



The *Al Hassan* Judgment: ICC's First take on the War Crime of Passing of Sentences by Irregular Courts under Article 8(3)(c)(iv) of Rome Statute

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Abstract

The *Al Hassan* case is the first case before the ICC to include charges under Article 8(2)(c)(iv) of the Rome Statute. As such, there is no relevant jurisprudence concerning its scope and application which Trial Chamber X could have relied on. In those circumstances, the judgment is likely to have a considerable impact on the development of the subsequent jurisprudence in this area. Article 8(2)(c)(iv) lies at the crossroads of International Criminal Law, International Humanitarian Law, International Human Rights Law and Public International Law; the provision's interpretation is problematic also because it is put in very generic terms and there is no international jurisprudence concerning its meaning. The judgment clarifies some areas of Article 8(2)(c)(iv), yet leaves others unanswered, especially when it comes to the selection of the appropriate source of legal rules for the determining of the parameters of that provision.

Keywords

Al-Hassan – ICC – ICL – precedent

1 Introduction

On 26 June 2024 Trial Chamber X of the International Criminal Court (hereinafter the ICC) issued its judgment in the case of *Al Hassan*¹ finding the defendant guilty of torture (as a crime against humanity² and a war crime³) and other inhumane acts (as a crime against humanity⁴), cruel treatment,⁵ outrages upon personal dignity⁶ and mutilation⁷ (all as war crimes) as well as of the crime against humanity of persecution on religious grounds.⁸ On top of that, the defendant was also found guilty of the war crime of passing of sentences without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable⁹ under Article 8(2)(c)(iv) of the Rome Statute. On the other hand, Al Hassan was found not guilty of the war crime of intentionally directing attacks against protected objects,¹⁰ the crime against humanity of other inhumane acts in the form of forced marriage¹¹ as well as of sexual slavery (as a crime against humanity¹² and a war crime¹³) and rape (as a crime against humanity¹⁴ and a war crime¹⁵).

The *Al Hassan* case is the first case before the ICC to include charges under Article 8(2)(c)(iv) of the Rome Statute.¹⁶ In fact, other than a couple of cases before the Extraordinary Chambers in the Courts of Cambodia (hereinafter the ECCC), in the context of international armed conflict (hereinafter IAC),¹⁷

1 Judgment, *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (ICC-01/12-01/18), Trial Chamber, 26 June 2024.

2 Count 1 under Rome Statute, Article 7(1)(f).

3 Count 3 under Rome Statute, Article 8(2)(c)(i).

4 Count 2 under Rome Statute, Article 7(1)(k).

5 Count 4 under Rome Statute, Article 8(2)(c)(i).

6 Count 5 under Rome Statute, Article 8(2)(c)(ii).

7 Count 14 under Rome Statute, Article 8(2)(c)(i).

8 Count 13 under Rome Statute, Article 7(1)(h).

9 Count 6 under Rome Statute, Article 8(2)(c)(iv).

10 Count 7 under Rome Statute, Article 8(2)(e)(iv).

11 Count 8 under Rome Statute, Article 7(1)(k).

12 Count 9 under Rome Statute, Article 7(1)(g).

13 Count 10 under Rome Statute, Article 8(2)(e)(vi).

14 Count 11 under Rome Statute, Article 7(1)(g).

15 Count 12 under Rome Statute, Article 8(2)(e)(vi).

16 D. Marchesi, 'The War Crimes of Denying Judicial Guarantees and the Uncertainties Surrounding Their Material Elements', 54(2) *Israel Law Review* (2021) 174–204, at p. 180.

17 Judgment, *Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/TC), ECCC, 26 July 2010; Judgement, *Nuon Chea and Khieu Samphan* (002/19-09-2007/ECCC/TC), ECCC, 16 November 2018.

and one before the Swedish domestic courts,¹⁸ there has not been any criminal trial which would involve an equivalent to the charges under Article 8(2)(c)(iv) of the Rome Statute.¹⁹ As such, there is very little relevant jurisprudence, international or domestic, concerning the scope of Article 8(2)(c)(iv) of the Rome Statute which Trial Chamber X could have relied on. This is especially important given that Article 8(2)(c)(iv) of the Rome Statute contains vague phrases such as the ‘regularly constituted court’ and ‘judicial guarantees which are generally recognised as indispensable’ which naturally require a specification in the course of interpretation and the subsequent application to the facts of the case. Now the ruling in the *Al Hassan* case has finally shed some light on Article 8(2)(c)(iv) of the Rome Statute; however, many questions still remain unanswered.

In its judgment, Trial Chamber X²⁰ mainly referred to the Elements of Crimes and, based on that source, accepted three alternative possibilities for violating Article 8(2)(c)(iv) of the Rome Statute envisaged therein: (a) ‘there was no previous judgement pronounced by a court, or [(b)] the court that rendered judgement was not “regularly constituted”, that is, it did not afford the essential guarantees of independence and impartiality, or [(c)] the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law.’²¹ Each of these alternatives was briefly discussed by the Court; at the same time, the ICC focused only on the ‘passing of sentence’ element of Article 8(2)(c)(iv) of the Rome Statute and deliberately omitted the ‘execution’ aspect because it was not charged in the case before it.²²

At the outset of this part of the judgment, the ICC declared that ‘Article 8(2)(c)(iv) of the Statute derived from Common Article 3(1)(d) of the Four Geneva Conventions’ which led the Court to ‘refer to relevant rules on international humanitarian law in that regard.’²³ Having positioned itself in this framework, Trial Chamber X²⁴ first tackled the concept of a ‘sentence’ by reference to the International Committee of the Red Cross (ICRC) Commentary on the Third Geneva Convention.²⁵ It found that while ‘the use of force applied entirely

18 Judgment, *Omar Sakhanh Haisam Sakhanh* (B 3787- 16), Stockholm District Court, 16 February 2017; Judgment, *Omar Sakhanh Haisam Sakhanh* (2259-17), Svea Court of Appeal, 31 May 2017.

19 Marchesi, *supra* note 16, at p. 180.

20 *Al Hassan*, *supra* note 1, at pp. 571–72.

21 Elements of Crimes, at p. 34.

22 *Al Hassan*, *supra* note 1, at p. 572, ft. 3872.

23 *Ibid.*, at paras 1160–1161.

24 *Ibid.*, at paras 1162–1168.

25 ICRC, Commentary on the Third Geneva Convention relative to the Treatment of Prisoners of War, Article 3 (ICRC, 2020), at para. 712.

outside the framework of a criminal process and sentence would not satisfy the elements of Article 8(2)(c)(iv) of the Statute, a punitive process and the passing of sentences can take place outside of a courtroom and the use of physical force as a punishment imposed on a wrongdoer may suffice to fulfil the elements of this provision.²⁶ Furthermore, the Court confirmed that the provision ‘applies to sentences of varying severity, as it focuses on the lack of due process.’²⁷ Importantly, ‘not everyone can pass sentences and not all acts against persons who are not taking an active part in hostilities qualify as the passing of sentences’; instead, ‘for someone to commit this war crime, Common Article 3 of the Four Geneva Conventions must have been applicable to his or her conduct, at the relevant time’ and ‘the perpetrator who passes a sentence without previous judgment must have some form of authority, derived from his or her position or as a result of having taken (military) control over the area.’²⁸

However, the most important part of the ruling pertains to the issues of a ‘regularly constituted court’ and ‘judicial guarantees which are generally recognised as indispensable’ and their meaning under Article 8(2)(c)(iv) of the Rome Statute. In its judgment, Trial Chamber X dealt with both concepts; although it has managed to clarify this area to a certain extent, some questions seem to remain unanswered still. The purpose of this Article is to examine the construction of Article 8(2)(c)(iv) of the Rome Statute employed in the *Al Hassan* case as well as to address the gaps left by the judgment. In doing so, this Article aims to use various interpretative aides provided for under the Rome Statute itself as well as in public international law generally. Those aides, however, must be applied in a coherent manner, with a special attention paid to their interplay. As the *Al Hassan* case is the first one to include charges under Article 8(2)(c)(iv) of the Rome Statute, the judgment of Trial Chamber X in this case is likely to have a considerable impact upon the development of the subsequent jurisprudence in this area. This is especially important in light of the recent ‘Report on Preliminary Examination Activities’²⁹ published by the ICC Office of the Prosecutor (hereinafter the OTP) indicating that the war crimes of denying a fair trial might have been committed in the Palestine and Ukraine situations.³⁰

26 *Al Hassan*, *supra* note 1, at para. 1164.

27 *Ibid.*, at para. 1165.

28 *Ibid.*, at para. 1167.

29 ICC Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2020’, 2020 at paras 221 and 278.

30 Marchesi, *supra* note 16, at p. 181.

2 Interpretation

In its judgment in the *Al Hassan* case, the ICC appears to be struggling with the overall approach to Article 8(2)(c)(iv) of the Rome Statute. In the part of the judgment pertaining to the ‘guarantees of independence and impartiality’, the Court relies on legal instruments derived from both international humanitarian law (hereinafter IHL) and human rights law (hereinafter IHRL);³¹ on the other hand, in the part concerning ‘judicial guarantees generally recognized as indispensable under international law’, the ICC invoked only IHL sources.³² This is despite the fact that Article 21 of the Rome Statute allows for the references to both and there is no doubt that IHRL has plenty to say about the defendant’s procedural rights.³³ Even more strikingly, Trial Chamber X³⁴ seems to be reluctant to rely on any regional human rights law³⁵ even where it does use the body of IHRL. At the same time, no explanation is provided as to the distinction between international and regional human rights for the purposes of the ICC’s jurisprudence.

