Relationship between Jus in Bello and Jus ad Bellum: A Dialogue between Authors", in Leila Nadya Sadat (ed.), *Seeking Accountability for the Unlawful Use of Force*, Cambridge University Press, Cambridge, 2018, p. 480; K. Okimoto, above note 3, p. 41; Raphaël van Steenberghe, "Les interventions militaires étrangères récentes contre le terrorisme international Première partie: Fondements juridiques (jus ad bellum)", *Annuaire Français de Droit International*, Vol. 61, 2015, pp. 173–176, 185–190.

5 To this author's knowledge, only one scholar has attempted to define the principle in the context of NIACs. For a critique of his assessment, see the below section entitled "The Principle of Equality of Belligerents in NIACs: A Sketch of a Definition, Based on State Practice".

6 See, for example, Ezequiel Heffes, "Detention by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law", *Journal of Conflict and Security Law*, Vol. 20, No. 2, 2015, pp. 229–230 (binding force), 238–239 (existence of symmetrical rules for each party to the conflict); Jelena Pejic, "Armed Conflict and Terrorism: There Is a (Big) Difference", in Ana María Salinas de Frías, Katja L. H. Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2009, p. 172 (existence of symmetrical rules for each party to the conflict and symmetry of application); Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law", *International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, p. 17 (symmetry of application), 35 (existence of symmetrical rules for each party to the conflict); Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, International Committee of the Red Cross (ICRC), Geneva, 2019, p. 17 (symmetry of application), 125 (binding force); René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, Oxford University Press, Oxford, 2021, p. 144 (existence of symmetrical rules for each party to the conflict and symmetry of application).

7 For an assertion that IHL "applies equally to all parties to the armed conflict" in an argument relating to the binding force of IHL on armed groups, see Daragh Murray, *Human Rights Obligations of Non-State Armed Groups*, Hart, Oxford and Portland, OR, 2016, pp. 109–110; Laura M. Olson, "Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law

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Faced with the absence of a central element in defining the principle, the academic literature seems uncertain about its meaning, legal basis, and effects in NIACs. In this research paper, the author will attempt to address these questions. The paper proposes that the principle is composed of two elements: symmetry of application and symmetry of substance. The first concerns the equal application of IHL rules by the parties to the conflict, regardless of any potential discriminatory factors; the second ensures that IHL rules are drafted symmetrically. The paper will begin by presenting these elements as they apply to IACs. It will then argue that the principle in NIACs is primarily defined by its symmetry of substance component, before moving on to discuss the principle's meaning and scope. The paper will then evaluate the principle's nature as a general principle of IHL, and finally will explore some of its concrete effects on IHL rules. The paper will not address other pressing issues related to the adaptation of the principle in NIACs, such as its interaction (or lack thereof) with domestic law or international human rights law.

The principle of equality of belligerents in IACs: The two constitutive elements

As mentioned above, the author proposes that the principle is composed of two constitutive elements. In IACs, the principle mandates an equal application of IHL rules to all parties to the conflict, irrespective of any discriminatory factors. These factors include the legality of the use of force by the parties, the just or unjust nature of their struggle, the origins of the conflict, and the motivations of the belligerents. This aspect of the principle is referred to as "symmetry of application". It ensures that the application of IHL by the parties cannot vary based on extralegal or irrelevant considerations. Therefore, symmetry of application concerns the fact that every party to the conflict must *implement* IHL rules equally.

The second constitutive element of the principle, in the author's view, is the "symmetry of substance" of IHL rules. It is ensured in IACs by the principle of the sovereign equality of States, and it implies that the behaviour of the parties to the conflict is regulated by a set of rules with equivalent content for each party. In other words, this symmetry does not guarantee that IHL rules are applied equally, but that they are drafted symmetrically and identically for each party. Indeed, international law rules, whether customary or conventional, are designed to be identical for all concerned States. Consequently, if two States involved in an IAC are parties to an

– Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict", *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, p. 450; Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, p. 64. For occurrences of the equivocal assertion that the rules of IHL, in NIACs, "apply equally to and expressly bind all parties to the conflict", see Inter-American Commission on Human Rights (IACHR), *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, 1999, Chap. IV, para. 13; IACHR, *Juan Carlos Abella v. Argentina*, Case No. 11.137, Report No. 55/97, 18 November 1997, para. 174; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Kunarac and Others*, Case Nos IT-96-23-T, IT-96-23/1-T, Judgment (Trial Chamber), 22 February 2001, para. 470.

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IHL treaty, symmetry of substance means that, as a matter of principle, the rules outlined in the treaty must be identical for both. However, the concept of symmetry of substance must be understood more thoroughly. It does not signify that all States must be bound symmetrically by all IHL rules. For instance, a State party to an IAC might have ratified an IHL convention, while its adversary has not. States remain free to ratify or not ratify a convention or to become a persistent objector to a customary rule in the making. States may also theoretically agree to establish a treaty providing for asymmetrical rules; formally, nothing prevents them from doing so. Nor is there anything to prevent States from unilaterally committing to certain IHL obligations. Therefore, States can derogate to symmetry of substance if they consent to it. Nevertheless, by default, IHL rules are drafted identically for each of the involved States.

Symmetry of substance in IHL is not, however, guaranteed by the principle of sovereign equality in certain types of IACs – namely, in conflicts between national liberation movements (NLMs) and States. In these situations, symmetry is ensured by the principle of equality of belligerents itself: symmetry of substance has been explicitly affirmed based on the principle and following the classification of conflicts involving NLMs as IACs by AP I.[8] Article 96(3)(c) of AP I stipulates that AP I and the Geneva Conventions "are equally binding upon all Parties to the conflict". Given the absence of sovereign equality, this provision relies on the principle of equality of belligerents, as confirmed by AP I's Commentary[9] and preparatory works.[10]

The reference to the principle in Article 96(3)(c) of AP I involves symmetry of substance rather than symmetry of application, since the article does not address the implementation of IHL rules but rather addresses those rules' symmetrical character for all parties to the conflict, whether State or non-State. Article 96(3)(c) establishes the binding force of the Geneva Conventions and AP I on NLMs, and also ensures that these rules are symmetrical for all parties involved. This concept was articulated by Norway when it proposed the text of the future Article 96(3). The Norwegian delegate indicated that the purpose of this amendment was "to establish

8 See AP I, Art. 1(4). To this author's knowledge, the only armed group that has been recognized (by the Swiss Ministry of Foreign Affairs) as an NLM for the purposes of AP I is the Polisario Front, fighting against Morocco for the independence of Western Sahara. For more information, see Katharine Fortin, "Unilateral Declaration by Polisario under API Accepted by Swiss Federal Council", *Armed Groups and International Law*, 2 September 2015, available at: www.armedgroups-internationallaw.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/ (all internet references were accessed in April 2025). For the actual text of the declaration and the acceptance of the Swiss Federal Council, see Swiss Federal Department of Foreign Affairs, "Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims", 26 June 2015, available at: www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150626-GENEVE_en.pdf.

9 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), para. 3769.

10 During the negotiations of what was to become Additional Protocol I, Norway indeed equated the future Article 96(3) with the "fundamental principle … [of] the equality of the parties to the conflict". ICRC, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977*, Vol. 14, 1978, p. 380 (intervention by the Norwegian delegate on 24 March 1975).

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a procedure whereby national liberation movements would have the same rights and obligations as the High Contracting Parties to the Geneva Conventions of 1949 and to Protocol I".[11]

In the present author's view, this idea is also reflected in the remarks of the delegate of the Federal Republic of Germany, who emphasized "the utmost importance" of a provision allowing NLMs to assume "the same rights and obligations as those which had been assumed by a High Contracting Party" at the 1977 Diplomatic Conference.[12] Once again, the focus is not on the equal application or implementation of IHL rules but on the imposition of identical rules on both NLMs and State parties to the conflict.

