De Facto Justice: Prosecution by Non-State Actors in Armed Conflict

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Abstract: This chapter explores the lawful contours of a growing phenomenon – the administration of criminal justice by non-state armed groups in territories under their control. It highlights a steadily mounting body of international practice recognizing the lawfulness of the 'de facto' processes as dependent on *how* – rather than *by whom* – justice is administered and considers the conditions that international law places on such justice. These include the core standards of independence and impartiality, fair trial guarantees, respect for the principle of legality and the nature of the crimes, which pose myriad challenges in practice in the context of de facto justice. Among others, the chapter flags the particular implications of increased resort by non-state actors (like states) to broad terrorism-related crimes as a basis for prosecution. Finally, as meeting the standards required of de facto justice will generally depend on external support, the chapter questions whether under international law states can – or in certain circumstances should – cooperate with or recognize such processes consistently with international law. In an area of dynamic legal and practical development, the chapter reveals a landscape that is evolving to meet the realities of the changing nature of non-state actors' exercise of power and control, but where tensions, uncertainties and paradoxes remain.

Key words: Criminal Justice; Prosecutions; Human Rights; Fair Trial; State Cooperation

I. Introduction

It is a growing reality that non-state armed groups (NSAGs) exercise investigative and prosecutorial power around the globe, often within territories over which they exercise exclusive *de facto* control. The fact that in 2021 the International Committee of the Red Cross (ICRC) estimated that 60-80 million people currently live under the exclusive control of NSAGs is indicative of how many are potentially impacted by whether, how and for what such justice is administered.[1] The implications are complex and wide-reaching, for suspects, victims, human security, accountability and the rule of law.

[1] ICRC, 'ICRC Engagement with Non-state Armed Groups - Why, how, for what purpose, and other salient issues', ICRC position paper (March 2021); see also Katharine Fortin 'The Procedural Right to a Remedy when the

This administration of criminal justice by *de facto* non-state authorities (*de facto* justice), is far from new. From Syria to Sri Lanka, Congo to Colombia, Rwanda to the Philippines and beyond, NSAGs have held criminal trials in conflict situations for decades.[2] But for a long time, a state-centric international legal order largely looked the other way; criminal justice was treated as a quintessential exercise of state sovereignty, and NSAGs treated by states as entities 'wholly permeated by illegality', to be prosecuted, not prosecuting.

However, in recent years, there has been a shift to recognize and engage with a reality that can no longer be ignored. A growing body of practice, across diverse international law settings and engaging with various areas of that law, suggests a clear trajectory towards treating the administration of justice by NSAGs as no longer inherently impermissible; rather, the key question has shifted from the nature of the authorities to the nature of the processes, and the quality of 'justice' administered. As a result, the legal landscape is changing in significant ways, giving rise to a more nuanced, contextual and functional approach.

This chapter explores this area of dynamic legal and practical development**.** The chapter reveals a still state-centric international legal order that *is* adjusting to the reality of non-state actors' power and control, but where tensions, uncertainties and paradoxes remain.

Section II contextualizes the discussion. It provides a brief factual background on diverse *de facto* justice actors and processes, honing in on the example of the Autonomous Authority in North East Syria (NES), whose request for international cooperation to prosecute Islamic State-related crimes illustrates the developments and shortcomings explored in the chapter. Section II also enquires into the normative context and trends which have a bearing on the analysis of the lawfulness of *de facto* justice that follows. These include the significance of the gradual embrace of non-state actor responsibility under international human rights law (IHRL), the uncomfortable way in which international humanitarian law (IHL) addresses NSAGs, and the multi-faceted role of criminal law.

State has Left the Building? A Reflection on Armed Groups, Courts and Domestic Law' (2022) 14 Journal of Human Rights Practice 387.

[2] In his 2021 book, René Provost points to Sri Lanka, El Salvador, Nepal, Afghanistan, Sierra Leone, Colombia, Rwanda, Congo, Sudan, Kosovo, Syria, Iraq, Turkey, Western Sahara, India, Ethiopia, Russia, Indonesia, Eritrea, Ukraine, Philippines, Mali, Burma and 'many other places' as countries where this has occurred. René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford University Press 2021) 2. See also Jonathan Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict' (2007) 876 International Review of the Red Cross 655; Sandesh Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 Journal of International Criminal Justice 489; Mark Klamberg, 'The Legality of Rebel Courts during Non-International Armed Conflicts' (2018) 16 Journal of International Criminal Justice 235.

Section III, the heart of the chapter, considers how diverse international legal actors have, in practice, grappled with and shaped the lawfulness of *de facto* justice under current international law, concluding that the international legal conversation has now shifted from *whether* to *how* NSAGs administer justice. The pre-requisites for lawfulness–including the core standards of independence and impartiality, fair trial and more neglected considerations on the nature of the crimes charged – and some of the many challenges they give rise to in practice, are flagged in Section IV. Given those challenges, Section V circles back to states, whose cooperation with *de facto* justice will often be a pre-requisite to meeting essential fair trial conditions. It asks whether states reluctance to provide support for *de facto* criminal justice is grounded in their international obligations, or whether they can – or in certain circumstances should – cooperate with or recognize *de facto* justice processes consistently with international law.

II. Factual and Normative Context

A. Factual realities: Non-state actors and justice

Criminal investigation and prosecutions by NSAGs have been a common feature of armed conflict scenarios around the globe for decades. While the actual practice of these justice processes remains underexplored, in recent years there has been an explosion of academic commentary and analysis of the phenomenon of 'rebel courts'[3] or 'insurgent justice'[4] and other closely related issues of rebel governance[5] and non-state actor detention.[6] The landscape reveals vast diversity, first and foremost as between the NSAGs that administer justice,[7] but