Such an explanation would be highly beneficial in the context of Article 8(2)(c)(iv) of the Rome Statute as the provision appears to exceed a pure body of IHL and IHRL could play an important role in its interpretation. This is because Article 8(2)(c)(iv) of the Rome Statute lies at the intersection of four different bodies of law:³⁶ international criminal law (hereinafter ICL) (*inter alia*, imposing personal criminal liability for war crimes), IHL (*inter alia*, regulating the behaviour of parties to an armed conflict), IHRL (protecting individual rights) and public international law (*inter alia*, governing interpretation of international treaties). Accordingly, interpretation of Article 8(2)(c)(iv) of the Rome Statute entails an interplay of four separate areas of law whose norms are not in any hierarchical relationship to one another; the provision must reconcile separate, but equally applicable, norms derived from separate, but equally important, bodies of law.

As noted by Trial Chamber X,³⁷ Article 8(2)(c)(iv) of the Rome Statute indeed derives from Article 3 of the four Geneva Conventions 1949 (hereinafter

³¹ *Al Hassan*, *supra* note 1, at paras 1172–1173.

³² *Ibid.*, at para. 1176.

³³ *E.g.*, Article 14 ICCPR.

³⁴ *Al Hassan*, *supra* note 1, at paras 1177–1178.

³⁵ *E.g.*, ECHR, IACHR.

³⁶ *Cf.* J. Somer, ‘Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-international Armed Conflict’, 89(867) *International Review of the Red Cross* (2007) 655–690.

³⁷ *Al Hassan*, *supra* note 1, at paras 1160–1161.

Common Article 3), but ‘with the sole exception of the suppression of the reference to “civilized people” and the addition of “generally” instead.’³⁸ This replacement does not seem to carry any legal significance. It is generally accepted that the version contained in Article 8(2)(c)(iv) of the Rome Statute ‘is how it should be interpreted in the current international legal order.’³⁹ Accordingly, the wording of Article 8(2)(c)(iv) of the Rome Statute was also adopted by the Kosovo Law⁴⁰ on Specialist Chambers and Specialist Prosecutor’s Office.⁴¹ Additionally, Article 8(2)(c) of the Rome Statute sets two contextual requirements for the relevant crimes—there must be a nexus with a non-international armed conflict (hereinafter the NIAC) and the victims must have taken no active part in the hostilities.

The interpretation of Article 8(2)(c)(iv) of the Rome Statute is governed by several different legal instruments—Vienna Convention on the Law of Treaties 1969 (hereinafter the VCLT), Rome Statute, Elements of Crimes and *travaux préparatoires*. Each of those instruments contains one or more provisions applicable to Article 8(2)(c)(iv) of the Rome Statute insofar as its interpretation is concerned. Accordingly, interpretation of Article 8(2)(c)(iv) of the Rome Statute is governed by a total of six sets of provisions: (i) Articles 31 and 32 of the VCLT; (ii) Articles 21(1) and 21(3) of the Rome Statute; (iii) Article 9 of the Rome Statute; (iv) Article 22 of the Rome Statute; (v) the Elements of Crimes; as well as (vi) *travaux préparatoires*.

2.1 VCLT

The VCLT lies down the general rules of interpretation of international treaties, including the Rome Statute. According to Article 31(1) of the VCLT, ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. As such, at least three approaches to interpretation are permitted under the VCLT—literal, contextual and purposive.⁴² Naturally, each of those approaches is likely to lead to a different outcome.

38 K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, Cambridge, 2003) at p. 409.

39 P. Askary and K. Hosseinnejad, ‘Non-State Courts: Illegal or Conditional?: The Case of Da’esh Courts’, 10(2) *Journal of International Humanitarian Legal Studies* (2019) 240–264 at p. 255.

40 Article 14(1)(c)(iv) Law on Specialist Chambers and Specialist Prosecutor’s Office, Law No 05/L-053, 2005.

41 Marchesi, *supra* note 16, at p. 192.

42 Ch. Djefal, *An Interpreter’s Guide to Static and Evolutive Interpretations: Solving Intertemporal Problems According to the VCLT Evolutionary interpretation and international law* (Hart Publishing, Oxford, 2019) at p. 24.

In addition, Article 32 of the VCLT also permits the use of *travaux préparatoires*, at least as secondary to interpretation based on the autonomous meaning of a given provision.⁴³ This approach dates back to the early jurisprudence of the Permanent Court of International Justice⁴⁴ and was subsequently adopted by the International Court of Justice⁴⁵ (hereinafter the ICJ) shortly after its creation.⁴⁶ Under Article 32 of the VCLT, interpretation of a provision could only be based on *travaux préparatoires* once the general rules of interpretation under Article 31 of the VCLT have been applied and the use of such *travaux préparatoires* might be employed only for the purposes of confirming or determining the meaning of a given provision.⁴⁷ Accordingly, the confirmative limb of Article 32 of the VCLT allows for a consultation with *travaux préparatoires* in virtually all circumstances in order to confront the results of the application of interpretation rules laid down in Article 31 of the VCLT with the information contained in *travaux préparatoires*.⁴⁸ At the same time, the determinative limb of Article 32 of the VCLT allows for the consultation with *travaux préparatoires* only where the ordinary rules of interpretation 'leave the meaning ambiguous or obscure; or lead to a result which is manifestly absurd or unreasonable'.⁴⁹ Given the flexible concept of ambiguity, *travaux préparatoires* could be easily referred to under this limb of Article 32 of the VCLT as well.⁵⁰

2.2 Rome Statute

The Rome Statute itself contains a series of provisions which are designed to assist in its interpretation. Those relevant in the context of Article 8(2)(c)(iv) of the Rome Statute include Articles 9, 21 and 22 of the Rome Statute. Out of those, the most important one is Article 21 of the Rome Statute which governs applicable law and instructs the ICC to apply '(a) in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) failing that, general principles of law derived by the

43 O. Dörr, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, Cham, 2012) at p. 572.

44 S.S. Lotus case (*France v. Turkey*), 1927 PCIJ (ser. A) No. 10 at p. 16.

45 *Advisory Opinion Concerning Competence of the General Assembly for the Admission of a State to the U.N.*, ICJ Reports (1950) 5 at p. 8.

46 Dörr, *supra note* 43, at pp. 572–573.

47 *Ibid.*, at pp. 581–582.

48 *Ibid.*, at p. 583.

49 *Ibid.*, at p. 584.

50 *Ibid.*

Court from national laws of legal systems of the world’;⁵¹ at the same time, the provision makes clear that ‘the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.’⁵²

The structure of Article 21 of the Rome Statute suggests that while Article 21(1) of the Rome Statute lays down the hierarchy of legal sources, Article 21(3) of the Rome Statute ensures that whichever legal source is being used, it is interpreted consistently ‘with internationally recognized human rights.’⁵³ However, at the same time, while Article 21(1)(b) of the Rome Statute expressly refers to IHL⁵⁴ (which clearly includes the Geneva Conventions 1949 and their Additional Protocols 1977 (hereinafter AP)⁵⁵), it has also been interpreted by the ICC⁵⁶ to encompass IHRL instruments such as the International Covenant on Civil and Political Rights (hereinafter the ICCPR), European Convention on Human Rights (hereinafter the ECHR), American Convention on Human Rights (hereinafter the ACHR) and the Convention Against Torture (hereinafter the CAT).⁵⁷

When it comes to Article 21 of the Rome Statute, the ICC⁵⁸ has also indicated that Article 21 of the Rome Statute allows for the application of both binding⁵⁹ and non-binding⁶⁰ human rights law instruments.⁶¹ As such, to date,

51 Article 21(1) Rome Statute.

52 Article 21(3) Rome Statute.

53 E. Irving, ‘The Other Side of the Article 21 (3) Coin: Human Rights in the Rome Statute and the Limits of Article 21 (3), 32(4) *Leiden Journal of International Law* (2019) 837–850 at p. 838.

54 ‘the established principles of the international law of armed conflict’.

55 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) Pre-Trial Chamber, 15 June 2009 at para. 78, ft. 101, pp. 227–228, 317, ft. 389.

56 Decision reviewing the Registry’s decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, *Thomas Lubanga Dyilo*, (ICC-01/04-01/06) Trial Chamber, 30 August 2011, at para. 41; Redacted Decision on the request by DRC-DOL-WWWW-0019 for special protective measures relating to his asylum application, *Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber, 5 August 2011, at para. 60.

57 W.A. Schabas, *The International Criminal Court (2nd Edition): A Commentary on the Rome Statute* (Oxford University Press, Oxford, 2016) at p. 520.

58 Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant Article 93(7) of the Statute, *Mathieu Ngudjolo Chui* (ICC-01/04-02/12) Appeals Chamber, 20 January 2014 at para. 24, fts. 28–29.

59 *E.g.*, ICCPR.

60 *E.g.*, Universal Declaration of Human Rights.

61 Schabas, *supra* note 57, at p. 530.

various IHRL instruments have been invoked by the ICC in order to boost the rights of the accused prescribed by Article 67 of the Rome Statute;⁶² to order procedural remedies which are not expressly mentioned in the Rome Statute (*e.g.* stay for abuse of process,⁶³ *habeas corpus*⁶⁴); to expand the protection and participation of victims;⁶⁵ and such.⁶⁶

2.3 *Elements of Crimes*

The Elements of Crimes are heavily influenced by the contents of Article 6 of AP II.⁶⁷ Specifically in regards of Article 8(2)(c)(iv) of the Rome Statute, the Elements of Crimes provide, *inter alia*, that, as part of the crime in question, ‘4. There was no previous judgement pronounced by a court, or the court that rendered judgement was not ‘regularly constituted’, that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law.’⁶⁸ Under Article 21(1)

62 Decision on the ‘Requête urgente aux fins de fixation d’une nouvelle date d’audience portant sur le réexamen des conditions de maintien en détention, *Laurent Gbagbo* (ICC-02/11-01/11) Pre-Trial Chamber, 8 October 2014 at para. 10; Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled ‘Decision on ‘Mr Bemba’s Request for provisional release’, *Jean-Pierre Bemba Gombo et al.* (ICC-01/05-01/13) Appeals Chamber, 29 May 2015 at para. 1; Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on Application for Interim Release’, *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) Appeals Chamber, 16 December 2008 at paras 28–34.