The symmetry of substance of the rules for IACs involving NLMs was also affirmed in the preparatory works of AP I on another occasion. Following the classification of wars of national liberation as IACs[13] at the 1974 Diplomatic Conference, a key question arose: under what conditions could members of guerrilla movements affiliated with NLMs obtain prisoner of war (PoW) status? Specifically, it was debated whether NLM members were required to distinguish themselves from the civilian population by means of a fixed and distinctive emblem recognizable from a distance. It was necessary to determine if this criterion could be imposed as a condition for granting PoW status to NLM members. Asymmetrical obligations were proposed: one set for NLMs and another for government forces. Advocates for NLMs argued that the condition of distinguishing themselves from the civilian population should be abolished or relaxed due to their precarious material situation, contending that it was difficult, if not impossible, for their members to maintain such distinction at all times.[14] Blending in with the civilian population was an integral tactic in their struggle, essential for overcoming often better-equipped government forces.[15] The original text of draft Article 42 of AP I (now Article 44) thus provided that "members of organized resistance movements" – and only those members – would receive PoW status if they distinguished themselves from the civilian population "in military operations".[16] In contrast, draft Article 42 required government forces to distinguish themselves from the civilian population at all times, as mandated by Geneva Convention III (GC III).[17] This amendment faced substantial criticism, with many objections based on the principle, condemning the imposition of asymmetrical obligations on the parties to the conflict.[18]

11 *Ibid.*, Vol. 9, p. 364 (intervention by the Norwegian delegate on 25 April 1975).

12 *Ibid.*, Vol. 9, p. 369 (intervention by the delegate of the Federal Republic of Germany on 26 April 1977).

13 Provided they meet the conditions set out in Article 1(4) of AP I.

14 ICRC, above note 10, Vol. 14, p. 365 (intervention by the Algerian delegate on 21 March 1975), 370 (intervention by the Nigerian delegate on 21 March 1975), 384 (intervention by the representative of the Zimbabwe African Union NLM on 24 March 1975).

15 Giovanni Mantilla, *Lawmaking under Pressure: International Humanitarian Law and Internal Armed Conflict*, Cornell University Press, Ithaca, NY, and London, 2020, p. 137.

16 ICRC, above note 10, Vol. 1, pp. 323–324 (draft Article 42 of AP I).

17 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 4(A)(2)(b).

18 See, among others, ICRC, above note 10, Vol. 14, pp. 333–334 (intervention by the Norwegian delegate on 19 March 1975), 379 (intervention by the Norwegian delegate on 24 March 1975), 545–546 (written form

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Draft Article 42 was subsequently amended and reworded to eliminate any distinction based on the nature of the parties to the conflict. As a result, both NLM members and State armed forces can benefit from a (restrictive) exception to the requirement for distinguishing the civilian population during military operations.[19] The Algerian delegate noted that this final wording was a guarantee of the "principle of legal equality … between a soldier serving in conventional armed forces and a combatant belonging to a liberation movement".[20] Thus, the symmetry of substance of the rules for the parties to the conflict was defended on this occasion. The goal was not to impose compliance with or application of IHL on the parties but to establish rules that were symmetrical for all parties involved in the conflict.

In conclusion, the author proposes that the principle of equality of belligerents is primarily defined in IACs as a symmetry of application. While its element of symmetry of substance is present in this type of conflict, it is only to a minor extent. This understanding of the principle has so far only been articulated in the context of wars of national liberation, insofar as IACs are concerned.[21] Nonetheless, it imposes a symmetrical character on the rules that apply to those rare IACs in which at least one of the parties does not benefit from sovereign equality.

The principle of equality of belligerents in NIACs: A sketch of a definition, based on State practice

In the author's view, the principle applicable in NIACs comprises the two same elements as in IACs. However, it is proposed that, unlike its application in IACs, the principle should be defined in NIACs as primarily involving a symmetry of substance. While symmetry of application is equally relevant and important in NIACs and IACs, it is more implicit and seems to be accepted without significant criticism or major challenge in NIACs. It is proposed that this symmetry prohibits the same elements of discrimination as in IACs, with the difference that international *jus ad bellum* is replaced by domestic law. Accordingly, no party to the conflict may refuse to apply IHL on extralegal grounds or on the basis that the State's domestic laws prohibiting the use of force have been violated. With these exceptions, symmetry of application operates similarly for both IACs and NIACs.[22]

This research paper focuses on the second element of the principle – that is, symmetry of substance. To date, no author appears to have provided an authoritative commentary on the symmetry of substance of IHL rules, as protected by the

of the intervention by the Norwegian delegate on 24 March 1975), 365–366 (intervention by the Algerian delegate on 21 March 1975), 521 and 523 (written form of the intervention by the Algerian delegate on 21 March 1975).

19 ICRC Commentary on the APs, above note 9, para. 1703.

20 ICRC, above note 10, Vol. 14, p. 366 (intervention by the Algerian delegate on 21 March 1975).

21 As explained above, in IACs involving States, the symmetry of substance of IHL rules is guaranteed by the principle of sovereign equality.

22 For an advanced legal analysis on the question of whether the symmetry of application aspect of the principle is also present in NIACs and possesses a legal basis, see Philippe Jacques, "Le principe d'égalité des belligérants dans les conflits armés non internationaux", PhD thesis, UCLouvain, 2025.

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principle, in either IACs or NIACs. Furthermore, defining symmetry of substance allows for a clearer determination of the scope of various assertions that parties to a NIAC are "equally subject"[23] to IHL rules or that these rules equally bind or apply to all parties to the conflict.[24] Just as in IACs involving NLMs and States, the symmetrical nature of the rules in NIACs is not guaranteed by the principle of sovereign equality of States.

It is submitted that the principle must therefore ensure the identical character of the applicable rules. In the absence of symmetrical rules, it is difficult to imagine that a party to an armed conflict would agree to abide by more restrictive legal constraints than its adversary. Only symmetrical rules can effectively govern the behaviour of the parties in an armed conflict. The principle aims to safeguard IHL by maintaining the conditions for mutual respect for the rules imposed on each party to the conflict. It forms the foundation of IHL, upon which the latter's effectiveness relies, and prevents a negative spiral of IHL violations that could ultimately lead to the collapse of this body of law, rendering it inapplicable in practice. This view is confirmed by various authors who place the principle in NIACs within the perspective of a sociological dynamic of reciprocity[25] and recognize that dynamic as a central element for ensuring respect for IHL in such conflicts.[26]

The principle thus compensates for the absence of sovereign equality for armed groups by ensuring the existence of symmetrical IHL rules for all parties to the conflict. However, it is important to note that the principle is not equivalent to the principle of sovereign equality of States: it does not grant the non-State party to

23 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 4th ed., Cambridge University Press, Cambridge, 2011, p. 2.

24 See, notably, Daragh Murray, "Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward", *Leiden Journal of International Law*, Vol. 30, No. 2, 2017, pp. 436, 438, 439; E. Heffes, above note 6, p. 239; F. Kalshoven and L. Zegveld, above note 23, p. 2; Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, Oxford, 2016, p. 100; Marco Sassòli and Laura M. Olson, "The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 602; N. Melzer above note 6, p. 17.

25 See, for example, Jann K. Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference", *Netherlands International Law Review*, Vol. 54, No. 2, 2007, p. 322; Robin Geiss, "Asymmetric Conflict Structures", *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 777; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 246. For an assertion in the context of a NIAC that modern IHL is based on reciprocity and the symmetry of its rules, see Jens David Ohlin, "The Combatant's Privilege in Asymmetric and Covert Conflicts", *Yale Journal of International Law*, Vol. 40, No. 337, 2015, p. 348.

26 See, among others, Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford and New York, 2006, pp. 287–288; Frédéric Mégret, "Detention by Non-State Armed Groups in Non-International Armed Conflicts: International Humanitarian Law, International Human Rights and the Question of Right Authority", in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice*, T. M. C. Asser Press, The Hague, 2019, p. 178; Jonathan Somer, "Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict", *International Review of the Red Cross*, Vol. 89, No. 867, 2007, p. 687; René Provost, "Asymmetrical Reciprocity and Compliance with the Laws of War", in Benjamin Perrin (ed.), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*, UBC Press, Vancouver, 2012, p. 36; R. Geiss, above note 25, p. 777.