[3] E.g. Provost (n 2).
[4] Ezequiel Heffes, *Detention by Non-State Armed Groups Under International Law* (Cambridge University Press 2022). See also Frank Ledwidge, *Rebel Law: Insurgents, Courts and Justice in Modern Conflict* (Oxford University Press 2017). Daragh Murray, 'Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward' (2017) 30 Leiden Journal of International Law 435.
[5] Provost (n 2) 2.
[6] Heffes (n 4). Among the growing commentaries on justice by NSAGs, see also Hannes Jöbstl, 'Bridging the Accountability Gap: Armed Non-state Actors and the Investigation of War Crimes' (2020) 18(3) Journal of international Criminal Justice 567; Diletta Marchesi, 'The War Crimes of Denying Judicial Guarantees and Uncertainties Surrounding their Material Elements' (2021) 54(2) Israel Law Review 174; Fortin (n 1).
[7] For *indiciae* as to what constitutes a NSAG for IHL purposes, see *Prosecutor v Ramush Haradinaj* (Judgment) ICTY-04–84-T, T Ch I (ICTY, 3 April 2008). It does not include the goals, conduct, impact or approach to international law, which in practice vary greatly.

also as between the nature and impact of the *de facto* processes they put in place.[8] Research points to diverse problems and as yet limited best practice. Undoubtedly, some *de facto* justice processes have been thinly veiled summary ad hoc justice, but others involve complex multi-tiered justice systems,[9] some with relatively progressive laws and policies, that leave many states justice systems lagging.[10] In a context where simple generalisations and assumptions as to the nature, capacity or impact of *de facto* justice processes therefore prove problematic, international standards can provide a principled way to navigate diverse actors and the complex realities on the ground by distinguishing on the basis of what the actors do, rather than who or what they are.

One recent scenario illustrates many of the legal issues arising in this chapter.[11] Since at least 2014 *de facto* Kurdish authorities (the Autonomous Authority or AA) have exercised exclusive authority of NES.[12] The AA passed its own constitution,[13] multiple laws, and established ministries, courts and a police force, backed up by the Syrian Democratic Forces (SDF), the official defence force of the Autonomous region.[14] The context is the ongoing armed conflict in NES,[15] in which the SDF and Daesh/Islamic State in Iraq and the Levant (ISIL) are parties alongside myriad other NSAGs.[16] Many states intervened in joint military offensives against ISIL alongside the SDF,[17] leading to tens of thousands of Syrians and foreigners – men, women and children of all ages – being held in mass displacement camps under AA control,

[8] Variations include those prosecuted (from their own ranks, opposition forces or others), charges lodged, sources of law (their own laws, existing domestic law or international law), goals and implications.

[9] In North-East Syria by 2020, the Kurdish authorities had convicted 1,881 Syrians for association with ISIS: UNHRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (14 August 2020) A/HRC/45/31, paras 77–78.

[10] See e.g. the gender policies and safeguards of the Autonomous Authority in Helen Duffy, 'International Legal Advice on the Potential Prosecution of Adult Females in Al Hol by Courts Established by the Autonomous Administration of North East Syria' (*Human Rights in Practice*, 21 April 2021) para 79 <https://www.rightsinpractice.org/s/Legal-Opinion-NES2-Final-c65j.pdf> accessed 5 December 2022. E.g. during the protracted Sri Lankan civil war, the Liberation Tigers of Tamil Eelam (LTTE) created a multi-tiered system complete with mandatory curriculum in its own college of law. Provost (n 2) 233, 239.

[11] Duffy (n 10) para 79.

[12] While territorial control has been in flux and Turkish attacks in October 2019 had an impact, AA remains in control of relevant areas and the SDF has been described as controlling about a quarter of Syrian territory.

[13] The Democratic Union Party (PYD) announced the Kurdish Constitution on 21 July 2013. It does not appear to assert statehood but recognises Syria as a country, of which the autonomous region is an integral part.

[14] Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (15 August 2019) A/HRC/42/51, para 82.

[15] The SDF declared that it had defeated ISIL in March 2019, though reports suggest that this group continued its influence and an ongoing armed conflict: e.g. Editorial, 'ISIL defeated in final Syria victory: SDF', *Al Jazeera* (23 March 2019) <https://www.aljazeera.com/news/2019/03/isil-defeated-syria-sdf-announces-final-victory-190323061233685.html> accessed 5 December 2022.

[16] Terry Gill, 'Classifying the Conflict in Syria' (2016) 92 International Law Studies 353.

[17] Several states intervened individually or through coalitions; e.g. the US-led international coalition had 60 partner states. U.S. Department of State, 'Joint Statement Issued by Partners at the Counter-ISIL Coalition Ministerial Meeting' (3 December 2014) <//2009-2017.state.gov/r/pa/prs/ps/2014/12/234627.htm> accessed 9 May 2022.

including many men and women who the Autonomous Authority claim were responsible for egregious Daesh/ISIL related crimes.

It is a matter of international notoriety that the situation in the camps is dire – camps housing women and children have been described as a 'humanitarian crisis' involving loss of life, soaring insecurity and intra-camp violence.[18] Foreign states (including the states of the detainees' nationality and those involved militarily in the interventions that led to the detentions in the first place) have often been reluctant to repatriate nationals,[19] or to bring their own justice systems to bear for those accused of criminality.[20] The result is both a humanitarian crisis in the camps, and a deficit in accountability for ISIL crimes.[21]

In this context, the Autonomous Authority has requested international support for the prosecution of crimes related to ISIL by persons detained in camps under their control. Specifically, in 2020 it announced its intention to (re)launch a justice process,[22] and throughout 2022 it continued to seek international support to prosecute ISIS-related crimes in a manner consistent with international law.[23] The Autonomous Authority urged, with some force, that "partners on the ground from a military perspective, [should provide] partnership in sharing the burden of prosecution".[24] But the requested international cooperation with those *de facto* processes, or support for an international tribunal on territory controlled by AA, has not been forthcoming, and the issue has been fraught with controversy, prompting an array of queries

[18] International Rescue Committee, 'Data analyzed by the IRC reveals staggering health and humanitarian needs of children in Al Hol camp' (16 September 2019), <https://www.rescue.org/press-release/data-analyzed-irc-reveals-staggering-health-and-humanitarian-needs-children-al-hol#> accessed 5 December 2022.

[19] OHCHR, 'Syria: UN experts urge 57 States to repatriate women and children from squalid camps' (8 February 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26730&LangID=E> accessed 5 December 2022.