63 Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, *Thomas Lubanga Dyilo* (ICC-01/04-01/06) Appeals Chamber, 14 December 2006 at paras 37 & 39.

64 Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on Application for Interim Release’, *Jean-Pierre Bemba Gombo*, (ICC-01/05-01/08) Appeals Chamber, 16 December 2008 at para. 31.

65 Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, *Thomas Lubanga Dyilo* (ICC-01/04-01/06) Trial Chamber, 13 June 2008 at para. 58; Decision on the applications by 7 victims to participate in the proceedings, *Thomas Lubanga Dyilo* (ICC-01/04-01/06) Trial Chamber, 10 July 2009, at para. 24; Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo*, (ICC-01/04) Pre-Trial Chamber, 17 January 2006; Fourth Decision on Victims’ Participation, *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) Pre-Trial Chamber, 12 December 2008 at para. 16.

66 Schabas, *supra* note 57, at p. 532.

67 Dörmann, *supra* note 38, at p. 408.

68 Elements of Crimes, at p. 34.

of the Rome Statute, the ICC is to apply the Elements of Crimes, 'in the first place', next to the Rome Statute itself and the Rules of Procedure and Evidence. The Elements of Crimes are to 'assist the Court in the interpretation and application of Articles 6, 7 and 8, consistent with the Statute'.⁶⁹ Article 9 of the Rome Statute itself expressly allows for the use of the Elements of Crimes when interpreting offences listed in, *inter alia*, Article 8 of the Rome Statute. In the *Al Bashir* case,⁷⁰ the Pre-trial Chamber (hereinafter the PTC) indicated that the Elements of Crimes were binding on the ICC, at least 'unless the competent Chamber finds an irreconcilable contradiction between these documents on the one hand, and the Statute on the other hand'.⁷¹ However, some scholars claim that the Elements of Crimes should be regarded as merely persuasive rather than strictly binding.⁷²

2.4 *Travaux Préparatoires*

According to the *travaux préparatoires* of the Rome Statute, relevant for interpretation under Article 32 of the VCLT,⁷³ the drafting of Article 8(2)(c)(iv) of the Rome Statute was heavily influenced by Article 6(2) of AP II.⁷⁴ As such, the term 'regularly constituted court', borrowed from Common Article 3, was defined as a court which was both independent and impartial.⁷⁵ In the process of drafting the Elements of Crimes, Costa Rica, Switzerland and Hungary proposed a list of judicial guarantees to be included in Article 8(2)(c)(iv) of the Rome Statute which was ultimately rejected based on three considerations: (a) a list of expressly-stated judicial guarantees implied the non-importance of others (even where non-exhaustive);⁷⁶ (b) a violation of one rights should not lead to a conviction of a war crime;⁷⁷ and (c) a list of judicial guarantees drafted for the purposes of Article 8(2)(c)(iv) would differ from the rights guaranteed to ICC defendants.⁷⁸ Accordingly, the list proposed by Costa Rica,

69 *Ibid.*, at p. 1.

70 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Public Redacted Version)', ICC-02/05-01/09-3, 4 March 2009, paras 128–131.

71 G. Hochmayr, 'Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC statute', 12(4) *Journal of International Criminal Justice* (2014) 655–679 at p. 657.

72 M. Klamburg, 'The Legality of Rebel Courts during Non-international Armed Conflicts', 16(2) *Journal of International Criminal Justice* (2018) 235–263 at p. 250.

73 See above.

74 Dörmann, *supra* note 38, at p. 408.

75 *Ibid.*, at pp. 408–9.

76 *E.g.* Proposal submitted by Colombia, Doc. No. PCNICC/1999/WGEC/DP.15.

77 See Elements of Crimes, at p. 34, ft. 59.

78 S. Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?', 7(3) *Journal of International Criminal Justice* (2009) 489–513 at pp. 504–505.

Switzerland and Hungary was rejected for reasons other than the belief that such rights would exceed what should be considered ‘judicial guarantees which are generally recognized as indispensable’,⁷⁹ which is an indication as to its perceived meaning at the time of a drafting and a subsequent ratification process.

3 Elements of Article 8(2)(c)(iv)

3.1 *Court Constitution*

In its judgement, the ICC analysed the concept of a ‘regularly constituted court’ under Article 8(2)(c)(iv) of the Rome Statute which, in accordance with the Elements of Crimes,⁸⁰ was to be understood as devoid of ‘essential guarantees of independence and impartiality’ which ‘implies that the focus is broader than a consideration of the manner in which the court was set up and should involve a broader assessment as to the overall ability of the court to conduct a fair trial’.⁸¹ Trial Chamber X clarified that a violation of Article 8(2)(c)(iv) of the Rome Statute occurred as soon as there was a ‘passing of sentences pursuant to a judgment pronounced by a court lacking the “essential guarantees of independence and impartiality”’ because ‘the lack of independence and impartiality must be seen as rendering any judgment by the court invalid, resulting in a situation comparable to there having been no judgment at all’.⁸² In the absence of any definition of ‘independence and impartiality’, the Court⁸³ invoked Article 21 of the Rome Statute which allowed for references to ‘customary and conventional international law regardless of whether any lacuna exists, to ensure an interpretation of Article 8 of the Statute that is fully consistent with international law’. This enabled the ICC⁸⁴ to rely on a number of instruments, including the ICRC Commentary on the Third Geneva Convention, the ICCPR⁸⁵ as well as the United Nations (hereinafter the UN) Human Rights Committee General Comments on Article 14(1) of the ICCPR.⁸⁶

79 *Ibid.*

80 Elements of Crimes, at p. 34.

81 *Al Hassan, supra* note 1, at para. 1169.

82 *Ibid.*, para. 1170.

83 *Ibid.*, para. 1171.

84 *Ibid.*, paras 1172–1173.

85 Article 14 ICCPR.

86 UN Human Rights Committee General Comments on Article 14(1) of the ICCPR (2007) CCPR/C/GC/32.

Accordingly, in this context, Trial Chamber X did not hesitate to refer to both IHL and IHRL as the sources for legal rules.

3.1.1 NSA s Powers

In its judgment, Trial Chamber X recognised the legal possibility of non-state actors (NSA s) to establish courts of law which, at least in theory, could fulfil the criteria set out in Article 8(2)(c)(iv) of the Rome Statute. Importantly, the Court⁸⁷ admitted that ‘a court established by a non-state actor may not be able to successfully comply with the same level of independence required of a State court’ and, as such, ‘reasonable flexibility should be applied in assessing non-state armed groups’ capacity to adhere to these standards’. This approach appears to adequately address the often-unique nature of NIAC s.

Common Article 3, on which Article 8(2)(c)(iv) of the Rome Statute is based,⁸⁸ expressly requires punishments issued by NSA s to emanate from courts of law. To that effect, Common Article 3 implies a legal power to establish courts of law as a precondition to its compliance.⁸⁹ This interpretation appears to be in line with the ‘object and purpose’ approach prescribed by Article 31 of the VCLT— if the object of Common Article 3 is to prevent summary executions,⁹⁰ it must imply a power to establish courts. Furthermore, the opposite interpretation would render Common Article 3 ineffective and, as such, would run contrary to the principle of effective interpretation of treaties.⁹¹ This position under IHL applies to Article 8(2)(c)(iv) of the Rome Statute by virtue of Article 21(1) of the Rome Statute.

This approach is generally accepted in scholarship. Sivakumaran argues, after the ICRC,⁹² that the intention behind Common Article 3 was to outlaw summary executions which, in turn, required the use of courts.⁹³ Since NIAC IHL binds all parties to a conflict, including NSA s, they also must be able to establish courts in order to comply with Common Article 3.⁹⁴ He further argues that this position could also be inferred from the application of the

87 *Al Hassan*, *supra* note 1, at para. 1173.

88 Dörmann, *supra* note 38, at p. 409.

89 Sivakumaran, *supra* note 78, at pp. 495–98.

90 J.S. Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958) at p. 39.

91 J. Willms, ‘Justice through Armed Groups’ Governance—An Oxymoron?’, *SFB-Governance Working Paper Series*, No. 40, October 2012 at p. 7, cited in J. Wahlberg, *Rebel Courts: the Legality of Courts Established by Non-state Actors in the Context of NIAC* (Stockholm University, Stockholm, 2017) at p. 43.