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the conflict a legal status comparable to that of a State. Like IHL overall, the principle is pragmatic in nature. Its significance and relevance arise from the existence of an armed conflict involving multiple actors, and in such situations, the only way to regulate violence is to establish that the rules must be the same for all parties involved. The principle does not entail recognizing any equality of status among the different parties to the conflict.[27] The present author therefore disagrees with Terry Gill, the only other author who has identified the concept of symmetry of substance, when he conflates that concept with equality of status between States and armed groups.[28]

Some State practice recognizes that the principle in NIACs involves a symmetry of substance. When drafting Additional Protocol II to the Geneva Conventions (AP II) and Article 3 common to the Geneva Conventions (common Article 3), States ensured (1) that the rules of IHL were binding on armed groups and (2) that these rules of IHL were identical for both States and armed groups.[29] This logic was then mirrored in other IHL instruments applicable in NIACs. More recently, several UK courts have interpreted the principle as involving a symmetry of substance. For example, the UK Court of Appeal has stated:

> One of the reasons why the States subscribing to what became Common Article 3 and APII did not make provision for a power to detain in a non-international armed conflict was that to do so would have enabled insurgents to claim that the principles of equality, equivalence and reciprocity (which would be usual in international humanitarian law) meant that they would also be entitled to detain captured members of the government's army.[30]

27 See, in particular, E. Heffes, above note 6, p. 239; Maria Gavrilova, "Administrative Detention by Non-State Armed Groups: Legal Basis and Procedural Safeguards", *Israel Law Review*, Vol. 53, No. 1, 2020, p. 43; S. Sivakumaran, above note 25, p. 245.

28 See Terry D. Gill, "Reconciling the Irreconcilable: Some Thoughts on Belligerent Equality in Non-International Armed Conflicts", *Netherlands Yearbook of International Law*, Vol. 51, 2020, pp. 355–356: "States party to IHL conventions which are applicable to both the State and to any armed opposition movement may be willing to accept they are bound by the same obligations …. But in contrast to international armed conflict where being party to an armed conflict denotes at least legal equality between belligerents, no such equality exists in NIAC. States do not perceive armed groups engaged in rebellion or armed insurrection as their 'equals' …. In short, despite the equal application of obligations under IHL to all parties, there is no equality of belligerents in the absence of belligerent status." This misconception derives from the assumption that the principle of equality in IACs only derives from the principle of sovereign equality (see pp. 344–345).

Furthermore, the understanding drawn by Gill from the concept of symmetry of substance is very limited, as it is recognized only in relation to obligations and lacks real scope since it must accommodate the asymmetries provided for in domestic law. In other words, "[e]quality of obligation is without doubt a part of the notion of belligerent equality …. But unless an act is lawful or unlawful under *both* IHL and domestic law there is no true equality of obligation as long as the application of domestic law is unaffected by the legality of an act under IHL" (p. 353, emphasis added). Furthermore, "the equality of application of [IHL] does not result in any meaningful equality of rights and obligations between the parties to the conflict except in relation to acts prohibited under both IHL and domestic law" (p. 354).

29 A study of the preparatory works is unfortunately not possible in the present article. On this question, see P. Jacques, above note 22, pp. 87–116.

30 UK Court of Appeal (Civil Division), *Serdar Mohammed and Others v. Secretary of State for Defence*, EWCA Civ 843, 30 July 2015, para. 178.

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This view was later confirmed in an appeal made from the same case by Lord Reed of the Supreme Court:

> [S]ince international humanitarian law is generally understood as being reciprocal in its operation …, the authorisation of detention in non-international armed conflicts would have entailed that States recognised the legitimacy of detention by dissident armed groups (for example, the legitimacy of the detention of British and American troops in Afghanistan by the Taliban): something which would be anathema to most States.[31]

The vocabulary used by the Court of Appeal and by Lord Reed regarding the principle is not particularly rigorous, but it represents an explicit reference to a concept that appears to align with the symmetry of substance of the principle in the context of a NIAC. In this case, States seem to recognize that if a right or prerogative applies to them in a NIAC, it would also apply to non-State armed groups engaged in the conflict.[32] These considerations were reiterated during discussions on the development of the rules related to detention in NIACs. On this occasion, several States noted that the recognition of a right to detain in NIACs for States would similarly apply to armed groups. During the discussions,

> [s]ome States expressed particular concern that if grounds and procedures for detention by non-State parties to NIACs were regulated, this would implicitly grant the non-State parties to NIACs a right to detain …. Other States strongly emphasized the need to regulate detention by non-State parties to NIACs and indicated that an outcome document would need to apply to such parties as well as to States.[33]

A significant number of States therefore recognize that emerging IHL must possess a symmetrical content and must apply to each party to a NIAC.

Belgium also appears to have developed an explicit position on the principle in NIACs in the context of anti-terrorism rules. The State has made pertinent comments on the 1997 International Convention for the Suppression of Terrorist Bombings, which criminalizes the use of explosive devices in public places but includes an exclusion clause to prevent criminalizing acts of armed forces, whether governmental or belonging to an armed group, in situations of armed conflict, which are governed by IHL.[34] Belgium notes that it played a decisive role in the negotiations

31 UK Supreme Court, *Serdar Mohammed and Others v. Secretary of State for Defence*, UKSC 2015/2018, 17 January 2017, para. 263.

32 On this, see Ezequiel Heffes, *Detention by Non-State Armed Groups under International Law*, Cambridge University Press, Cambridge, 2022, p. 13.

33 ICRC, *Meeting of All States on Strengthening Humanitarian Law Protecting Persons Deprived of Their Liberty Chair's Conclusions*, Geneva, 2015, p. 15.

34 International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256, 15 December 1997 (entered into force 23 May 2001), Art. 19(2).

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to ensure the Convention's neutrality with respect to IHL and to place government armed forces and other armed forces on an equal footing.[35] Earlier drafts had proposed excluding only acts committed by State armed forces in situations of armed conflict, thereby criminalizing similar acts if committed by members of non-State armed groups.[36]

The International Committee of the Red Cross (ICRC) has also commented on this exclusion clause during debates on the adoption of another convention on the suppression of terrorism:

> It is understood from the negotiation of this clause that acts committed by the party to a non-international armed conflict other than a State, namely an armed group, are excluded from the applicability of the 1997 Convention. The ICRC believes, both because of the intrinsic logic of IHL and of its experience in promoting respect for humanitarian law in the midst of armed conflicts, that *the same rules* must be applicable to both opponents on the battlefield.[37]

Indeed, avoiding asymmetrical criminalization of conduct governed by IHL can be seen as a logical consequence of the symmetrical character of rules applicable to each party in a conflict.[38]

Finally, to the author's knowledge, no State engaged in a NIAC considers that IHL rules applicable to it are or should be different from those applicable to the armed group that it is fighting against, or that these rules should not apply to the armed group in question.[39] Instead, generally speaking, States involved in a NIAC

35 *Projet de loi portant assentiment à la Convention internationale pour la répression des attentats terroristes à l'explosif, faite à New York le 15 décembre 1997*, 21 December 2004, para. 60. On this topic, see also Thomas Van Poecke, "Terrorism and Armed Conflict: A Transnational Criminal Law Framework", PhD thesis, KU Leuven, 2023, paras 223, 328, 533.

36 *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN Doc. A/52/37, 1997 (see the different versions of draft Article 3 and the different interventions about it).

37 ICRC, "Draft Convention on the Suppression of Acts of Nuclear Terrorism: Statement by the International Committee of the Red Cross", UN General Assembly, 53rd Session, Sixth Committee, Working Group Established Pursuant to General Assembly Resolution 51/210, 6 October 1998 (emphasis added).

38 See Ilya Sobol and Gloria Gaggioli, "Proscription and Group Membership in Counter-Terrorism and Armed Conflict: Areas of Tensions between Criminal Law and International Humanitarian Law", in Katharine Fortin and Ezequiel Heffes (eds), *Armed Groups and International Law: In the Shadowland of Legality and Illegality*, Edward Elgar, Cheltenham and Northampton, MA, 2023, pp. 105–106.

39 A single anecdotal exception exists regarding the asymmetric recognition of the right to detain in NIACs in IHL. "[M]indful that deprivation of liberty is an ordinary and expected occurrence in armed conflict, and that *under international humanitarian law … States have, in all forms of armed conflict*, both the power to detain, and the obligation to provide protection and to respect applicable legal safeguards, including against unlawful detention for all persons deprived of their liberty …". 32nd International Conference of the Red Cross and Red Crescent, Res. 1, "Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty", 32IC/15/R1, December 2015, p. 1 (emphasis added). For a critique of this aspect of the resolution on the basis of the principle, see Anne Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?*, Edward Elgar, Cheltenham and Northampton, MA, 2020, pp. 195–196. This exception is qualified as anecdotal as it was very discreetly mentioned in the preamble of a resolution rather than in its main text. Moreover, the said resolution was adopted shortly after the end of an extensive consultative process organized by the ICRC on the development of new rules regarding detention in NIACs. As mentioned above (see quotation in the main text at note 33), its outcome

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tend to deny the very existence of the conflict itself.[40] In these cases, States refuse to apply IHL based on the denial of the existence of a NIAC rather than on an assertion that IHL rules are asymmetrical for States and armed groups.