[20] Most states passed wide-reaching terrorism offences, and have often prosecuted offences of travel or association under 'foreign terrorist fighter' laws, though prosecution of the most serious IS crimes remains limited; see e.g. Genocide Network, 'Cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences' (Eurojust, May 2010) <https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.PDF> accessed 5 December 2022.

[21] See e.g. UNSC, Resolution 2249 (2015) S/RES/2249.; UNSC, Resolution 2651 (2022) S/RES/2651, calling for accountability of Da'esh in particular of those most responsible.

[22] While men had been prosecuted, the AA has expressed deep concern repeatedly as to the role of some women from the al Hol camps, who had been – and continue to be – engaged in serious crimes. On this and concerns that 'displacement camps in Syria [risk becoming] an everlasting embodiment of the ideology and practices of ISIS', see e.g. Jiwan Soz, 'Concerns over the threat posed by female jihadists with ties to ISIS in Al-Hawl are rising following repeated military attacks on the camp' (*Carnegie Endowment for International Peace*, 14 July 2022) <https://carnegieendowment.org/sada/87510> accessed 5 December 2022.

[23] 'Efforts underway to establish tribunal of an international character for trying ISIS prisoners', Syrian Observatory form Human Rights, https://www.syriahr.com/en/270479/ accessed 12 December 2022 and 'The Anti-Terror Trial System in NES', *Rojava Information Center* (13 March 2021) <https://rojavainformationcenter.com/2021/03/the-anti-terror-trial-system-in-nes/> accessed 5 December 2022.

[24] Duffy (n 10) para 84.

explored in this chapter as to how the international legal framework addresses criminal accountability processes by the *de facto* authorities, and the cooperation of states. [25]

B. Normative Context

The issues addressed in the chapter lie at the intersection of a plurality of applicable legal norms and expose a range of tensions in the international legal framework. As diverse authorities have engaged with the fact of NSAG control of swathes of the globe (as discussed in Section III), they have been compelled to interpret and (co-)apply various norms under IHL, IHRL, and international criminal law (ICL), and to address some of the peculiarities of these areas of law as they relate to NSAGs.

1. How IHL engages with NSAGs

IHL is the primary body of law governing the conduct of NSAGs in armed conflict, albeit alongside IHRL.[26] It is relatively uncontroversial that IHL imposes obligations on NSAGs.[27] However, it is a well-recognised 'paradox' that the law provides little explicit guidance as to NSAGs' *rights* or *powers*; as such, IHL 'seems to demand what it fails to authorise'.[28] Some suggest this is how IHL has sought to embody a 'balance' between, on the one hand, regulating the realities of NSAGs' exercise of power, and on the other avoiding 'legitimising' or empowering the incursion into state sovereignty that such exercise was seen (by states parties negotiating IHL treaties) to represent. This may account for the lack of clear and explicit answers in IHL treaties to questions concerning the powers of NSAGs during a non-international armed conflict (NIAC), including in relation to prosecution. Instead, the questions that *can* be answered by IHL treaties may be whether particular activity is *explicitly prohibited*, or in some cases *implicitly* authorised.

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[25] This chapter is based in part on a legal opinion provided by the author in relation prosecutions in NES; see Helen Duffy, 'International Legal Advice on the Potential Prosecution of Female Al Hol Detainees by Courts Established by the Autonomous Administration for North East Syria' (*Human Rights in Practice*, 21 May 2020) <https://www.rightsinpractice.org/armed-conflictnorth-east-syria> accessed 5 December 2022; and Duffy (n 10).

[26] See Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication' in Ziv Bohrer, Janina Dill and Helen Duffy, *Law Applicable to Armed Conflict* (Max Planck Trialogues, Cambridge University Press 2020) 16.

[27] ibid.

[28] Morten Bergsmo and Song Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (2nd edn, Torkel Opsahl Academic EPublisher 2018) 426.

In this context, where the ordinary wording of provisions may not be clear, consistent or conclusive, the approach to interpretation of international law becomes critical.[29] In an area where practice is evolving rapidly, one significant principle of interpretation that should be borne in mind is the evolutive or 'living instrument' approach, by which law seeks to remain relevant and effective by adjusting to changing times and contexts, such as the growing reality of *de facto* justice. A holistic or systemic interpretative approach to applicable law suggests what IHL treaties say or do not on the issue should be read in light of subsequent IHL provisions,[30] but also international law as a whole, including IHRL or ICL.[31] Likewise, the logic, purpose and effectiveness of the law raise the question whether the power to conduct trials is logically implicit in provisions that regulate the *fairness* of such trials.[32] As such, it is relevant to consider whether such a power to prosecute may be implicit in established principles such as belligerent equality or superior responsibility (now well established as applicable to NSAGs commanders),[33] which require misconduct of subordinates to be punished. Conversely, the policy implications of denying the 'reality of insurgent justice', which may incentivise 'summary justice' or even extra-judicial executions, underscore the importance of a purposive interpretation.[34]

2. The evolution of IHRL to govern non-state armed groups conduct

There can be no doubt that IHRL has struggled to catch up with IHL in terms of applicability to NSAGs, and the issue has long been controversial.[35] It is worth recalling, however, that the question of *de facto* justice forms parts of a broader evolution in respect of NSAG responsibility under IHRL. Where NSAGs have the *capacity* to afford human rights protections (whether or not they do so), and have assumed quasi-state functions, there is longstanding jurisprudential

[29] Duffy (n 26).
[30] As noted below, the language of Additional Protocol II of 1977 to the Geneva Conventions of 1949 can inform our reading of common article 3 to the Geneva Conventions.
[31] Duffy (n 26).
[32] Daragh Murray, 'Non-State Armed Groups in NIAC: Does IHL Provide Legal Authority for the Establishment of Courts?' (*Ejil Talk*, 4 June 2014) <https://www.ejiltalk.org/non-state-armed-groups-in-niac-does-ihl-provide-legal-authority-for-the-establishment-of-courts/ accessed 5 December 2022.
[33] See section III.C below, and for an in-depth analysis Alessandra Spadaro, 'Punish and Be Punished? The Paradox of Command Responsibility in Armed Groups' (2020) 18(1) Journal of International Criminal Justice 1.
[34] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para 689: 'NSAs' courts […] may constitute an alternative to summary justice and a way for armed groups to maintain "law and order" and to ensure respect for humanitarian law'.
[35] See generally Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006); Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016); Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).