92 Pictet, *supra* note 90, at p. 39.

93 Sivakumaran, *supra* note 78, at p. 496.

94 *Ibid.*, at p. 496.

doctrine of command responsibility to NIACs which requires commanders of armed groups, including NSAs, to maintain a discipline among their troops for the purposes of compliance with IHL.⁹⁵ At the same time, the maintenance of such discipline requires the possibility of imposing punishments which, in turn, must be administered through a system of courts.⁹⁶ According to Sivakumaran, 'IHL may not explicitly create a right for armed opposition groups to set up courts; neither does it prohibit their establishment. Rather, it regulates their creation and operation should armed opposition groups decide to convene them'.⁹⁷ Marchesi seems to be in agreement with Sivakumaran that IHL generally does not authorise NSAs to establish their own court, but it also does not prohibit it.⁹⁸ She also bases her opinion on the fact that a system of courts is necessary for NSAs to maintain discipline which, in turn, is required under IHL.⁹⁹

Askary and Hosseinnejad point out that while courts established by NSAs are necessarily illegal under domestic law of the country in which a NIAC is taking place, their legality under international law is a different issue altogether.¹⁰⁰ Indeed, the UN Security Council appears to have implicitly recognised the power of NSAs to establish their own courts, at least in the context of punishing those responsible for violations of laws of war, in its 2003 Resolution on the situation of Liberia¹⁰¹ in which it called on 'all parties' to the conflict to 'cease all human rights violations and atrocities' and 'bring to justice those responsible'.¹⁰² More recently, in relation to Libya, the UN Human Rights Council¹⁰³ called on both the Libyan Government and the National Transitional Council to 'conduct exhaustive, impartial and public investigations into all allegations of IHRL and IHL violations, and in particular to investigate with a view to prosecuting cases of extrajudicial, summary or arbitrary executions and torture with full respect of judicial guarantees' which could also be taken to implicitly recognise the power of NSAs to establish their own courts.¹⁰⁴

95 *Ibid.*, at p. 497.

96 *Ibid.*, at p. 498.

97 *Ibid.*

98 Marchesi, *supra* note 16, at p. 195.

99 *Ibid.*

100 Askary and Hosseinnejad, *supra* note 39, at p. 245.

101 UN Security Council Resolution 1509, UN Doc S/RES/1509 (19 September 2003) at para. 10.

102 Askary and Hosseinnejad, *supra* note 39, at p. 244.

103 UN Human Rights Council 'Report of the International Commission of Inquiry on Libya', UN Doc A/HRC/17/44 (1 June 2011), at pp. 268–269.

104 Askary and Hosseinnejad, *supra* note 39, at p. 244.

Finally, the power of NSA s to establish courts has been recognised in the context of domestic application of IHL. In the Swedish case of *Prosecutor v. Omar Sakhanh Haisam Sakhanh*,¹⁰⁵ where a former member of an Islamic rebel group fighting against the Syrian Government was convicted under the Swedish penal code for executing prisoners following an illegitimate trial, the Swedish District Court¹⁰⁶ found that there was a NIAC in Syria at the time and, therefore, Common Article 3 applied as a matter of treaty law and AP II applied as a matter of customary international law.¹⁰⁷ The District Court¹⁰⁸ held that Common Article 3 implied the power of NSA s to establish courts for the purposes of upholding discipline among their members and administer (both new and old) laws.¹⁰⁹ This position is also espoused by Klamberg who happened to have testified before the Swedish District Court in that case.¹¹⁰ Accordingly, it seems that the approach taken by Trial Chamber X, whereby it allowed for the possibility of courts set up by NSA s in NIAC s to qualify as ‘regularly constituted’ for the purposes of Article 8(2)(c)(iv) of the Rome Statute, is justified and likely to be accepted with satisfaction by legal scholars across the spectrum.

3.1.2 Independence and Impartiality

Having accepted the possibility of legal NSA s’ courts, Trial Chamber X moved to define the concept of ‘essential guarantees of independence and impartiality’. In doing so, the Court relied on legal sources drawn from both IHL and IHRL. In terms of independence, this was defined as being shielded from external interference emanating from the executive and legislative branches of the government¹¹¹ whose competences must be clearly separated;¹¹² in terms of impartiality, the ICC¹¹³ distinguished between objective and subjective impartiality,¹¹⁴ with judges needed to be free of any personal bias against the defendant, of presumption of guilt or of favouritism towards any party to the proceedings¹¹⁵ (subjective impartiality) as well as to appear impartial to

¹⁰⁵ *Omar Sakhanh*, *supra* note 18.

¹⁰⁶ *Ibid.*, para. 13.

¹⁰⁷ Klamberg, *supra* note 72, at p. 258.

¹⁰⁸ *Omar Sakhanh*, *supra* note, paras 29–31.

¹⁰⁹ Klamberg, *supra* note 72, at pp. 256–257.

¹¹⁰ *Ibid.*

¹¹¹ ICRC, Commentary on the Third Geneva Convention, *supra* note 25, at § 716; UN Human Rights Committee General Comment No. 32 on Article 14, at para. 19.

¹¹² UN Human Rights Committee General Comment No. 32 on Article 14, *supra* note 111, at para. 19.

¹¹³ *Al Hassan*, *supra* note 1, at paras 1172–1174.

¹¹⁴ ICRC, Commentary on the Third Geneva Convention, *supra* note 25, at para. 717.

¹¹⁵ UN Human Rights Committee General Comment No. 32 on Article 14, *supra* note 111, at para. 21; ICRC, Commentary on the Third Geneva Convention, *supra* note 25, at para. 717.

reasonable observers¹¹⁶ (objective impartiality). At the same time, the Court¹¹⁷ clarified that a lack of either independence or impartiality meant that ‘the inquiry need not, in principle, go further, even if a violation of other judicial guarantees is alleged’, despite footnote 59 in the Elements of Crimes¹¹⁸ which suggested a cumulative approach to judicial safeguards.

The position that the concept of a ‘regularly constituted court’ under Article 8(2)(c)(iv) of the Rome Statute refers to a court established by a NSA which fulfils the requirements of independence and impartiality has a very strong support in Article 21(1) of the Rome Statute. This is because, in accordance with Article 21(1) of the Rome Statute, the meaning of the phrase ‘regularly constituted court’ should be informed, in the first place, by the Elements of Crimes. Indeed, according to the Elements of Crimes, a court which is not ‘regularly constituted’ is defined as the court which ‘did not afford the essential guarantees of independence and impartiality’.¹¹⁹

This reading of Article 8(2)(c)(iv) of the Rome Statute closes the door on the alternative, *i.e.* courts of law pre-dating the NSA taking-over, an interpretation which also finds some support in IHL. According to the ICRC,¹²⁰ the phrase ‘regularly constituted court’ was deleted from AP II in light of some experts claiming that ‘it was unlikely that a court could be “regularly constituted” under national law by an insurgent party’.¹²¹ Furthermore, according to a study conducted by the ICRC,¹²² a ‘regularly constituted court’ is one which ‘has been established and organized in accordance with the laws and procedures already in force in a country’.¹²³ Interestingly, the ICRC study was cited with approval by the US Supreme Court (hereinafter the SCOTUS) in the case of *Hamdan v. Rumsfeld*,¹²⁴ where the majority opinion held that under Common Article 3, a ‘regularly constituted court’ had to ‘be appointed or established in accordance with the appointing country’s domestic law’.¹²⁵ Although it could be argued that this conclusion was arrived at in the context of courts established by a

116 *Ibid.*

117 *Al Hassan*, *supra* note 1, at para. 1175

118 Elements of Crimes, at p. 34.

119 *Ibid.*

120 C. Pilloud, Y. Sandoz, C. Swinarski and B. Zimmermann, *Commentary on the Additional Protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Norwell, MA, 1987), at para. 1398.

121 Sivakumaran, *supra* note 78, at p. 498.

122 J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules* (Cambridge University Press, Cambridge, 2005), at p. 355.

123 akumaran, *supra* note 78, at pp. 498–499.

124 *Hamdan v. Rumsfeld* (2006) 548 U.S. 557, Stevens J., at p. 69.

125 Klamberg, *supra* note 72, at p. 242.

state which is a party to a NIAC (as opposed to a NSA),¹²⁶ the same position was taken by the UN Observer Mission¹²⁷ in El Salvador in respect of courts established by the Farabundo Martí Front for National Liberation in the 1990s.¹²⁸

On the other hand, the idea that a 'regularly constituted court' refers to a court of law pre-dating the NSA taking-over has been subject to a widespread criticism by various scholars such as Bond¹²⁹ on the grounds that 'guerrillas, after all, are not apt to carry black robes and white wigs in their back packs'; as such, it has been suggested that the relevant test should be 'whether the appropriate authorities, acting under appropriate powers, created the court according to appropriate standards'.¹³⁰ The same position has been adopted by Sivakumaran.¹³¹ It should also be mentioned that according to Dörmann, the deletion of the phrase 'regularly constituted court' from AP II was followed by the insertion of the phrase 'a court offering the essential guarantees of independence and impartiality' specifically in order to shift the attention from the formation of the courts towards their operation so that term 'regularly constituted court' became an equivalent to the term 'a court offering the essential guarantees of independence and impartiality'.¹³² As AP II forms part of IHL together with Common Article 3 (although there is some debate whether the former has the status of customary international law), it is unclear whether IHL could be unequivocally said to impose on NSA s the requirement of using pre-existing courts as opposed to of establishing courts which are independence and impartial.

Finally, it seems unlikely that NSA s, whose main object often is to overthrow a Government and institute a new legal order, would ever be willing to refrain from establishing their own courts and instead rely upon those already in existence which previously served the Government they work towards abolishing. Indeed, practice shows that NSA s do establish courts¹³³ and issue their own 'legislation' on a regular basis.¹³⁴ As such, forcing NSA s to use

¹²⁶ *Ibid.*

¹²⁷ Third Report of the United Nations Observer Mission in El Salvador, UN Doc. A/46/876-S/23580 (19 February 1992), at para. 111.

¹²⁸ Sivakumaran, *supra* note 78, at p. 498.

¹²⁹ J.E. Bond, 'Application of the Law of War to Internal Conflicts', 3 *Georgia Journal of International and Comparative Law* (1973) 345–384, at p. 372.

¹³⁰ Sivakumaran, *supra* note 78, at p. 499.

¹³¹ *Ibid.*, at pp. 498–500.

¹³² Dörmann, *supra* note 38, at pp. 412–413.