Meaning and scope of symmetry of substance in the context of a NIAC

In the present author's view, the symmetry of substance of the principle of equality of belligerents applies to both rights and obligations.[41] Thus, as explained in the previous section, for IHL rules to be effective, there should be no asymmetry in their formulation based on the identity of the parties to the conflict (i.e., State or non-State). Moreover, it is argued that the question of symmetry of substance is independent of the question of the binding force of IHL for armed groups, although these issues are often treated together indistinctly. In fact, since all rules applicable in NIACs are designed to be symmetrical for both States and armed groups, asserting that these rules are binding on each party to the conflict supports the idea of symmetry. Therefore, both the notions of binding force and symmetry aim to achieve the same overall objective: ensuring that both armed groups and States are bound by symmetrical rules.

Furthermore, the binding force of IHL on armed groups is a fundamental prerequisite for regulating NIACs and the existence of the principle.[42] The confusion between symmetry of substance and binding force explains, in the author's view, why the principle is sometimes invoked in academic work to support the binding nature of IHL rules applicable to armed groups in NIACs. However, despite the overlap

document acknowledges the importance of the principle when it concludes that if a right to detain in NIACs is recognized in the future, it should apply to both States and armed groups.

40 ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Document Prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007", *International Review of the Red Cross*, Vol. 867, No. 89, 2007, p. 745; ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2021 (ICRC Commentary on GC III), para. 904; F. Kalshoven and L. Zegveld, above note 23, p. 67; Giovanni Mantilla, "The Politics of Armed Non-State Groups and the Codification of International Humanitarian Law", in K. Fortin and E. Heffes (eds), above note 38, p. 49; R. Provost, above note 26, p. 26; S. Sivakumaran, above note 25, pp. 94, 200–204. For another point of view, see Gloria Gaggioli and Pavle Kilibarda, "Counterterrorism and the Risk of Over-Classification of Situations of Violence", *International Review of the Red Cross*, Vol. 103, No. 916–917, 2021. For an overview of a number of reasons which may encourage States to refuse to recognize a NIAC on their territory, see Andrew Clapham, *War*, Oxford University Press, Oxford, 2021, p. 257; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford and New York, 2017, p. 121.

41 See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report Prepared for the 32nd International Conference of the Red Cross and Red Crescent*, 32IC/15/11, Geneva, 2015, p. 14: "IHL aim[s] [to lay] down the same rights – and of course, obligations – for all parties to a conflict."

42 "It is crucial for the principle of equality of belligerents that all the rules which regulate internal armed conflict are binding on all the parties involved in the conflict." Sandesh Sivakumaran, "Re-envisaging the International Law of Internal Armed Conflict", *European Journal of International Law*, Vol. 22, No. 1, 2011, p. 248.

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between these issues, the principle is primarily presented by the academic literature as involving symmetry of substance.[43] Another reason the author believes that binding force and symmetry of substance are distinct legal issues is related to current debates on the binding force of IHL on armed groups. While it is now accepted that armed groups are bound by IHL rules applicable in NIACs,[44] there is still no consensus in academic debate regarding the legal mechanism for this.[45] None of the relevant theories even suggest that the rules of IHL should be identical for each party to the conflict.

It is important to note that, as previously explained in relation to IACs, symmetry of substance is not absolute. In the author's view, parties to an armed conflict can agree to asymmetrical rules. The principle does not prevent a special agreement within the meaning of common Article 3 from imposing different rules for each party to the conflict. Similarly, a party to the conflict may unilaterally agree to adhere to more restrictive rules for its own conduct, even if no corresponding obligations are imposed on its adversary; for example, an armed group might agree not to use anti-personnel mines,[46] even if the State it is fighting has not ratified the Ottawa Convention banning them. The same applies to States that establish conventions applicable in NIACs, but which only apply to States party to that convention, to the exclusion of armed groups. This is particularly relevant to certain treaties on weapon prohibition.[47]

43 For an indicative list of sources that discuss the principle in NIACs from the perspective of symmetry of substance – though sometimes confusing it with the binding nature of IHL rules for armed groups – see A. Quintin, above note 39, p. 201; ICRC, above note 41, p. 33; Ezequiel Heffes, "From Law-Taking to Law-Making and Law-Adapting: Exploring Non-State Armed Groups' Normative Efforts", in K. Fortin and E. Heffes (eds), above note 38, p. 209; Jean-Marie Henckaerts and Cornelius Wiesener, "Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice", in E. Heffes, M. D. Kotlik and M. J. Ventura (eds), above note 26, p. 197; J. Somer, above note 26, pp. 658, 663; K. Okimoto, above note 3, pp. 258–260; Marco Sassòli, "How to Develop International Humanitarian Law Taking Armed Groups into Account?", *Military Law and the Law of War Review*, Vol. 60, No. 1, 2022, p. 72; Tilman Rodenhäuser, "The Legal Protection of Persons Living under the Control of Non-State Armed Groups", *International Review of the Red Cross*, Vol. 102, No. 915, 2020, p. 1008.

44 See, in particular, Annyssa Bellal and Stuart Casey-Maslen, *The Additional Protocols to the Geneva Conventions in Context*, Oxford University Press, Oxford, 2022, p. 262; M. Sassòli, above note 43, pp. 72–73; Marcos D. Kotlik, "Towards Equality of Belligerents: Why Are Armed Groups Bound by IHL?", in *Experts Conference on International Humanitarian Law: Emerging Issues in the Law of Armed Conflicts*, Washington, DC, 2012, p. 14.

45 The most important theories are the so-called "legislative competence" and "consent" theories. The first proposes that armed groups are bound because the State on whose territory they are fighting has ratified the relevant IHL conventions. The second holds that armed groups should be bound by IHL rules only if they consent. For further developments on the importance of the theory of legislative competence, see, among others, Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, 2nd ed., Edward Elgar, Cheltenham and Northampton, MA, 2023, p. 216; Sandesh Sivakumaran, "Binding Armed Opposition Groups", *International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006, pp. 381–393. For developments on the theory of consent, see, among others, M. Sassòli, above note 45, p. 216; S. Sivakumaran, above note 45, p. 394. For a synthesis of this debate, see ICRC Commentary on GC III, above note 40, paras 539–542.

46 See, for example, the Deed of Commitment proposed by the NGO Geneva Call on the banning of the use of anti-personnel mines, available at: www.genevacall.org/deed-of-commitments/.

47 See, for example, the Biological Weapons Convention of 1972 or the Chemical Weapons Convention of 1993. Interestingly, the customary rules corresponding to the use of these weapons and identified as

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However, two points should be made on this topic. Firstly, in these cases, the consent of the parties to the conflict is crucial. States may agree to prohibit their own use of a particular weapon without extending the scope of the convention to armed groups. Conversely, the symmetry of substance of the principle implies that a convention cannot prohibit only armed groups from using a weapon without imposing an identical obligation on States.[48] Moreover, such conventions are exceptions rather than the rule, as States typically prefer to avoid being unilaterally bound by obligations towards armed groups. Secondly, it should be emphasized that the parties can only unilaterally agree to obligations and constraints;[49] a party to the conflict cannot unilaterally grant itself rights or prerogatives that the opposing party does not have.[50] Additionally, the exception to symmetry of substance based on consent highlights why the principle does not address the binding force of IHL on the parties to the conflict. The concept of regulation implies that armed groups are bound by IHL rules, even without their consent, and it is therefore challenging to discuss equality or "symmetry" in terms of the binding force of IHL. A consent-based exception would imply that armed groups could agree not to be bound, which is not considered an acceptable conclusion.[51]

In summary, it is submitted that the principle of equality of belligerents ensures the symmetrical nature of any rule of IHL for all parties to the conflict, whether concerning rights or obligations, and whether the rules are conventional or customary. However, the principle does not prohibit the existence of asymmetrical rules, provided that such rules have been agreed upon by the parties to the conflict. In other words, a party can decide to respect more rules than its adversary through a unilateral declaration, or parties can provide for asymmetrical rules in a special agreement adopted on the basis of common Article 3. It is also important to note that the symmetry of substance of the principle applies to all types of NIACs, including

such in the ICRC Customary Law Study appear to respect symmetry of substance as they apply to both States and armed groups. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 73–74, available at: https://ihl-databases.icrc.org/en/customary-ihl/rules.