support that they can be 'equated to […] [the State] for the purposes of certain human rights obligations'.[36] More recently, several inquiry commissions and UN special procedures have found that where NSAGs exercise control of an area, or where peremptory norms are at stake, they could be treated as bound by IHRL.[37] In a key development in 2021, a group of UN experts for the first time issued a general statement on the 'human rights responsibilities of armed non-state actors'.[38] asserting that human rights should be protected and victims able to obtain redress 'regardless of the actor at the origin of their grievance', 'at a minimum' where NSAGs exercise '*de facto* control over territory and a population'.[39]

What emerges then is a broad shift towards a pragmatic and functional approach to non-state actor responsibility, consistent with the recognised need for a purposive, evolutive and contextual interpretation of IHRL that reflects evolving realities on the ground.[40]

While the focus of this chapter is on whether *de facto* authorities *can* lawfully exercise criminal jurisdiction, these broad normative developments inevitably raise questions as to whether NSAGs may even be *obliged* to do so. If NSAGs in control of territory for example could, in principle, be considered to have positive obligations under IHRL, this would entail ensuring that violations were prevented, and that effective investigation, truth, and in certain circumstances prosecution and punishment followed allegations of violations.[41] While it may be overreaching to assert that there is a firm legal basis in current law obliging *de facto* authorities to prosecute, given the dearth of treaty law and insufficient practice to establish customary law, the UN statement makes clear this is an area of legal evolution.

3. The diverse functions of criminal justice and interests at stake

[36] Committee Aagainst Torture, *Sadiq Shek Elmi* v. *Australia*, Comm No 120/1998 (1999) CAT/C/22/D/120/1998, para 6.5.

[37] See e.g. UNHRC, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (16 June 2015) A/HRC/29/51. See also UNHRC, Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya (1 June 2011) A/HRC/17/44, para 72.

[38] OHCHR, 'Joint Statement by independent United Nations human rights experts on human rights responsibilities of armed non-State actors' (25 February 2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E#_ftn1 accessed 5 December 2022.

[39] ibid noting that 'practice acknowledges that, at a minimum, armed non-State actors exercising either government-like functions or de facto control over territory and population must respect and protect the human rights of individuals and groups'.

[40] Duffy (n 26) 78.

[41] Antal Berkes, *International Human Rights Law Beyond State Territorial Control* (Cambridge University Press 2021) 199.

A final contextual reflection relates to the role of criminal justice. On the one hand, the administration of justice on a state's territory is a quintessential exercise of its sovereignty. It involves multiple exceptional functions prior to, during and after the criminal process itself – legislative (criminalizing acts and establishing tribunals), investigative, institution-building to establish courts and justice processes, detention, prosecution and punishment, among others. The onerous implications of prosecution for the accused, give rise to strict principles of criminal law, rendering it an '*ultimo ratio*' to be used exceptionally and subject to strict constraints. It is unsurprising that the exercise of such powers by a non-state actor will be controversial and exceptional.

On the other hand, criminal law also serves other relevant functions beyond the exercise of state sovereignty. For any society, criminal law's basic public order function addresses the need to maintain order, prevent crime and reassert essential shared values. Moreover, as decades of development in ICL signal, criminal justice is also one essential way in which international values, and international law, are given effect. In armed conflict, investigation of serious crimes is 'in the DNA of IHL', essential to its effectiveness and enforcement, including (but not limited to) the exercise of command responsibility.[42] Under IHRL, a developed body of positive obligations, investigation and accountability are inherent in the prevention and protection of a range of human rights, as well as the reparation of victims of violations. Such obligations in respect of core crimes, are reflected across international criminal law and practice.[43]

As such, accountability is a sovereign state function, a dimension of victims' rights, and an 'interest of the international community as a whole'.[44] When NSAGs engage in criminal justice they may be seen to discharge a rule of law and accountability functions affecting interests far beyond those of the territorial state.

Conversely, the abusive potential of criminal process is clear. There are ample global examples of the weaponisation of criminal justice and 'judicial harassment'[45] of human rights

[42] Floris Tan, 'The Duty to Investigate in Situations of Armed Conflict: An Examination under International Humanitarian Law, International Human Rights Law, and Their Interplay' (2022) Doctoral dissertation, Leiden University <https://scholarlypublications.universiteitleiden.nl/access/item%3A3304174/view> accessed 5 December 2022.
[43] E.g. Rome Statute of the International Criminal Court (1998) Preamble.
[44] See e.g. sources in Xavier Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?' (2006) 88 International review of the Red Cross 375.
[45] See for one example among many, OHCHR, 'Indonesia: Stop Judicial Harassment of Human Rights Defenders – UN Expert' (26 November 2021) <https://www.ohchr.org/en/press-releases/2021/11/indonesia-stop-judicial-harassment-human-rights-defenders-un-expert> accessed 5 December 2022. See also '#Judicial Harassment' (*Front Line Defenders*) <https://www.frontlinedefenders.org/en/violation/judicial-harassment> accessed 5 December 2022.

defenders, protesters and dissenters, particularly under broad-reaching anti-terror laws, at the present time. The extent to which the criminal process can be a repressive tool is reflected in the crime of administering justice without essential guarantees under ICL.[46] This raises the stakes concerning the need for understanding as to international law governing *de facto* justice during armed conflict situations.

III. Lawfulness of *De Facto* Justice?

This section considers our core question on the permissibility of trials by non-state entities under contemporary international law. How have developments in treaty law, and interpretation in practice by diverse actors applying IHL, IHRL and ICL, reflected on and influenced the lawfulness of such prosecutions, and the conditions upon which such lawfulness depends?[47]

A. The 'Opening' in IHL Treaty Law?

The starting point is Common Article 3 (CA3) to the 1949 Geneva Conventions (GCs), which is widely applicable treaty law binding on all parties in all types of conflict,[48] often cited as constituting customary international law. CA3 explicitly prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples'. There is however no accepted definition of what constitutes a 'regularly constituted court', leading us to other IHL sources to interpret the terms.