¹³³ *E.g.* Farabundo Martí Front for National Liberation, Communist Party of Nepal (Maoist Centre), Liberation Tigers of Tamil Eelam.

¹³⁴ Sivakumaran, *supra* note 78, at pp. 491–495.

pre-existing courts seems like a futile endeavor. In fact, it might only discourage them from complying with Common Article 3. Accordingly, the approach taken by Trial Chamber X, whereby courts must be independent and impartial, but could be established by NSAs in place of a pre-dating court system, is clearly preferable and likely to be widely accepted in subsequent cases arising under Article 8(2)(c)(iv) of the Rome Statute.

3.2 *Fair Trial Rights*

Having dealt with the issue of ‘regularly constituted’ courts under Article 8(2)(c)(iv) of the Rome Statute, Trial Chamber X¹³⁵ moved to deal with the concept of ‘courts which did not afford all judicial guarantees generally recognized as indispensable under international law’ by referring to Common Article 3(1)(d) as well as AP II.¹³⁶ The concept is not explained anywhere in the Rome Statute or the Elements of Crimes and, as such, its meaning must be imported from external sources under Article 21(1) and/or 21(3) of the Rome Statute. Broadly speaking, there are three possible options. First, chosen in the *Al Hassan* case, the contents of the phrase ‘judicial guarantees which are generally recognized as indispensable’ under Article 8(2)(c)(iv) of the Rome Statute is to be determined by relying on legal instruments derived from IHL (IHL model). Second, the contents is to be determined by relying on instruments derived from IHRL (IHRL model). Alternatively, it is possible to combine the two models and determine the relevant contents by relying on both IHL and IHRL (Mixed model). All three options entail a different set of specific judicial guarantees which would be required under Article 8(2)(c)(iv) of the Rome Statute and they all carry their own strengths and risks.

Unfortunately, Trial Chamber X extracted a list of judicial guarantees considered ‘indispensable’ without any proper analysis of the preferred sources of law. Those guarantees included the right to be informed of charges and procedural rights, to be present at trial and to remain silent; at the same time, the principles of individual criminal responsibility and legality were also considered ‘indispensable’; on the other hand, the right to speak in one’s defence, to legal advice and to call evidence were rejected ‘as they are not listed in Additional Protocol II, but rather derive from regional legal instruments’.¹³⁷ As such, it appears that in this context Trial Chamber X took a narrow approach to Article 8(2)(c)(iv) of the Rome Statute by importing its content from IHL only, despite relying on IHRL when defining the concept of ‘independent and

135 *Al Hassan*, *supra* note 1, at para. 1176.

136 Article 6(2) AP II, Geneva Conventions.

137 *Al Hassan*, *supra* note 1, at paras 1177–1178.

impartial court'.¹³⁸ This mixed approach to the sources of law across different parts of Article 8(2)(c)(iv) of the Rome Statute proves problematic, especially in the absence of any explanation behind the divergence.

Nevertheless, it could be argued that when it comes to determining the parameters of Article 8(2)(c)(iv) of the Rome Statute, *i.e.* to identify the relevant judicial guarantees, the application of IHL, as effectuated by Trial Chamber X, was justified for several reasons. Firstly, Article 8(2)(c)(iv) of the Rome Statute itself points naturally towards the adoption of the IHL model by placing the issue of 'judicial guarantees which are generally recognized as indispensable' in the context of a NIAC by referring to 'serious violations of article 3 common to the four Geneva Conventions of 12 August 1949'. 'These rules of IHL thus form an integral part of Article 8 of the ICC Statute, that is, Article 8 is supplemented by these rules of external law'.¹³⁹ Accordingly, the very introduction to Article 8(2)(c)(iv) of the Rome Statute places the relevant offence in the environment of IHL. As such, 'in spite of their external character, those rules must be applied "in the first place", and not only under Article 21(1)(b) of the ICC Statute'.¹⁴⁰ Secondly, in accordance with the 'object and purpose' interpretation prescribed by Article 31 of the VCLT, the phrase 'judicial guarantees which are generally recognized as indispensable' should be construed narrowly as 'the object and purpose of criminal justice favours the strict construction of statutes'.¹⁴¹ This is because overbroad statutes are generally considered unfair to defendants and might implicate the principle of legality (*nullum crimen sine lege*). In fact, under Article 22 of the Rome Statute, 'the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'.¹⁴² In this particular case, Article 8(2)(c)(iv) of the Rome Statute is put in very broad terms and, as such, its construction should put strict limitations on its parameters in order to comply with the requirements of Article 22(2) of the Rome Statute.¹⁴³

As such, there appear to be good interpretative reasons for adopting the IHL model when defining the scope of judicial guarantees required under Article

138 See above.

139 G. Hochmayr, 'Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC statute', 12.4 *Journal of International Criminal Justice* (2014) 655–679 at p. 655.

140 *Ibid.*

141 L. Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court', 21(3) *European Journal of International Law* (2010) 543–583, at p. 550.

142 Article 22(2) Rome Statute.

143 Grover, *supra* note 141, at pp. 550–55.

8(2)(c)(iv) of the Rome Statute, as Trial Chamber X did. At the same time, this model also finds some support in academic scholarship. Somer maintains that judicial guarantees required under Article 8(2)(c)(iv) of the Rome Statute should be extracted from Article 6 of AP II as ‘most of the guarantees listed in Article 6(2)(a–f) are not affected by the disparity between states and armed opposition groups, although armed opposition groups may find them difficult to apply due to factual capabilities’.¹⁴⁴ Klamberg argues that ‘since the contextual element of crimes in Article 8(2)(c) of the ICC Statute is the same as in Article 6(2) of Additional Protocol II and common Article 3 of the Geneva Conventions (all of these provisions concern non-international armed conflicts), a reasonable conclusion is that the guarantees listed in Article 6(2) of Additional Protocol II are the same “indispensable” guarantees referred to in Article 8(2)(c)(iv) of the ICC Statute’.¹⁴⁵ Indeed, this focus on Article 6 of AP II specifically, as the main law-giving provision under the IHL model, could be said to be justified. Common Article 3, on which Article 8(2)(c)(iv) of the Rome Statute is based,¹⁴⁶ is put in very generic terms and relying on that provision only would not be possible in practice. Luckily, there seems to be a consensus among scholars,¹⁴⁷ which is also supported by the ICRC,¹⁴⁸ that the contents of the judicial guarantees required under Common Article 3 is the same as under Article 6 of AP II.

3.2.1 IAC/NIAC IHL

In adopting the IHL model, Trial Chamber X seems to have focused on NIAC rules exclusively. This approach further narrows the IHL model by rejecting multiple fair trial rights guaranteed as part of IACs. This approach seems justified for several reasons. From the point of view of proper interpretation of law, in accordance with the ‘context’ interpretation prescribed by Article 31 of the VCLT, the position of Article 8(2)(c)(iv) of the Rome Statute must be considered *vis-à-vis* Article 8(2)(a)(vi) of the Rome Statute.¹⁴⁹ The former,

144 Somer, *supra* note 36, at p. 676.

145 Klamberg, *supra* note 72, at p. 248.

146 Dörmann, *supra* note 38, at p. 409.

147 See D.A. Elder, ‘The Historical Background of Common Article 3 of The Geneva Convention of 1949’, 11 *Case Western Reserve Journal of International Law* (1979) 37–69, at p. 65; W.A. Solf, ‘Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict’, 13 *Georgia Journal of International and Comparative Law* (1983) 291–301, at p. 296; C. Kress, ‘War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice’, 30 *Israel Yearbook on Human Rights* (2000) 103–177, at p. 137; Doormann, *supra* note 38, at 412; Sivakumaran, *supra* note 79, at p. 504.

148 Pilloud *et al.*, *supra* note 120, at para. 3084.

149 Marchesi, *supra* note 16, at p. 199.

applicable to NIACs, provides a protection against judgments which are not issued by ‘a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable’; on the other hand, the latter, applicable to IACs, protects against ‘depriving a ... person of the rights of fair and regular trial’. Furthermore, the Elements of Crimes provide a rather specific guidance to Article 8(2)(a)(vi) of the Rome Statute stating that the offence is triggered ‘by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.’ At the same time, the Elements of Crimes concerning Article 8(2)(c)(iv) of the Rome Statute do not refer to that or any other legal instrument, but they are phrased to reflect Common Article 3.¹⁵⁰ Given the difference in the contextual application of the two provisions as well as their definitions as provided by the Elements of Crimes, it could be concluded that the difference in their wording is intentional. This is because, as indicated by the ICJ,¹⁵¹ under Article 31 of the VCLT, the use of the same terms throughout a treaty must be seen as having its implications, just as the use of different terms has its own implications.¹⁵² Under the contextual approach to interpretation of Article 8(2)(c)(iv) of the Rome Statute, the existence of Article 8(2)(a)(vi) of the Rome Statute, together with its different wording, implies that the former should be given a different scope than the latter. This could only be effectuated if the meaning of the former is linked to judicial guarantees applicable in the NIAC context while the latter’s are linked to judicial guarantees applicable in the IAC context.¹⁵³

This distinction between IAC and NIAC IHL finds also support in some scholarship; Klamberg, for example, argues that the word ‘indispensable’ in Article 8(2)(c)(iv) of the Rome Statute ‘appears to reflect a narrower standard than Article 75(4) of Additional Protocol I, which refers to “generally recognized principles of regular judicial procedure”’.¹⁵⁴ On the other hand, Sivakumaran argues that, beyond Article 6 of AP II, Article 8(2)(c)(iv) of the Rome Statute should be informed by IAC IHL due to ‘the interconnected nature of the various due process guarantees dispersed throughout the corpus of IHL’.¹⁵⁵ In addition, in terms of legal practice, the SCOTUS indicated in the case of *Hamdan v. Rumsfeld*¹⁵⁶ that Common Article 3 should instead follow Article

150 Klamberg, *supra* note 72, at p. 248.

151 Land, Island and Maritime Frontier Dispute (*El Salvador v. Honduras*), ICJ Reports (1992) 351, at para. 374.

152 Dörr, *supra* note 43, at p. 544.

153 *E.g.*, Article 75(4) Additional Protocol I, Geneva Conventions.