48 If it does, it will be disregarded in practice by the party to the conflict to which it applies, being bound by a rule that its opponent is free to ignore.

49 For example, the International Court of Justice (ICJ), in its judgment on nuclear tests, only mentions the possibility of unilaterally committing to obligations. ICJ, *Nuclear Tests Case (New Zealand v. France)*, 20 December 1974, *ICJ Reports 1974*, paras 46–47. The same applies to the guiding principles established by the International Law Commission on the basis of this judgment. See International Law Commission, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, 2006.

50 In international law, a unilateral declaration granting rights to its issuer may, at best, contribute to the formation of a customary rule. This was exemplified by President Truman's declaration regarding the exploitation rights of continental shelf resources, which served as the starting point for a customary rule on this subject. See Joe Verhoeven, *Droit international public*, Larcier, Brussels, 2000, p. 442. If an IHL customary rule were to arise following a practice resulting from unilateral declarations granting rights to its issuer, this rule would become symmetrical by the effect of the principle.

51 This is one of the main objections to the so-called "consent" theory, which posits that armed groups can only be bound by the rules of IHL to which they have consented. See the presentation of this theory and the supporting academic source in above note 45.

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those involving armed groups fighting against each other, in order to ensure that each party's behaviour is regulated by symmetrical rules.

The legal basis of the principle in NIACs

To this author's knowledge, no provision of IHL, whether conventional or customary, addresses the symmetry of substance of the principle. Nevertheless, the idea of symmetry of substance is reflected in the vast majority of existing IHL rules applicable in NIACs. These rules are, in fact, identical for both States and armed groups. However, this paper argues that it is incorrect to view any of these rules as individually constituting a legal basis for the principle: rather, they are merely a concrete application or reflection of the principle.

The academic literature generally supports this view concerning common Article 3 and AP II. Some authors argue that the wording of common Article 3, which states that "each Party to the conflict shall be bound to apply [the provisions of common Article 3]", implies the principle.[52] Others contend that common Article 3 is "based" on the principle.[53] The 2020 ICRC Commentary on GC III reflects this view, stating that "common Article 3 is based on the principle of equality of the Parties to the conflict. It grants the same rights and imposes the same obligations on both the State and the non-State Party."[54] A similar tendency is observed with AP II, which "supplements and develops" common Article 3.[55] A significant portion of the academic literature applying the principle in NIACs[56] adopts the position of the AP II ICRC Commentary of 1986,[57] which notes that common Article 3 and AP II are "similar"[58] and "based on the same structure".[59] Consequently, the principle is considered an implicit "common characteristic"[60] of AP II, as it and common

52 See, among others, François Bugnion, "*Jus ad Bellum, Jus in Bello* and Non-International Armed Conflicts", *Yearbook of International Humanitarian Law*, Vol. 6, 2003, p. 186; Kubo Mačák, *Internationalized Armed Conflicts in International Law*, Oxford University Press, Oxford, 2018, p. 147; Marco Sassòli, "Ius ad Bellum and Ius in Bello – the Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?", in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein*, Martinus Nijhoff, Boston, MA, 2007, p. 255; R. Provost, above note 6, p. 146; Y. Dinstein, above note 7, p. 133.

53 K. Fortin, above note 40, p. 126; M. Gavrilova, above note 27, p. 44.

54 ICRC Commentary on GC III, above note 40, para. 538. This statement is reinforced in para. 905, where it is mentioned that "humanitarian law provides for equal rights and obligations of the Parties to the conflict".

55 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), Art. 1.

56 See, in particular, E. Heffes, above note 32, pp. 238–239; M. Sassòli, above note 45, p. 215; R. Provost, above note 6, p. 146; S. Sivakumaran, above note 25, pp. 242–243.

57 ICRC Commentary on the APs, above note 9, paras 4437, 4442–4444. Another commentary on AP II takes a similar approach, stating that the guarantees of the Protocol "should be granted to both sides of such conflicts on a basis of complete equality". Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, Leiden and Boston, MA, 2013, p. 693.

58 ICRC Commentary on the APs, above note 9, para. 4437.

59 *Ibid.*, para. 4437.

60 *Ibid.*, para. 4437.

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Article 3 "are based on the principle of the equality of the parties to the conflict".[61] The Commentary on AP II further explains that the rules of the AP II "grant the same rights and impose the same duties on both the established government and the insurgent party".[62] Similarly, the final paragraph addressing the principle concludes that "[t]he extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State".[63] Some authors have also argued, based on the preparatory works of AP II,[64] that AP II presumes a "symmetry of obligations".[65] This author agrees with these statements but only so far as they confirm that these IHL rules *all* reflect the symmetry of substance imposed by the principle, without individually embodying an explicit legal basis for it.

A similar conclusion applies to rules outlined in the ICRC Customary Law Study. None of these explicitly addresses the principle as such; however, the principle is reflected in the various rules identified by the Study as customary law applicable in NIACs. Indeed, these rules do not differentiate in content between States and armed groups, and apply equally to each party to the conflict.[66] While the rules may vary depending on the type of conflict (IAC or NIAC),[67] they remain identical as between the belligerent parties, with only a few exceptions.

With regard to these exceptions, it is argued that the exclusive application of the rules of the ICRC Customary Law Study to States is justified in the vast majority of cases. Most of the exceptions pertain to customary rules regarding the implementation of IHL. Rules 149[68] and 150[69] constitute a reminder of the rules relating to State responsibility, which are only applicable to States. Rule 144[70] constitutes an obligation independent of the existence of an armed conflict and should therefore not be symmetrical in a NIAC. This paper does not have the space here to analyze in details Rules 157,[71] 158[72] and 161,[73] but it is nevertheless submitted that they either

61 *Ibid.*, p. 1345.

62 *Ibid.*, para. 4442.

63 *Ibid.*, para. 4444.

64 See, in particular, D. Murray, above note 7, pp. 103, 110; J.-M. Henckaerts and C. Wiesener, above note 43, p. 198.

65 Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts", *International and Comparative Law Quarterly*, Vol. 30, No. 2, 1981, p. 432.

66 For the assertion that the principle has the effect of imposing a symmetrical character on customary IHL rules, see K. Fortin, above note 40, pp. 331, 383. See also, of a similar opinion, L. Hill-Cawthorne, above note 24, p. 87.

67 ICRC Customary Law Study, above note 47, Rules 124, 128, 129.

68 *Ibid.*, Rule 149: "A State is responsible for violations of international humanitarian law attributable to it."

69 *Ibid.*, Rule 150: "A State responsible for violations of international humanitarian law is required to make full reparation of the loss or injury caused."

70 *Ibid.*, Rule 144: "States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law."

71 *Ibid.*, Rule 157: "States have the right to vest universal jurisdiction in their national court over war crimes."

72 *Ibid.*, Rule 158: "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects."

73 *Ibid.*, Rule 161: "States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects."

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should not be recognized as customary,[74] are only recognized as customary in IACs, have a justified exclusive application to States, or their content should be modified so that their symmetrical application can fit the limited material resources of armed groups (see the following section on "Concrete Effects of the Principle in NIACs").[75]

In the author's opinion, only Rules 141 and 143's applicability exclusively to States causes an issue regarding symmetry of substance. Rule 141 concerns the obligation of States to make available legal advisers to assist military commanders.[76] It stands in contrast to Rules 139 and 142, both applicable to States and armed groups, which provide for the obligation to ensure respect for IHL by the armed forces of the parties to the conflict, as well as to provide them with IHL training. Furthermore, Rule 141 also offers a different outcome compared to Article 82 of AP I. The latter provides that "[t]he High Contracting Parties at all times, *and the Parties to the conflict in time of armed conflict*" (emphasis added), must ensure the presence of legal advisers. The phrase "Parties to the conflict" refers here to both States and NLMs, the latter essentially being armed groups. Based on this symmetry of substance argument, the ICRC Customary Law Study could suggest a different conclusion: the Study emphasizes that State practice does not require the presence of legal advisers for armed groups,[77] an issue that will usually not be addressed by State practice, the latter being focused on the presence of legal advisers within States' own armies. Rather, symmetry of substance would indicate that this customary rule applicable to States also concerns armed groups, to the extent of their material capacities. According to this author, a case can also be made regarding Rule 143 on the obligation of States to encourage the teaching of IHL to the civilian population.[78] It is again no surprise that the practice of States ignores the situation of armed groups concerning this rule. The commentary on the rule nevertheless recognizes the existence of Article 19 of AP II, which obliges States and armed groups to disseminate the AP II's content.[79] That being said, in time of peace, this obligation may still only concern States.