Other provisions of IHL and their interpretation may support this approach to CA3. These include Article 66 of the Fourth Geneva Convention, applicable in international armed conflicts, which requires 'properly constituted' courts – treated by the ICRC Commentary as identical to the 'regularly constituted' courts in CA3[49] – and as not necessarily referring to pre-

[46] Rome Statute of the International Criminal Court, Article 8(2)(c)(iv).
[47] For scholars that have explored this legal evolution in more depth, see e.g. an important early contribution by Sivakumaran (n 2) 498–500, and more recently Hannes Jöbstl, 'Bridging the Accountability Gap: Armed Non State Actors and the Investigation of War Crimes' (2020) 18(3) Journal of international Criminal Justice 567, 572–5.
[48] See commentary to ICRC, Customary IHL Database, Rule 100 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100> accessed 5 December 2022.
[49] Jean S Pictet (ed) *The Geneva Conventions of 12 August 1949: Commentary, Vol IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) Article 66.

existing courts in the occupied territory, but to ones which meet certain 'recognised principles governing the administration of justice' and are 'non-political'.[50]

Likewise, subsequent IHL treaty provisions appear to point in the same direction, by emphasizing the 'essential guarantees' of fair trial, rather than how or by whom the court was established.[51] Additional Protocol II (APII) to the 1949 GCs is of particular significance given its applicability to many of the conflicts where NSAGs exercise control of territory, which are the contexts in which insurgent tribunals are most likely to arise.[52] Article 6(2) of APII notably omitted the term 'regularly constituted court' found in CA3, in favour of a functional definition referring simply to a tribunal 'offering the essential guarantees of independence and impartiality'. The ICRC commentary to the APs suggests that this formulation was chosen precisely as the term 'regularly constituted' might preclude the application of Article 6(2) to tribunals created by NSAGs,[53] whereas the later formulation 'focuses more on the capacity of the court to conduct a fair trial than on how it is established [which] takes into account the reality of non-international armed conflict'.[54]

As such, it was suggested twenty years ago that, at a minimum, APII provided "… an opening in the law as it stands now to develop a legal space in which the practice of insurgent groups in setting up courts can be regulated so that it accords to a degree with the requirements of justice under international law".[55] Subsequent practice and interpretations suggest that this 'opening' to *de facto* justice in IHL texts has now been fully seized.

B. Evolving ICRC positions

First, given the significance of the ICRC's role in the interpretation of IHL, its apparent evolution of approach over time is worth underscoring. The ICRC Customary law study in 2005 described CA3 regularly constituted courts as ones 'established and organised in accordance with the laws and procedures already in force in a country', raising questions as to

[50] ibid para 2. For detailed provisions see Article 71 and ff; Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014).
[51] Article 84(2) of GC III 'in no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognised'.
[52] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977.
[53] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) 1398, and e.g. Sivakumaran (n 2).
[54] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para 678, referring also to paras 692–693.
[55] René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002) 426.

whether NSA-established tribunals were precluded.[56] By contrast, the ICRC's updated 2016 Commentary to GC I dispels any such doubt, by specifically ruling out an interpretation of CA3 that would 'refer exclusively to State courts constituted according to domestic law, [which] non-State armed groups would not be able to comply with'.[57] Instead, the 2016 Commentary includes references to NSAG trials, and focusing on whether they provide relevant 'guarantees':

> [n]o trial should be held, whether by State authorities or by non-State armed groups, if [the minimum] guarantees cannot be provided. Whether an armed group can hold trials providing these guarantees is a question of fact and needs to be determined on a case-by-case basis.[58]

The ICRC's 2016 Commentary thus specifically recognized that courts may be 'regularly constituted as long as they are constituted in accordance with the "laws" of the armed group'[59] Adopting a purposive approach, the Commentary explains that if CA3 referred exclusively to State courts, the application of the rule 'to each Party to the conflict' would 'be without effect', adding that NSAG trials 'may constitute an alternative to summary justice and a way for armed groups to maintain "law and order" and to ensure respect for humanitarian law'.[60]

C. ICC instruments and application

Second, the International Criminal Court (ICC) Elements of the Crimes annex to the Rome Statute, and recent practice before the ICC, support the view that a 'regularly constituted court' is one which meets the requirements of independence and due process, rather than depending on when or by whom the court was established.[61] The Elements annex, elaborating on the crime

[56] ICRC, Customary IHL Database, Rule 100 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100> accessed 5 December 2022.:'a court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country' appears at first glance to refer to the normal state apparatus but, as the ICRC's 2016 Commentary suggests, this language may simply reflect the principle of legality requiring criminal law to be in force before crimes are committed, and the law establishing the tribunal to be in force before the tribunal operates, without precluding the possibility that the NSAG itself creates those laws. Moreover, the remainder of the commentary to Rule 100, and military manuals cited in the practice section (ICRC Customary IHL Database Vol II) refer to essential guarantees of fair trial, not to who establishes the tribunals based on which laws.

[57] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para 692.

[58] ibid para 694.

[59] ibid para 692. See also ICC *Al Hassan* decision, below.

[60] ibid para 689.