154 Klamberg, *supra* note 72, at p. 248.

155 Sivakumaran, *supra* note 78, at p. 502.

156 *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Stevens J., at p. 70.

75 of AP I,¹⁵⁷ which provides an even more robust list of judicial guarantees.¹⁵⁸ Nevertheless, there appear to be no further authorities pointing towards IAC IHL as a source of fair trial rights under Article 8(2)(a)(vi) of the Rome Statute; indeed Trial Chamber X also refused to recognise IAC IHL in this context which seems justified from the point of view of the IHL model.

3.2.2 IHRL Model

The alternative approach to the IHL (NIAC) model taken by Trial Chamber X would rest on IHRL. This approach is possible as there is a general commonality of interest between the ICC and human rights tribunals. This is based on the fact that human rights are incorporated in the ICC system, both address human rights violations, yet both lack proper enforcement mechanisms.¹⁵⁹ In practice, there appear to be four different uses of regional human rights jurisprudence in the reasoning of the ICC: (a) to recognise the overlap between regional human rights and the text of the Rome Statute; (b) to support conclusions reached based on unrelated reasoning; (c) to clarify the meaning of certain terms and (d) to fill gaps in the text of the Rome Statute.¹⁶⁰ When it comes to Article 8(2)(c)(iv) of the Rome Statute specifically, relying on IHRL in order to establish its parameters falls in line with the idea ‘that international human rights has had a “humanizing effect” on international humanitarian law. Thus, while many international crimes initially “emerged directly from” international humanitarian law or were at least characterized as such, this relationship is weakening and international criminal law’s direct ties to international human rights strengthening.’¹⁶¹ As such, several different reasons have been put forward in support of this IHRL model. Firstly, in accordance with the ‘object and purpose’ interpretation prescribed by Article 31 of the VCLT, the phrase ‘judicial guarantees which are generally recognized as indispensable’ should be construed broadly in order to ensure that crimes do not go unpunished and their victims obtain redress.¹⁶² A broad interpretation of the parameters of Article 8(2)(c)(iv) of the Rome Statute means that anyone subject to a passing of sentence following a trial which only provided an absolute minimum of

¹⁵⁷ Klamberg, *supra* note 72, at p. 242.

¹⁵⁸ See below.

¹⁵⁹ T.E. Sainati, ‘Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts’, 49 *Vanderbilt Journal of Transnational Law* (2016) 191–243, at p. 220.

¹⁶⁰ A. Jones, ‘Insights into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court’, 16 *Human Rights Law Review* (2016) 701–729, at pp. 717–721.

¹⁶¹ Grover, *supra* note 141, at p. 551.

¹⁶² *Ibid.*, p. 550.

judicial guarantees is able to claim the status of victim of the war crime and, correspondingly, the person responsible for the passing of that sentence (or its execution) becomes a potential accused under the same provision. This, in turn, incentives those in charge of criminal justice during a NIAC to inflate the number of judicial guarantees available to defendants; on the other hand, a narrow construction of Article 8(2)(c)(iv) of the Rome Statute incentives the reduction of available judicial guarantees and, as such, is conducive towards impunity.

Secondly, in the *Al Bashir* case,¹⁶³ the PTC I suggested that Article 21(3) of the Rome Statute, which invokes internationally recognised human rights, should be applied prior to a recourse to IHL which could be relied upon under Article 21(1)(b) of the Rome Statute.¹⁶⁴ According to this approach, the parameters of Article 8(2)(c)(iv) of the Rome Statute should be established by a reference to IHRL, as an area higher on the priority of sources of law under the Rome Statute. This focus on IHRL was also espoused by the ICC Appeals Chamber¹⁶⁵ in relation to regional human rights systems.¹⁶⁶ Thirdly, according to the *travaux préparatoires*, in the process of drafting the Elements of Crimes, Costa Rica, Switzerland and Hungary proposed a list of judicial guarantees which was subsequently rejected for reasons¹⁶⁷ other than the belief that such rights would exceed what should be considered ‘judicial guarantees which are generally recognized as indispensable’.¹⁶⁸ The list of the judicial guarantees included in the Costa Rica/Switzerland/Hungary proposal borrows more from the IHRL instruments than AP II.¹⁶⁹ Regardless, in the context of the *Al Hassan* judgment, the employment of the IHRL model could have also offered the additional benefit of external consistency whereby both ‘regularly constituted court’ and ‘judicial guarantees generally recognized as indispensable under international law’ could have been interpreted with the use of IHRL.

Based on the examination of the most important human rights instruments (ICCPR, ECHR, ACHR and the African Charter on Human and Peoples’ Rights (hereinafter the AChHPR)), it is possible to extract the following judicial guarantees as protected under Article 8(2)(c)(iv) of the Rome Statute under the IHRL model:

163 Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Public Redacted Version), *Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-3) Pre-Trial Chamber, 4 March 2009 at para. 126.

164 Schabas, *supra* note 57, at p. 515.

165 *Thomas Lubanga Dyilo*, *supra* note 63, at para. 38.

166 Schabas, *supra* note 57, at p. 530.

167 See above.

168 Sivakumaran, *supra* note 78, at pp. 504–5.

169 Dörmann, *supra* note 38, at p. 409.

- The right to an independent tribunal;
- The right to an impartial tribunal;
- The right to sufficient time for the preparation of legal defence;
- The right to a counsel;
- The right to an interpreter;
- The right to a speedy trial;
- The right to a public hearing;
- The right to a public judgment;
- The right to be presumed innocent;
- The right to be notified of charges;
- The right to adequate facilities for the preparation of legal defence;
- The right to cross-examine witnesses;
- The right to obtain the attendance of witnesses on one's behalf;
- The right to remain silent;
- The right to be present at trial;
- The right not to be tried twice for the same offence (double jeopardy principle);
- The right to appeal;
- Equality of arms between the defendant and the prosecutor;
- Adversarial nature of proceedings;
- Legality principle;
- Legal basis for tribunal.

The list of fair trial rights extracted under the IHRL model is relatively long due to the inclusion of not only universal human rights instruments (such as the ICCPR) but also regional conventions. In this context, it is especially the ECHR and the ECtHR which has recognised, upheld and explained most of those rights. In the *Al Hassan* case, Trial Chamber X was openly hostile towards relying on regional human rights.¹⁷⁰ However, there are several valid reasons for such a reliance. Firstly, from a practical point of view, it is regional human rights jurisprudence which could be truly useful to the ICC, if for no other reasons, due to the sheer number of caselaw existing¹⁷¹ under regional mechanisms compared to the UN system. While the UN Human Rights Committee, dealing with the ICCPR, registered over 400 new communications and issued over 100 decisions in the pre-pandemic 2019,¹⁷² the ECtHR, in the same year, registered over 44 000 applications and issued over 2000 judgments.¹⁷³ Furthermore, between 1959 and 2021, almost 40% of

170 *Al Hassan*, *supra* note 1, at paras 1177–1178.

171 Jones, *supra* note 160, at p. 702.

172 UN, Report of the Human Rights Committee 126th, 127th, 128th session (2021), at p. 4.

173 ECtHR, Annual Report 2019 (2020) at p. 127.

all violations declared by the ECtHR pertained to Article 6 of the ECHR (*i.e.* the provision dealing with judicial procedure), the most of all articles of the Convention.¹⁷⁴ Secondly, relying on regional human rights jurisprudence offers the benefit of increasing the coherency and consistency of human rights law by lifting its local interpretation and rendering it universal; this, in turn, prevents a fragmentation¹⁷⁵ of international law.¹⁷⁶ Thirdly, taking into account regional human rights jurisprudence, even where it is not fully adopted by the ICC, is likely to increase the level of analysis¹⁷⁷ which the Court conducts because it has no choice but to examine numerous judgments dealing with potentially the same issues under regional human rights instruments.¹⁷⁸

Finally, it has been argued that the use of human rights jurisprudence increases the legitimacy of the ICC due to the effect of synergy with other human rights institutions.¹⁷⁹ That being said, a counter-argument has also been raised in this context based on the concern that relying heavily on regional human rights law could undermine the legitimacy of the ICC as a universal institution.¹⁸⁰ This is because human rights vary slightly from one region to another and adopting jurisprudence from one such region over the other could be seen as perpetrating some form of cultural bias.¹⁸¹ Nevertheless, the positive potential for the utilisation of regional human rights law by the ICC has already been widely recognised. In fact, it has been argued that relying on regional human rights jurisprudence ‘has helped the ICC and regional human rights courts to “speak with the same voice” on a range of legal issues, from the meaning and scope of fair trial standards to the rights of victims to participation and reparations, and to identify synergies in the jurisprudence of the ICC and regional human rights courts which can be built upon in future years.’¹⁸² Accordingly, outside the *Al Hassan* case, the Court often relies on the jurisprudence of the ECtHR whenever taking a recourse to IHRL. Other regional instruments are also present; for instance, in the *Lubanga* case,¹⁸³ references to the jurisprudence of the ECtHR and the IACTHR were as

174 ECtHR, Overview 1959–2021 ECHR (2022) at p. 6.

175 See M. Koskeniemi and P. Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden Journal of International Law* (2002) 553–579.