Rather than being a conventional or customary rule, the legal basis of the principle of equality of belligerents, in the author's view, rests on its nature as a general principle of IHL.[80] In its draft conclusions adopted in 2023, the International

74 Specifically concerning Rule 158 on the obligation to prosecute or extradite, see in this regard Ezéchiel Amani Cirimwani, "L'obligation d'extrader ou de poursuivre les auteurs des crimes internationaux: Combler les lacunes du droit conventionnel", PhD thesis, UCLouvain and Vrije Universiteit Brussel, 2023, pp. 134–161.

75 For a detailed analysis of these questions, see P. Jacques, above note 22, pp. 168, 169, 176–179.

76 ICRC Customary Law Study, above note 47, Rule 141: "Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law."

77 *Ibid.*, p. 501.

78 *Ibid.*, Rule 143: "States must encourage the teaching of international humanitarian law to the civilian population."

79 *Ibid.*, p. 508.

80 As it tends to reflect the existing state of IHL, this author believes this claim can be argued as a matter of *lex lata*. However, as it has never been discussed in academic literature before, it can also be considered as a *de lege ferenda* allegation. Further, it can more precisely be considered as a "foundation" of the IHL framework; in this regard, see Jeroen Van Den Boogaard, "Principles of International Humanitarian Law:

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Law Commission considers that general principles of law formed within the international legal system underlie international legal rules or must be reflected by them.[81] Such principles must appear to be "intrinsic", meaning that they "must be specific to the international legal system and reflect … and regulate … its basic features".[82] It is also accepted that such principles of international law can constitute "general standards overarching the whole body of law governing a *specific* area".[83] In this respect, general principles of IHL have already been described as deriving from existing IHL rules.[84] They specify those rules' substance and meaning, must be considered in the interpretation of those rules,[85] and guide the development of future IHL rules by setting certain guidelines.[86] In the author's view, the principle, understood as symmetry of substance, fits into this framework. As explained above, although it is not embodied in a specific conventional or customary rule, the principle appears to be reflected in almost every IHL rule applicable in NIACs. Its existence is also supported by State practice.[87] Furthermore, academic literature often regards the principle, in NIAC, as "central",[88] "fundamental",[89] a "basic principle",[90] a "dogma" within IHL,[91] or one of IHL's "cornerstones".[92] The ICRC itself considers that the principle "underlies the law of armed conflict".[93]

A New Framework", in Sandesh Sivarkumaran and Christian R. Burne (eds), *Making and Shaping the Law of Armed Conflict*, Oxford University Press, New York, 2024, pp. 65–67, esp. p. 67.

81 *Report of the International Law Commission: Seventy-Fourth Session (24 April–2 June and 3 July–4 August 2023)*, UN Doc. A/78/10, 2023, p. 23.

82 *Ibid.*

83 Paola Gaeta, Jorge E. Vinuales and Salvatore Zappalà, *Cassese's International Law*, 3rd ed., Oxford University Press, Oxford, 2020, p. 152 (emphasis added).

84 M. Sassòli, above note 45, p. 57.

85 *Ibid.*, p. 57.

86 Jean Pictet, "The Principles of International Humanitarian Law (II)", *International Review of the Red Cross*, Vol. 6, No. 66, 1966, p. 512. For a thorough definition of the notion of a general principle of IHL, see Jean Pictet, *Le droit humanitaire et la protection des victimes de la guerre*, A. W. Sijthoff, Leiden and Geneva, 1973, pp. 29–30.

87 See the above section entitled "The Principle of Equality of Belligerents in NIACs: A Sketch of a Definition, Based on State Practice".

88 Gus Waschefort, *International Law and Child Soldiers*, Hart, Oxford and Portland, OR, 2015, pp. 79, 88; Mark Klamberg, "The Legality of Rebel Courts during Non-International Armed Conflicts", *Journal of International Criminal Justice*, Vol. 16, No. 2, 2018, pp. 236, 240.

89 F. Kalshoven and L. Zegveld, above note 23, p. 2; S. Sivakumaran, above note 25, pp. 95, 242–243. See also the description of the principle as a "foundational notion of international humanitarian law" in R. Provost, above note 6, p. 144.

90 R. Provost, above note 26, p. 37.

91 Jann K. Kleffner, "The Unilateralization of International Humanitarian Law", *International Review of the Red Cross*, Vol. 104, No. 920–921, 2022, p. 2161; Louise Doswald-Beck, "Judicial Guarantees under Common Article 3", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 488, 494; Marco Sassòli and Yuval Shany, "Should the Obligations of States and Armed Groups under International Humanitarian Law Really Be Equal ?", *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 427.

92 J. Pejic, above note 6, p. 173 fn. 3.

93 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report Prepared for the 28th International Conference of the Red Cross and Red Crescent*, 03/IC/09, Geneva, 2003, p. 19.

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The principle's nature as a general principle of IHL is confirmed by the fact that the symmetry of substance of the principle does not have any normative content *per se*. It is addressed to the "legislator" and is relevant at the level of the creation and interpretation of the rules of IHL. It represents an ideal or a guideline, rather than requiring specific actions or omissions from the parties to the conflict (the addressees of IHL rules). In a sense, it functions as a secondary rule of IHL, determining how primary rules should be created and interpreted. This characteristic underscores its nature as a "principle" in the strict sense, as opposed to "rules", which most of the time impose specific behaviours on their addressees.[94] The principle informs the legislator about the nature of IHL as a legal framework governing conflict situations between different actors. In this context, proposing symmetrical rules for all parties to the conflict is essential for their effectiveness and acceptance.[95] No party would tolerate being bound against its will by rules that are more demanding than those imposed on its adversary.

Here lies the importance of the principle as a general principle of IHL: it does not recognize an equal status for the belligerents, but is a pragmatic measure. It lays down the minimal conditions to ensure that IHL has any chance of being respected by all parties. Without symmetrical rules, it is impossible to effectively regulate violence in armed conflict situations. From this perspective, the principle is similar to the principles of military necessity and humanity, which are also specific to IHL. The principle of equality shares the same generality as these principles, as it guides the legislator in understanding the nature of the rules and creating new standards.[96] Interpreted in this way, this paper considers the nature of the principle to be "constitutional" within IHL.[97] Deviating from it would undermine the very essence of IHL; indeed, asymmetrical IHL rules suffer from a lack of effectiveness, as parties to an armed conflict will typically refuse to be bound by more stringent legal constraints than their opponent. As such, a violation of the principle results in the creation of rules which will not be respected in practice, threatening IHL's overall purpose of protecting victims of armed conflicts. Furthermore, as a constitutional principle, it is natural to find the principle reflected in nearly all IHL rules, even if

94 Robert Alexy, *A Theory of Constitutional Rights*, Oxford University Press, New York, 2010, p. 57; Ronald Dworkin, *Taking Rights Seriously*, 8th ed., Duckworth, London, 1996, pp. 22, 26.

95 See the above section entitled "The Principle of Equality of Belligerents in NIACs: A Sketch of a Definition, Based on State Practice".

96 On the development function of general principles of international law, see Kirsten Stefanik, "The Environment and Armed Conflict: Employing General Principles to Protect the Environment", in Carsten Stahn, Jens Iverson and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflicts to Peace: Clarifying Norms, Principles, and Practices*, Oxford University Press, Oxford, 2017, p. 102; M. Cherif Bassiouni, "A Functional Approach to 'General Principles of International Law'", *Michigan Journal of International Law*, Vol. 11, No. 3, 1990, pp. 777–778.

97 For an overview of the principle of military necessity as a "constitutional" principle of IHL and its influence on the creation of this branch of international law, see Robert Kolb, "La nécessité militaire dans le droit des conflits armés – essai de clarification conceptuelle", in *La nécessité en droit international: Colloque de la Société française de droit international*, Paris, Pedone, 2007, pp. 157–158. For an overview of the codifying power of the principle of military necessity on the law of armed conflict between 1863 and 1954, see Etienne Henry, *Le principe de nécessité militaire: Histoire et actualité d'une norme fondamentale du droit international humanitaire*, Paris, Pedone, 2016, pp. 225–270.