[61] ibid para 678 cites the ICC Elements in support of its view that a 'regularly constituted' court' is one that affords 'essential guarantees of independence and impartiality'.

under Article 8(2)(c)(iv) of the ICC Statute which gives effect to CA3, details that the provision refers to situations where 'the court that rendered judgment was not "regularly constituted", that is, it did not afford the essential guarantees of independence and impartiality, or […] other judicial guarantees generally recognised as indispensable under international law".[62]

In the *Al Hassan* case, the ICC Office of the Prosecutor (OTP) charged the accused with the war crime of sentencing or execution without such guarantees.[63] The Defense counsel cited to 'authoritative views that "rebel" courts are not ipso facto illegal under IHL',[64] arguing that – on the contrary – such courts 'might be required to satisfy a commander's obligations to prevent or punish violations of the laws of war'.[65] Notably, neither the OTP nor the pre-trial chamber took the view that the establishment of the tribunal by the non-state armed groups in Timbuktu was inherently illegal. Indeed, the Pre-trial chamber found, by reference to the language of the Elements of Crimes, supported by the *travaux préparatoires*, that it is the capacity of a court or tribunal to offer fair trial guarantees and not the way in which it was established that are key to whether it is 'regularly constituted'.[66]

The issue has also arisen indirectly in prosecutions based on command responsibility under ICL, which is now well established to apply to NSAG commanders and to embrace their duty to punish serious violations by subordinates.[67] The ICC in the *Bemba* case recognised the availability of a 'functional military justice system' operated by the NSAG of which Mr. Bemba was Commander-in-chief in the DRC, such that his failure to invoke it contributed to his superior responsibility.[68] This amounts, at a minimum, to implicit recognition that *de facto* justice processes are not inherently unlawful, as international law could not require what it prohibits.[69]

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[62] ICC, 'Elements of the Crimes' (2013) 23, related to Article 8(2)(c)(iv) War crime of sentencing or execution without due process.

[63] *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Submission for the confirmation of charges (9 July 2019) ICC-01/12-01/18-394-Red (ICC Pre-Trial Chamber I) [254–255].

[64] *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Public Redacted Version) (13 November 2019) ICC-01/12-01/18 (ICC Pre-Trial Chamber I) [376] : '*capacité du tribunal de conduire un procès équitable plutôt que sur la façon dont il est établi. Autrement dit, les caractéristiques d'indépendance et d'impartialité sont les caractéristiques requises pour qu'un tribunal soit considéré comme « régulièrement constitué » au sens du Statut*'.

[65] ibid.

[66] *Al Hassan* (n 63) para 255.

[67] Spadaro (n 33) and Jöbstl (n 6) 586–7.

[68] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute (21 March 2016) ICC-01/05-01/08-3343(ICC Trial Chamber III) [697].

[69] Fortin (n 1) 18 citing Spadaro, on the 'two paradoxical alternatives' for NSAGs' commanders – 'do nothing and be punished or punish and be punished' and calling for an approach consistent with the 'systemic integrity of international law'.

D. Human Rights courts and bodies

Third, the practice of human rights courts and bodies, applying IHRL provisions also support the focus on whether the court is established by law, independent and impartial, and in practice meets fair trial standards, rather than a formalistic approach based on the authority that sets up the tribunal.

International human rights courts remain state-centric, with their contentious jurisdiction limited to claims against states, so they have rarely had reason to engage with the lawfulness of non-state actors (NSA) justice. However, in *Ilaşcu v. Moldova*, the European Court of Human Rights did note that '[i]n certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal "established by law" provided that it forms part of a judicial system operating on a "constitutional and legal basis" […] enable[ing] individuals to enjoy the Convention guarantees'.[70]

Moreover, human rights mechanisms with broader mandates of monitoring and protection, while also still state-centric, have engaged increasingly with NSAs, including on occasion *urging* them to exercise justice-related functions, on the basis that they are vital to ensure compliance with IHL and IHRL. The longstanding nature of such engagement is evident in the UN Observer Mission in El Salvador (ONUSAL) recognizing the reality that non-state entities were legislating and prosecuting in territories under their control, and shifting to seeking to ensure they did so in a rule of law compliant way in 1990;[71] or calls by the UN Special Rapporteur on the Situation of Human Rights in the Sudan to the Sudan People's Liberation Army and South Sudan Independence Army to 'investigat[e] and hold […] perpetrators responsible'.[72] More recently, multiple examples include reports by the UN Special Rapporteur on Extra-judicial Executions, the Independent Commission of Enquiry in Libya, and the United Nations Assistance Mission for Afghanistan, all of which have called for investigations, often 'with a view to prosecuting' serious crimes.[73] As IHRL shifts to embrace

[70] *Ilaşcu v. Moldova and Russia* (2004) App no 48787/99 (ECHR, Grand Chamber) [460]. See also *Cyprus v Turkey* (2001) App no 25781/94 (ECHR, Grand Chamber) [231], [236–237] and [358].
[71] Americas Watch, *Violation of Fair Trial Guarantees by the FMLN's Ad Hoc Courts* (Human Rights Watch 1990).
[72] See e.g. UN Human Rights Commission, Report of the Special Rapporteur on the situation of human rights in Sudan, Gaspar Biro (20 February 1996) E/CN.4/1996/62, para 87.
[73] Jöbstl (n 6) 582 and Fortin (n 1) 20.

NSA obligations, it is likely to lead to more specific engagement of human rights bodies with *de facto* justice processes.

E. State Reactions and Domestic Courts

Finally, while state practice remains limited, there is also implicit support for the power of NSAs to conduct trials in statements of governments and domestic practice. One particularly striking example, arising in the context of controversies surrounding the French government's reluctance to repatriate French so-called 'foreign terrorist fighters' detained in NES, was the Foreign Minister's statement that they could be 'judged by local judicial authorities'.[74] Other examples point to States selectively calling on NSAGs to investigate and prosecute war crimes or crimes against humanity, where necessary to address cultures of impunity.[75]

An interesting example of the role of national courts in interpreting – and thereby contributing to – international standards[76] is the Swedish *Haisam Sakhanh* case 'On the Establishment of Courts in Non-International Armed Conflict by Non-state Actors'.[77] The Stockholm District Court had to consider specifically whether the creation and operation of a court by an armed group in Syria was prohibited under IHL and thus a war crime. The Swedish court held that: 'sovereignty does not prevent a non-state actor from establishing a Court. The requirement that a court be regularly constituted should rather be regarded as fundamentally paired with the issue of whether the court offers essential judicial guarantees, such as independence and impartiality'.[78] It made explicit that over time there had been 'a shift in focus from the question of how a court is established to an assessment of how a court ensures fundamental procedural guarantees'.[79]

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[74] Editorial, 'Une centaine de jihadistes français sont détenus en Syrie, selon Le Drian', *France 24* (7 February 2018) <http://www.france24.com/fr/20180207-jihadistesfrancais-centaine-detenus-syrie-le-drian-irak-familles-rapatriement-justice> accessed 5 December 2022; Geneva Call, 'Administration of Justice by Armed Non-State Actors', Report from the 2017 Garance Talks (2018) 6; Jöbstl (n 6) 585.