176 Jones, *supra* note 160, at p. 704.

177 See L.R. Helfer and A.-M. Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’, 107 *Yale Journal of International Law* (1997) 273–391, at pp. 320–323.

178 Jones, *supra* note 160, at pp. 705–706.

179 *Ibid.*, at p. 706.

180 *Ibid.*, at pp. 706–707.

181 *Ibid.*

182 *Ibid.*, at p. 723.

183 Judgment on the Appeal of Mr Lubanga Dyilo Against the Oral Decision of Trial Chamber I of 18 January 2008, *Thomas Lubanga Dyilo*, (ICC-01/04-01/06-1433) Appeals Chamber, 11 June 2008, Partly Dissenting Opinion of Judge Georgios M. Pikis, at para. 3.

plentiful as to the judgments of the ICTY.¹⁸⁴ Furthermore, prior to the ICC, the *ad hoc* tribunals¹⁸⁵ also generously referred to regional human rights, especially the jurisprudence of the ECHR.¹⁸⁶ Importantly, as explained by the ICC Appeals Chamber¹⁸⁷ in the context of Article 21(3) of the Rome Statute, the application of regional IHRL instruments were not limited to their strict geographical jurisdictions but, instead, could be extended to situations arising on different continents as well.¹⁸⁸ As such, the fact that the *Al Hassan* case arose out of a situation in Mali was never a bar to the application of the ECHR or ACHR. Unfortunately, this step of analysis appears to be missing from the *Al Hassan* judgment; to the contrary, Trial Chamber X rejected rights protected by the ECHR or ACHR ‘as they are not listed in Additional Protocol II’.¹⁸⁹ This illustrates a long problem in ICL jurisprudence already raised in the past by the former President of the ICTY, Judge Antonio Cassese,¹⁹⁰ in the context of the *ad hoc* tribunals, stressing a failure of Judges to actually set out the theoretical foundations for their use of human rights jurisprudence in ICL.¹⁹¹

In any event, any potential adoption of the IHRL model is problematic for at least two reasons. Firstly, all major human rights instruments laying at its foundations allow for derogations in times of an emergency.¹⁹² ‘The very existence of an armed opposition group involved in an armed conflict will mean that the derogation regime would tend to become the norm’.¹⁹³ As such, drawing from provisions which are generally inapplicable in times of an armed conflict for the purposes of identifying rights which are to be applicable specifically within the context of an armed conflict is not ideal, to say the least.¹⁹⁴

184 Jones, *supra* note 160, at p. 713.

185 E.g. Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, *Milosevic* (IT-02-54-AR73.7) ICTY Appeal Chamber, 2004, at para.17; Judgment, *Tolimir, Miletic & Gvero*, (IT-05-88/2-T) ICTY, Trial Chamber, 2012, at para. 854; Judgement and Sentence, *Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze*, (ICTR-99-52-T) ICTR Trial Chamber, 2003, at paras 991–999.

186 M. Buromenskyi and V. Gutnyk, ‘The Impact of ECHR and the Case-Law of the ECtHR on the Development of the Right to Legal Assistance in International Criminal Courts (ICTY, ICTR, ICC),’ 9:3 *TalTech Journal of European Studies* (2019) 188–204, at p. 198.

187 *Thomas Lubanga Dyilo*, *supra* note 63, at para. 38.

188 Schabas, *supra* note 57, at p. 530.

189 *Al Hassan*, *supra* note 1, at paras 1177–1178.

190 A. Cassese, ‘The Influence of the European Court of Human Rights on International Criminal Tribunals: Some Methodological Remarks’ in M. Bergsmo (ed.), *Human rights and criminal justice for the downtrodden: essays in honour of Asbjørn Eide* (Martinus Nijhoff, Leiden, 2003), pp. 19–52, at p. 49.

191 Jones, *supra* note 160, at p. 724.

192 Article 4 ICCPR; Article 15 ECHR; Article 27 ACHR.

193 Somer, *supra* note 36, at p. 668.

194 Dörmann, *supra* note 38, at p. 418.

In fact, according to the Merriam-Webster dictionary, the term ‘indispensable’ is defined as ‘not subject to being set aside or neglected’;¹⁹⁵ as such, its use in Article 8(2)(c)(iv) of the Rome Statute seems to imply those guarantees which could not be derogated from. Secondly, IHRL instruments have been designed with states specifically in mind.¹⁹⁶ As such, holding judicial procedures in courts established by NSA s during armed conflicts up to the standards of law developed for states in times of peace would inevitably create a practically unattainable level which is only likely to disincentive NSA s from pursuing any form of formal justice.¹⁹⁷ Consequently, this indicates that the IHRL model is simply unsuitable for the purposes of establishing the parameters of Article 8(2)(c)(iv) of the Rome Statute.

3.2.3 Mixed Model

At this point it could be argued that both the IHL and IHRL models have their own strengths and weaknesses when it comes to enlightening the contents of Article 8(2)(c)(iv) of the Rome Statute. However, the practical reality of jurisprudence suggests that perhaps it is the Mixed model, *i.e.* one based on both IHL and IHRL, that could constitute the most efficient approach to the provision in question. When it comes to the IHL model itself, the determination of the parameters of Article 8(2)(a)(vi) of the Rome Statute, and the accurate extraction of the rights required under it, does not seem to resolve this issue definitely. This is because even under the IHL model, the precise scope of judicial guarantees, including their constituting elements, could not be identified within the body of IHL due to the lack of relevant authorities within that body of law. Although the IHL model relies on IHL to identify the relevant judicial guarantees, the scope of each such guarantee must be identified with the assistance of other sources of law. Realistically, only IHRL is capable of shedding any meaningful light on the contents of judicial guarantees, regardless where those guarantees come from. Indeed, in its jurisprudence, the ICTY¹⁹⁸ relied on IHRL for the purposes of determining the meaning of various terms used in the ICTY Statute.¹⁹⁹ In the context of the ICC, such a recourse might be made under Article 21(3) of the Rome Statute

195 Merriam-Webster, *Indispensable*, available online at <https://www.merriam-webster.com/dictionary/indispensable> (accessed 12 June 2025).

196 Marchesi *supra* note 16, at p. 197.

197 G.I.A.D. Draper, ‘Humanitarian Law and Internal Armed Conflicts’, 13 *Georgia Journal of International and Comparative Law* (1983) 253–277, at p. 264 cited in Sivakumaran, *supra* note 78, at p. 501.

198 *E.g.*, Judgment, *Furundžija* (IT-95-17/1) ICTY Trial Chamber, 10 December 1998, at pp. 54–56.

199 Dörmann, *supra* note 38, at p. 412.

which provides that ‘the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights’. Accordingly, the meaning of judicial guarantees identified within the body of IHL is to be informed by reference to IHRL. As such, even under the IHL model, the use of IHRL appears unavoidable.

On the other hand, that approach should be distinguished from another variation of the Mixed model whereby the parameters of Article 8(2)(c)(iv) of the Rome Statute are established in reference to both IHL and IHRL (and the contents of each guarantee is determined with the use of the latter). In practice, this model is likely to produce a result substantially similar to that of the IHRL model. This is because there are few judicial guarantees found in IHL, yet absent from IHRL. In fact, out of all judicial guarantees recognised by Trial Chamber X in the *Al Hassan* case²⁰⁰ within the NIAC IHL model, arguably only the principle of individual criminal responsibility is not expressly protected by IHRL. This variation of the Mixed model finds some support in both academic scholarship as well as domestic jurisprudence. According to Dörmann, ‘the wording of the chapeau of Article 6(2) AP II is in its essence identical to common Article 3, and thus also to Article 8(2)(c)(iv) of the Statute.’²⁰¹ This leads to the conclusion that Article 8(2)(c)(iv) of the Rome Statute should be based on legal instruments found in both the IHL (AP II) and IHRL (the ICCPR, ECHR, ACHR, AChHPR) models. This is because, according to the ICRC,²⁰² Common Article 3 is informed by judicial guarantees listed in Article 6 of AP II and ‘Article 6 reiterates the principles contained in the Third and Fourth Conventions, and for the rest is largely based on the International Covenant on Civil and Political Rights, particularly Article 15.’²⁰³ Sivakumaran argues that Article 6 of AP II should be the starting point for compiling a list of ‘judicial guarantees which are generally recognized as indispensable’ for the purposes of Article 8(2)(c)(iv) of the Rome Statute.²⁰⁴ This is to be supplemented by IHRL as the link between IHL and IHRL is established in the preamble to AP II which states that ‘international instruments relating to human rights offer a basic protection to the human person.’²⁰⁵ This connection is strengthened by the fact that, as pointed out by the ICRC,²⁰⁶ Article 6 of AP II follows the

200 *Al Hassan*, *supra* note 1, at paras 1177–1178.

201 Dörmann, *supra* note 38, at p. 411.

202 Sandoz *et al.*, *supra* note 120, at para. 4597.

203 Dörmann, *supra* note 38, at pp. 411–412.

204 Sivakumaran, *supra* note 78, at p. 501.

205 *Ibid.*, p. 503.