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it is not explicitly mentioned. Its nature as a general principle of IHL also explains why certain exceptions are accepted, such as those involving the parties' consent to asymmetrical rules. This further allows the principle to maintain its relevance even when some rules do not adhere strictly to symmetry of substance.[98]

That being said, it is submitted that the principle differs from the principles of military necessity and humanity in some respects. Each rule of IHL is indeed presented as balancing the principle of military necessity on one hand and the principle of humanity on the other;[99] these principles serve as indicators that can be adjusted to align each rule of IHL with military necessity and humanitarian imperatives. In contrast, the principle of equality is not as diffuse and is more "binary" in nature. The (a)symmetrical nature of IHL rules immediately informs us about their compliance; a rule is either symmetrical or it is not.

The principle of equality, therefore, informs not so much the content of each rule but rather the form it must take to be effective and to fit into the architecture of this branch of law. It underscores the fundamental values of IHL, which aim to regulate violence between parties to an armed conflict, and specifies that this objective can only be achieved if the condition of symmetry is met. Thus, the principle has both a narrow and broad scope: narrow because it is concerned only with the symmetrical nature of the rules, and broad because it underlines the basic elements of every IHL rule, ensuring that they maintain a realistic character. For these reasons, this paper considers that the principle of equality fulfils a constitutional function within IHL, albeit in a manner distinct from the principles of humanity and military necessity.

In the author's view, like other general principles of IHL, the principle understood as a symmetry of substance also serves an interpretative function. It allows IHL standards to be interpreted as applying symmetrically to each party. The interpretative value of the principle enables the rendering of IHL rules as symmetrical, even if they are not explicitly formulated as such from the outset. As previously mentioned, general principles of IHL inform the entire body of IHL. Therefore, it is crucial to employ the principle of equality to clarify the content of specific rules and ensure the coherence of this branch of international law.[100]

Concrete effects of the principle in NIACs

As discussed in the previous section, the concrete effects of the constitutive function of the principle are few. They are however omnipresent in IHL, as almost every rule of IHL applicable in NIACs has been drafted with an identical content for State and non-State parties to the conflict.

98 For example, Rules 141 and 143 of the ICRC Customary Law Study, above note 47.

99 See, for example, Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, p. 798; Nils Melzer, "Targeted Killing or Less Harmful Means? Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity", *Yearbook of International Humanitarian Law*, Vol. 9, 2006, p. 100.

100 M. Sassòli, above note 45, p. 57.

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Academic literature has already recognized the interpretative function of the principle,[101] and case law has applied it in various situations. A notable example is the interpretation provided by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Čelebići* case, which clarified the definition of torture in IHL.[102] In this case, the ICTY incorporated into IHL the definition of torture provided for in the 1984 Convention against Torture;[103] however, this definition only applies to States.[104] Consistent with the principle, the Tribunal therefore expanded its scope to include armed groups.[105] On the same line, some authors suggest different other uses of the interpretative function of the principle. For instance, it has been advocated that, on the basis of the principle, UN Security Council resolutions related to IHL obligations should address both armed groups and States.[106] Additionally, it has been argued, again based on the principle, that if the concept of reprisals were to be applied in NIACs for States, it should also apply to armed groups.[107] Similarly, in the context of developing new standards for NIACs, academic literature has argued that if a right to detain is established, it should apply to both States and armed groups.[108]

Finally, some critics have also used the interpretative virtues of the principle to challenge the asymmetrical understanding of the "nexus" applied to the acts of armed groups controlling a territory.[109] Indeed, today's interpretation of the nexus requirement implies that IHL applies to *all* acts of armed groups exercising authority over a territory (broad interpretation of the nexus). In contrast, it only applies IHL to acts of States exercising authority over a territory that are *sufficiently linked* to the context of armed conflict (restrictive interpretation of the nexus). The

101 Ezequiel Heffes, Marcos D. Kotlik and Brian E. Frenkel, "Addressing Armed Opposition Groups through Security Council Resolutions: A New Paradigm?", *Max Planck Yearbook of United Nations Law*, Vol. 18, 2014, pp. 61–62.

102 ICTY, *Čelebići* (*Prosecutor v. Mucić et al.)*, Case No. IT-96-21-T, Judgment (Trial chamber), 16 November 1998, para. 473.

103 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. 1.

104 The definition found in this convention provides that only "a public official or other person acting in an official capacity" or at a public official's instigation or with his express or tacit consent can be the perpetrator of an act of torture.

105 J. Somer, above note 26, p. 664. See also, on the imposition of the symmetrical nature of the prohibition of torture for States and armed groups, Robert Cryer, "The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY", *Journal of Conflict and Security Law*, Vol. 14, No. 3, 2010, pp. 522–523.

106 E. Heffes, M. D. Kotlik and B. E. Frenkel, above note 101, p. 63.

107 Jérôme De Hemptinne, "Prohibition of Reprisals", in A. Clapham, P. Gaeta, and M. Sassòli (eds), above note 91, p. 590.

108 See Andrew Clapham, "Detention by Armed Groups under International Law", *International Law Studies*, Vol. 93, No. 1, 2017, pp. 2, 6, 8; A. Quintin, above note 39, pp. 201, 202, 204; E. Heffes, above note 32, p. 13; F. Mégret, above note 26, p. 175; M. Sassòli, above note 45, pp. 649–650.

109 Alessandra Spadaro, "Rebel Rulers and Rules for Rebels: Rebel Governance and International Law", in K. Fortin and E. Heffes (eds), above note 38, pp. 178–184; Elvina Pothelet, "Life in Rebel Territory: Is Everything War?", *Armed Groups and International Law*, 20 May 2020, available at: https://tinyurl.com/ye28ebxf; Katharine Fortin, "Al Hassan Symposium – Rebel Governance under the Spotlight: The ICC Al Hassan Case", *Articles of War*, 25 July 2023, available at: https://tinyurl.com/3aen9jc7; William A. Schabas, "Al Mahdi Has Been Convicted of a Crime He Did Not Commit", *Case Western Reserve Journal of International Law*, Vol. 49, No. 1, 2017, p. 98.

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International Criminal Court (ICC) has already issued several decisions based on a broad understanding of the nexus for armed groups, such as in the *Al Mahdi*[110] and *Al Hassan* cases.[111] The asymmetrical understanding of the nexus requirement for States and armed groups has also been endorsed by the ICRC in 2019.[112] The rationale behind the usual asymmetric interpretation of the nexus is commendable, as it aims to enhance the protection of individuals by prioritizing human rights under State control and applying IHL under armed group control – the latter not being bound by human rights law.[113] However, this asymmetric interpretation of IHL not only contravenes the principle but also has tangible consequences for armed groups. Acts of territorial management by armed groups are susceptible to being qualified as war crimes (if applicable), whereas the same acts resulting from a State's action may not necessarily be qualified as such. The present author does not consider persuasive the argument according to which "the different ways in which the victim is affected by the armed conflict [in government-held territory or in armed group-held territory]"[114] justify an asymmetrical understanding of the nexus. This argument amounts, *in fine*, to considering acts of armed groups as inherently linked to the armed conflict, while this would not necessarily be the case for States. To adhere to the principle, a symmetrical understanding of the nexus is advocated in the academic literature in order to ensure that the same rules apply to both States and armed groups.[115]

110 The *Al Mahdi* case concerned the destruction of several mosques and mausoleums in Timbuktu, which was under the control of the armed group that carried out the destruction. The Court considered that the link with the conflict was established by the simple control of the rebels in the city. ICC, *Situation in the Republic of Mali (Prosecutor v. Al Mahdi)*, ICC-01/12-01/15, Judgment and Sentence (Trial Chamber VIII), 27 September 2016, paras 18, 49, 51; A. Spadaro, above note 109, pp. 183–184; W. A. Schabas, above note 109, pp. 96–98.

111 In the *Al Hassan* case, a member of the "Islamic police", responsible for enforcing Sharia law in the territory controlled by the armed group, was prosecuted for committing a serious violation of common Article 3. The Court considered that the link with the conflict was established by the mere control of the armed group over the territory. ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Confirmation of Charges (Pre-Trial Chamber), 13 November 2019, para. 415; ICC, *Al Hassan*, ICC-01/12-01/18, Judgment (Trial Chamber), 26 June 2024, para. 1271; A. Spadaro, above note 109, pp. 182–183.

112 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, Geneva, 2019, p. 53.