[75] Jöbstl (n 6) 584–5 cites US comments in DRC or joint statements by US, UK and France in Mali concerning NSAGs' role in addressing impunity.

[76] André Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in Gideon Boas and William Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Brill Nijhoff 2003).

[77] Stockholm District Court, Case No: B 3787-16, Judgment (16 February 2017). For the English translation see 'On the Establishment of Courts in Non-International Armed Conflict by Non-state Actors: Stockholm District Court Judgment of 16 February 2017' (2018) 16 *Journal of International Criminal Justice* 403, 413–4.

[78] ibid 413. Reflecting the need for a purposive and holistic approach referred to above, it found 'that a non-state actor must be able to establish courts to maintain discipline within their units'.

[79] ibid 414, para 29, citing Mark Klamberg and affirming that the Court shared his view.

IV. *De Facto* Justice: Conditions, Charges & Challenges

The previous section provides strong support for the view that under international law as it now stands, lawfulness depends on the nature of the proceedings and whether they meet basic standards of justice. The sources of law from which we can derive those standards, applicable in times of war or peace, are IHL alongside the core of IHRL fair trial standards that have been held applicable at all times.[80] At its core we see that they include: (i) independence and impartiality of a tribunal established by law; (ii) basic fair trial rights, applicable throughout the process of investigation, trial and sentencing; and (iii) the principle of legality. Together, these provide the international litmus test for the legitimacy of any criminal procedure, in armed conflict and times of peace.

A comprehensive analysis of these standards, and their applicability in particular contexts, exceeds this short chapter. But some of the particular legal questions, and practical challenges, that arise for *de facto* justice are flagged below.

A. Competent, independent and impartial tribunal established by law

1. Tribunal established by Law?

It has been shown above that several authorities, including the ICRC Customary Law Study, note the basic requirement that tribunals be 'previously established by law'. This immediately raises the (controversial) question whether non-state *de facto* authorities in control of areas can themselves pass the necessary law to establish tribunals. Some, have questioned the law-*making* as opposed to law-*enforcing* function of NSAs,[81] but as already noted many authorities, including the ICRC, recognize the coexistence of various forms of national legislation (state and insurgent).[82] Indeed, the ICRC's 2016 Commentary explicitly notes that tribunals may be

[80] UNHRC, 'General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add. 13, para 15; *Advisory Opinion OC-9/87 on Judicial Guarantees in States of Emergency*, Series A No. 9 (IACHR, 6 October 1987) [30]. ICRC (n 48) has close regard to IHRL in interpreting IHL guarantees.

[81] See e.g. the ICC Prosecutor's position in *Al Hassan*, or Mark Klamberg suggesting the Court must apply law before the conflict, as endorsed by the Stockholm District Court in the *Haisam Sakhanh* case.

[82] E.g. ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 4605 recognizes possible 'co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents'.

'constituted in accordance with the "laws" of the armed group'.[83] Moreover, it would appear to flow logically that if NSAGs can in certain circumstances administer justice, and a key prerequisite of any legitimate tribunal is that it is duly 'established by law', the groups must be able to pass those laws in the first place.[84] This accords with IHRL which requires that any tribunal must be established by law before it adjudicates; however, unlike the criminal law itself, there is no requirement that jurisdiction be established in law at the time of the commission of the crimes in question.[85]

2. An independent, impartial and competent tribunal?

The right to trial by an independent and impartial tribunal is a rule of customary law applicable at all times, including international or non-international armed conflicts.[86] UN endorsed standards describe judicial independence as 'a prerequisite to the rule of law and a fundamental guarantee of a fair trial'.[87]A tribunal must be structurally, institutionally and functionally independent from external influence, including from governments, whether *de facto* or regular.

Objective impartiality is particularly important in armed conflict situations, and clearly precludes the involvement or influence of members of *de facto* authorities in the adjudication process.[88] This requires safeguards to exclude any legitimate doubt as to independence from parties to the conflict and to ensure 'public confidence',[89] including a degree of transparency. Litigation from armed conflict situations has made clear how extreme limitations – such as anonymous 'faceless judges' – are impermissible, specifically as they may lead to 'serving members of the armed forces' being on the bench.[90]

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[83] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para 692. See also ICC *Al Hassan* decision.

[84] On implicit law-making functions as inherently linked to exercise of other powers, see e.g. Ezequiel Heffes, *Detention by Non-State Armed Groups Under International Law* (Cambridge University Press 2022) 166. See also Berkes (n 41) 203.

[85] Article 15, International Covenant on Civil and Political Rights; Helen Duffy, *The War on Terror and the Framework of International Law* (Cambridge University Press 2015) 154.

[86] See e.g ICRC (n 48).

[87] UNODC, 'Strengthening Basic Principles Of Judicial Conduct. The Bangalore Principles on Judicial Conduct' (2018) ECOSOC 2006/23 75.

[88] Eg. on the role of military judges during each stage of proceedings – investigation, trial and conviction – redndering independence from the executive "questionable: see e.g. *Öcalan v Turkey* App no 46221/99 (ECHR, Grand Chamber 2005) paras 112 et seq.

[89] *Öcalan v Turkey* App no 46221/99 para 114 (Section Judgment, 2003); UN General Comment 32, para 21.

[90] UNHRC, *Polay Campos v Peru*, Views, Comm no 577/1994 (9 January 1998) CCPR/C/61/D/577/1994, para 8.8; *Incal v Turkey* (1998) App no 22678/93 (ECHR, Grand Chamber); *Grieves v The United Kingdom* (2003) App no 57067/00 (ECHR, Grand Chamber); *Öcalan v Turkey* (2003) App no 46221/99 (ECHR, First Section).