206 Sandoz *et al.*, *supra* note 120, at para. 4597.

ICCPR as well as the drafting process of Article 6 of AP II²⁰⁷ during which many delegates supported the preliminary draft of Article 6 of AP II on the grounds that it reflected the ICCPR.²⁰⁸

Furthermore, there have been at least two domestic cases within the last two decades where the contents of Common Article 3, on which Article 8(2)(c)(iv) of the Rome Statute is based,²⁰⁹ was considered and IHRL was invoked. Firstly, in the US case of *Hamdan v. Rumsfeld*,²¹⁰ in footnote 66, Justice Stevens suggested that the contents of Common Article 3 could be informed by the ICCPR as one of 'other international instruments to which the United States is a signatory'.²¹¹ Secondly, in the Swedish *Sakhanh* case,²¹² where the local District Court²¹³ found that Common Article 3 applied as a matter of treaty law and AP II applied as a matter of customary international law,²¹⁴ the Court²¹⁵ went beyond the list of judicial guarantees contained within AP II and supplemented them with the rights found in IHRL, including the right to be presumed innocent; to a legal defence; to remain silent; to a speedy trial; to examine witnesses and to obtain the attendance and examination of witnesses on one's behalf; to a public trial and public judgment; as well as to appeal.²¹⁶ Although neither case is strictly binding on the ICC, they are not without any persuasive value as, under Article 21 of the Rome Statute, the Court is allowed to look into 'general principles of law derived ... from national laws of legal systems of the world'.²¹⁷ In any event, from a practical point of view, the effect of this variation of the Mixed model is effectively the same as the 'pure' IHRL model. As such, it also has the same flaws as the IHRL model, *i.e.* it fails to recognise that the term 'indispensable' in Article 8(2)(c)(iv) of the Rome Statute implies guarantees which could not be derogated from; yet all fair trial rights contained in major human rights instruments allow for such derogations. It

207 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–1977) Vol. 8–9 (Bern, 1978), at p. 347, para. 25 (delegate of the ICRC), at p. 347, para. 27 (delegate of Iran), at p. 350, para. 41, at 312, para. 39 (delegate of Belgium), at p. 308, para. 19 (delegate of the FRG).

208 Sivakumaran, *supra* note 78, at p. 503.

209 Dörmann, *supra* note 38, at p. 409.

210 *Hamdan v. Rumsfeld*, *supra* note 124, Stevens J., at p. 70.

211 W. Taft, 'The Law of Armed Conflict After 9/11: Some Salient Features', 28 *Yale Journal of International Law* (2003) 319–323, at p. 322.

212 *Omar Sakhanh*, *supra* note 18.

213 *Ibid.*, at para.13.

214 Klamberg, *supra* note 72, at p. 258.

215 *Omar Sakhanh*, *supra* note, at paras 32–34.

216 Klamberg, *supra* note 72, at p. 258.

217 Article 21(1)(c) Rome Statute.

also sets the bar for fair trials at a practically unattainable level, at least when it comes to courts established by NSA s during armed conflicts. Accordingly, it could be argued that the Mixed model should distinguish between the use of one source of law (IHL) for the establishing of the parameters of Article 8(2)(c) (iv) of the Rome Statute and the second source of law (IHRL) for the shedding of some light on the contents of the rights included within that parameter.

3.2.4 Practical Modification

At the end, it is important to note that, when it comes to the IHRL model as well as the Mixed model (of either variation), the scope of the selected judicial guarantees should not be imported into Article 8(2)(c)(iv) of the Rome Statute exactly as they exist under IHRL, but rather should be modified so as to accommodate the inherent differences between NIAC s and times of peace as well as between NSA s and ordinary Governments. According to Sivakumaran, ‘the content of none of [the selected] instruments can be transported *ipso facto* and without more into a common Article 3 conflict *simpliciter*, for that would be to destroy the “intimate nexus” between the scope and content of that article.’²¹⁸ Sivakumaran proposes to interpret judicial guarantees ‘in a way that both respects their substance yet modifies them so as to take into account the particular nature of the conflict.’²¹⁹ The basic premise should be ‘the greater the degree of organization, the more refined the disciplinary process.’²²⁰ Moreover, NSA s should be incentivised to establish local courts for the purposes of prosecuting individuals who otherwise would be summarily executed. As such, the scope of the rights of the accused before such courts, which are required from the point of view of ICL, should be attainable for NSA s.²²¹ ‘If humanitarian considerations dominate to the exclusion of the capacity of the insurgents ... then the proposed rules are divorced from reality.’²²² Marchesi also observes that ‘given the possible involvement of [NSA s] in the administration of justice, it may be that the judicial guarantees to be applied in NIAC s are to be interpreted differently from those in IAC s in order to take into account the features that characterise NIAC s and [NSA s].’²²³ This suggestion appears to be shared by the ICRC²²⁴ which indicated that

²¹⁸ Sivakumaran, *supra* note 78, at p. 503.

²¹⁹ *Ibid.*, 505.

²²⁰ *Ibid.*, 506.

²²¹ *Ibid.*, 501.

²²² Draper, *supra* note 197, at p. 264 cited in Sivakumaran, *supra* note 78, at p. 501.

²²³ Marchesi, *supra* note 16, at p. 203.

²²⁴ ICRC, *supra* note 25, at para. 715.

relying on jurisprudence of IHRL tribunals in NIACs through Article 21(3) of the Rome Statute is ‘relevant in the context of common Article 3 ... for courts operated by State authorities’, implying that IHRL must be modified insofar as it is applied to NSAs.²²⁵ Given the general conditions associated with NIACs, importing the exact scope of judicial guarantees from IHRL, which has been designed for states in times of peace, into Article 8(2)(c)(iv) of the Rome Statute, might be considered setting a bar too high for NSAs. This, in turn, will inevitably disincentive them to establish courts and afford any fair trial rights.

This approach finds some support in domestic jurisprudence. In the US case of *Hamdan v. Rumsfeld*,²²⁶ Justice Stevens, writing for the majority of the US Supreme Court, suggested that judicial guarantees extracted from IHL for the purposes of Common Article 3 might be modified by ‘evident practical need’ in order to accommodate the context in which they are being applied.²²⁷ According to Justice Stevens, ‘Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems.’²²⁸ A similar approach was adopted following the creation of *gacaca* courts in Rwanda.²²⁹ Defendants before *gacaca* courts, which operated under a constitution which ‘draws on the main human rights treaties and institutions of Western democracies’, did not enjoy the right to counsel as understood in Western jurisprudence.²³⁰ In fact, at the time, the UN High Commissioner for Refugees²³¹ observed that “Gacaca” is not a judicial process and even less an adversarial system, therefore, human rights observers insist that a way must be found to ensure that a defendant does not stand alone before his accusers’.²³²

Interestingly, it seems that, had Trial Chamber X reached this question of modification of scope of judicial guarantees required under Article 8(2)(c)(iv) of the Rome Statute, it would have likely accepted that such a scope should be adjusted in the context of NIACs. In fact, this is exactly what the Court said concerning the concept of a ‘regularly constituted court’ where it was admitted that ‘a court established by a non-state actor may not be able to successfully

225 Marchesi, *supra* note 16, at pp. 197–98.

226 *Hamdan v. Rumsfeld*, *supra* note 124, Stevens J., at pp. 70–71.

227 Sivakumaran, *supra* note 78, at p. 505.

228 *Hamdan v. Rumsfeld*, *supra* note 124, Stevens J., at p. 72.

229 Sivakumaran, *supra* note 78, at pp. 505–506.

230 J. Fierens, ‘Gacaca Courts: Between Fantasy and Reality’, 3(4) *Journal of International Criminal Justice* (2005) 896–919 at pp. 903 and 912.

231 UN High Commissioner for Refugees, Background Paper on the Human Rights Situation in Rwanda (Geneva, 2000) at p. 5.

232 Fierens, *supra* note 206, at pp. 910–911.

comply with the same level of independence required of a State court' and, as such, 'reasonable flexibility should be applied in assessing non-state armed groups' capacity to adhere to these standards'.²³³ The same approach should be applied when determine the scope of 'judicial guarantees generally recognized as indispensable under international law'. Accordingly, regardless what the role of IHRL should be for the purposes of Article 8(2)(c)(iv) of the Rome Statute, the rights interpreted in light of IHRL should always be modified to the extent this is necessary due to practical considerations associated with courts run by NSAs during armed conflicts.

4 Conclusions

Article 8(2)(c)(iv) of the Rome Statute lies at the crossroads of ICL, IHL, IHRL and public international law. Its interpretation is problematic at least for three reasons. Firstly, it is governed by a number of different instruments—VCLT (Articles 31 and 32 of the VCLT), the Rome Statute itself (Articles 9, 22, 21(1) and (3) of the Rome Statute), the Elements of Crimes as well as *travaux préparatoires*. Secondly, it is put in very generic terms and contains vague phrases. Thirdly, there is no international jurisprudence concerning its meaning (and very little relevant domestic jurisprudence).

The ruling issued in the *Al Hassan* case finally sheds some light on the provision. It definitely resolves at least some of the issues (especially the question of what constitutes a 'regularly constituted court' under Article 8(2)(c)(iv) of the Rome Statute) while others are still left unanswered. Among these, the most important is the selection of the appropriate source of legal rules for the determining of 'judicial guarantees generally recognized as indispensable under international law'. In its judgment, Trial Chamber X relied on the IHL model and managed to accurately extract judicial guarantees which that model contained. The reliance on the IHL model is well-justified on several grounds and might, indeed, be the better of the available options. However, the development of ICL, as an area of law, could have benefited from at least some explanation behind the rejection of the other models. This is especially so given that IHRL was used by Trial Chamber X in relation to the 'regularly constituted court' phrase. Furthermore, the Court did not address the question of the proper place of IHRL in determining the scope of the rights of the accused and their potential modification for the purposes of a NIAC, even if extracted under the IHL model.

²³³ *Al Hassan*, *supra* note 1, at para. 1173.

That being said, as a general practice, no first judgment provides answers to all legal questions arising in a given area of law. As such, either an appeal in the *Al Hassan* case or subsequent trials are likely to clarify the remaining issues over time. Overall, the ruling of Trial Chamber X pertaining to Article 8(2)(c) (iv) of the Rome Statute is a solid starting point for further jurisprudence in this area.

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