113 The traditional position is indeed that human rights do not apply to armed groups. See, for example, A. Quintin, above note 39, pp. 245–246; Jann K. Kleffner, "Human Rights and International Humanitarian Law", in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, 2nd ed., Oxford University Press, Oxford, 2015, p. 52; T. Rodenhäuser, above note 43, pp. 993–994, 1013.

114 T. Rodenhäuser, above note 43, p. 1008.

115 See A. Spadaro, above note 109, p. 184; K. Fortin, above note 109. For example, it is proposed that the nexus be recognized for acts that have been committed "to pursue the aims of the conflict or, alternatively, … with a view to somehow contributing to attaining the ultimate goals of a military campaign or, at a minimum, in unison with the military campaign". See also Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 78. It seems obvious that not all acts of territorial administration carried out by armed groups can be linked to the armed conflict, particularly those which regulate daily life. E. Pothelet, above note 109; E. Heffes, above note 6, pp. 93–97; Katharine Fortin, "The Application of Human Rights Law to Everyday Civilian Life under Rebel Control", *Netherlands International Law Review*, Vol. 63, No. 2, 2016, p. 179; Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford and New York, 2018, p. 119.

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The constitutional and interpretative functions of the principle have, in the author's view, a second major effect. This becomes relevant when a rule of IHL applicable in an IAC is transposed to a NIAC. The principle underscores that such a rule should apply to both State and non-State parties, which may necessitate modifications to its content.[116] Consequently, the rule in a NIAC might differ from its counterpart in an IAC but remain symmetrical for each party to the conflict. Indeed, rules designed for States may not be suitable for armed groups; for example, the transposition of the responsibility of hierarchical superiors by the ICTY in 2003[117] has been criticized for lacking realism. This issue has been considered through the lens of the principle.[118] Leaders of armed groups often lack resources comparable to those of a State and may struggle to hold their members accountable for serious violations of IHL – in particular, they may be unable to adequately repress such abuses according to the standards prescribed by international law.[119] Notably, the 2003 ICTY decision concerned only State troops engaged in a NIAC. Nevertheless, it is proposed that after transposition to a NIAC, this rule should also apply to armed groups, as an effect of the principle. Therefore, it is submitted that the principle can modulate the rules of IACs transposed to NIACs. Given that rules intended for States must also be capable of being respected by armed groups, their content or interpretation will need to be adapted to consider the contexts and challenges faced by armed groups, which often do not have the same material resources as States. Failing to do so risks undermining the credibility of IHL by creating unrealistic expectations.[120]

In addition to its two main functions, the principle has been interpreted in ways that this author does not believe it warrants. For instance, it is unlikely that the principle is relevant to the legal mechanisms used to establish the binding force of IHL on armed groups, so its application in a discussion favouring one theory over another on this topic would be inappropriate.[121] The same applies to

116 Again, as it partly reflects the state of current IHL, this claim may be understood as following the *lex lata*. However, as it has not been addressed in previous academic debate, and is not verified in every instance of IHL rules being transposed from IACs to NIACs, it may also constitute a *de lege ferenda* allegation. For an extensive analysis of the modifications of IHL rules transposed from IACs to NIACs that the principle warrants, see P. Jacques, above note 22, pp. 149–151, 172–179.

117 ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Appeals Chamber), 16 July 2003, paras 11–31.

118 J. Somer, above note 26, p. 669; M. Sassòli, above note 6, p. 16.

119 On this topic, see Marco Sassòli and Julia Grignon, "Les limites du droit international pénal et de la justice pénale internationale dans la mise en œuvre du droit international humanitaire", in Abdelwahab Blad and Paul Tavernier (eds), *Le droit international humanitaire face aux défis du XXIe siècle*, Bruylant, Brussels, 2012, pp. 147–148. See also M. Sassòli, above note 6, p. 16.

120 M. Sassòli and J. Grignon, above note 119. See also M. Sassòli, above note 6, p. 15; M. Sassòli, above note 43, p. 79; M. Sassòli and Y. Shany, above note 91, p. 124. This argument is reiterated more succinctly by Laura M. Olson, who writes that "IHL can only apply equally to parties to a non-international armed conflict if it recognizes the practical differences between the State and the non-State actor". L. M. Olson, above note 6, p. 452.

121 For a use of the principle in support of the theory of "consent", see E. Heffes, M. D. Kotlik and B. E. Frenkel, above note 101, pp. 58–60, 66. For a use of the principle in support of other theories, see M. D. Kotlik, above note 44, pp. 2, 17, 25. For a use of the principle in rejection of other theories, see Ezequiel Heffes, "Generating Respect for International Humanitarian Law: The Establishment of Courts by Organized

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arguments using the principle in the context of creating IHL. Some argue that the source of rights and obligations must be identical for different parties in a NIAC;[122] this perspective suggests that armed groups should have a role in the creation of IHL applicable in NIACs, potentially allowing them to participate in the development of customary IHL,[123] which is not accepted in the current state of international law.[124] In other words, it is proposed that the principle, which ensures the symmetrical nature of IHL rules, should also dictate a corresponding mode of production for this body of law, equivalent for States and armed groups. This argument is compelling, and the present author acknowledges that involving armed groups in developing rules applicable to them aligns with the principle's goal of better IHL compliance, even though States would never accept this solution. However, nothing in this author's research suggests that the principle extends to modifying the secondary rules of international law concerning its sources in order to enable armed groups to create customary law alongside States.[125] In this author's view, the importance of the symmetrical nature of IHL rules does not necessarily imply that their mode of creation also benefits from symmetry.

Conclusion

In this research paper, an attempt was made to demonstrate that the principle of equality of belligerents extends beyond merely ensuring an equality of application of the rules of IHL against an element of discrimination: the "symmetry of application" component of the principle. It was argued that the principle also encompasses a second notion: "symmetry of substance". This latter concept requires that IHL rules be symmetrical for each party to the conflict. Furthermore, it was proposed that in NIACs, the principle should be primarily understood in terms of symmetry of substance, as there is no principle of sovereign equality guaranteeing that applicable rules in a conflict will be symmetrical. The aim is to ensure that armed groups are subject to rules identical to those of States, thereby creating the minimum conditions necessary for compliance with IHL by all parties to the conflict. No belligerent

Non-State Armed Groups in Light of the Principle of Equality of Belligerents", *Yearbook of International Humanitarian Law*, Vol. 18, 2015, pp. 187, 197; E. Heffes, M. D. Kotlik and B. E. Frenkel, above note 101, p. 61.

122 E. Heffes, above note 121, pp. 187–188, 197; Ezequiel Heffes and Marcos D. Kotlik, "Special Agreements as a Means of Enhancing Compliance with IHL in Non-International Armed Conflicts: An Inquiry into the Governing Legal Regime", *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014, p. 1202; E. Heffes, M. D. Kotlik and B. E. Frenkel, above note 101, p. 58.

123 E. Heffes, above note 121, pp. 187–188; E. Heffes, M. D. Kotlik and B. E. Frenkel, above note 101, pp. 59–60.

124 Only the practice of States is considered as relevant for the creation of customary norms of international law; the practice of armed groups is not relevant in this regard. See, for example, IRC Customary Law Study, above note 47, p. xlii; D. Murray, above note 7, pp. 83–89; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford and New York, 2017, pp. 324–325.

125 For an example of rejecting the use of the principle to justify the creation of customary rules by armed groups, see M. Gavrilova, above note 27, p. 43; International Law Commission, *Identification of Customary International Law: Text of the Draft Conclusions as Adopted by the Drafting Committee on Second Reading*, UN Doc. A/CN.4/L.908, 2018, Conclusion 4, para. 3.

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would willingly accept being bound by more stringent rules than its opponent unless it consented to do so.

This paper has also posited that the principle constitutes a general principle of IHL of "constitutional" significance. The principle informs the nature of IHL as a legal framework applicable to armed conflict, and can only achieve effectiveness by maintaining a symmetrical character. It is reflected in almost every rule of IHL and is recognized as a cornerstone of this branch of international law. Additionally, it allows for the interpretation of IHL rules in a way that ensures symmetrical rules for each party, which may lead to modifications in their content when transposed from IACs to NIACs in order to address the material realities of armed groups. The analysis of the principle in NIACs is a compelling subject that warrants further exploration, particularly regarding the principle's interaction with domestic law and international human rights law. This author hopes to have provided a sufficiently insightful examination of this aspect of IHL, which, to the best of the author's knowledge, has not previously received an in-depth analysis.

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