In turn, s*ubjective* impartiality requires that judges have no personal interest in the case, and that 'the court must not harbour preconceptions about the matter before them, nor act in a way that promotes the interests of one side'.[91] Where there is personal bias, or appearance of bias, the judge must voluntarily withdraw, or be disqualified.[92] These principles are already in jeopardy in robust systems faced with adjudicating notorious crimes, but will almost inevitably be under additional pressure where accused persons are associated with a party to an ongoing armed conflict.[93]

Likewise, the trial judges should not themselves be contaminated by involvement at the investigative stage of the case, while an appeal must be before a different independent, impartial and competent higher tribunal than the trier of fact.[94] In practice, among other things, this requires a sufficient standing cadre of qualified and competent judges to allow for recusals, and multiple judicial benches. Other safeguards include independent appointment and removal procedures, security of judicial tenure,[95] and ensuring judges do not face pressure or prejudice for their judicial activity.[96] Ensuring they receive sufficient salaries and personal security is not only important in itself, but a safeguard against vulnerability to external influence.[97]

Finally, competence is a core requirement. This is made explicit in IHRL standards, reflected in the ICRC Customary law study,[98] and in any event considered inherent in the authority essential in any judicial process. While there is no specific level of education or experience required for a competent judge or bench, as the Basic Principles on the Independence of the Judiciary state, '[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law'.[99] The UNHRC has

[91] UNHRC, *Karttunen v. Finland*, Comm No 387/1989 (1992) CCPR/C/46/D/387/1989, para 7.2.
[92] UN General Assembly, 'Independence of judges and lawyers', Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán (17 July 2020) A/75/172, para 95; UNHRC, Report of the Special Rapporteur on the independence of judges and lawyers (9 April 2010) A/HRC/14/26, para 68; *Öcalan v* Turkey (2003) App no 46221/99 (ECHR, First Section).
[93] ICRC (n 48).
[94] UNHRC, *Baltasar Garzon v Spain*, Comm no 2844/2016 (25 August 2021) CCPR/C/132/D/2844/2016
[95] See e.g. UNHRC, 'Concluding Observations: USA' (7 April 1995) A/50/40 (CCPR/C/79/Add.50), para 36.
[96] E.g. *Baltasar Garzon v Spain*, Comm no 2844/2016 (25 August 2021) CCPR/C/132/D/2844/2016; and UNWGAD, 'Opinion 20/2010, Communication addressed to the Government of the Bolivarian Republic of Venezuela concerning Maria Lourdes Afiuni Mora' (17 March 2010) A/HRC/16/47/Add.1.
[97] Mikael Ekman (ed), 'Rule of Law Assessment Report: Syria 2017' (International Legal Assistance Consortium, 2017)42–43 <http://www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf> accessed 5 December 2022.
[98] The term is not in IHL treaties referring to fair trial, but reflected in Rule 100 of the ICRC Customary Study, which refers back to IHRL authorities. See ICRC (n 48). Competence was also discussed by the Stockholm District Court in the *Haisam Sakhanh* case.
[99] OHCHR, 'Basic Principles on the Independence of the Judiciary' (6 September 1985) Principle 10.

noted that composition of the bench, including gender balance, may also have an impact on independence, impartiality and competence, and basic fair trial rights.[100]

As ever, whether NSAGs can meet these and other relevant standards is a question of fact. The challenges in conflict situations are perhaps obvious, and not unique to *de facto* justice systems. But accounts of the diversity in the structure of such systems – ranging from the 17 multi-tiered courts and support structures to fighters being trained ad hoc to serve as judges – suggests each framework, and critically how they operate in practice, needs to be carefully assessed separately.[101] In NES, the extent of the commitment to independence, impartiality and competence by the Autonomous Authority in NES, and associated legal and institutional developments, is perhaps illustrative of how seriously these international standards can be taken by a *de facto* authority. The Autonomous Authority 'justice council' was set up to support the formal *separation of powers* between the judicial structure and the executive authority,[102] the requirement that the judges 'should not be affiliated to any armed faction, thus respecting the criterion of independence' was made clear,[103] and rules requiring one women judge per bench, would put many national systems to shame.[104] Still, tensions arise between armed factions and judicial independence in practice,[105] including practical challenges such as low salaries, limited available qualified personnel and inevitable security threats.

Notably, efforts to overcome these difficulties, such as by the Autonomous Authority's proposal to involve international judges as part of a composite bench, could have enhanced independence and impartiality, and the legitimacy, competence and capacity of the bench, particularly to try international crimes. However, such active efforts to secure international support for a hybrid tribunal have been unsuccessful (see Section V).

B. Fair Trial: Investigation, Prosecution and Punishment

[100] UNHRC, 'Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers' (14 July 2020) A/HRC/44/L.7: emphasizing the importance of gender balance for the quality of justice.
[101] Jöbstl (n 6) 578 contrasting the LTTE system comprising 17 courts, and the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP) revolutionary Courts martial engaging fighters as judges.
[102] Duffy (n 10) para 47.
[103] Geneva Call (n 74)
[104] Duffy (n 10) para 79.
[105] Duffy (n 10); and also Geneva Call (n 74).

Fair trial requirements apply at all stages of the criminal process from investigation to trial and sentencing,[106] and are essential prerequisites to its legitimacy. Basic due process standards are enshrined in detail in IHRL, IHL and ICL.[107]

In practice, they are frequently violated by states, particularly in conflict situations, but this does not detract from states obligations. Likewise, challenges facing NSAGs do not detract from the fact that if NSAGs assume the responsibility to administer criminal justice, their investigations and trials must be fair. Further, while the law must be capable of being given meaningful effect, there is little principled basis – consistent with a rule of law and victim-centred approach to criminal justice – for setting aside or watering down basic fair trial rights.[108]

There is however a degree of inherent flexibility in the interpretation of IHRL and IHL, to accommodate the reality of particular contexts and circumstances. This is reflected in the requirement in IHRL that trials must be fair when taken as a whole, such that less fundamental rights infringements during investigation may be corrected at trial, for example.[109] However, core fair trial rights or 'minimum guarantees'[110] applicable at all times must not be compromised. As IHL and IHRL authorities reflect, these include at least the presumption of innocence, the right to know the case against you and to prepare an adequate defence, and to meaningfully confront and present evidence.[111] There is nothing to indicate difference in the approach to these core fair trial rights under IHRL and IHL.[112]

Multiple rights implications, including for the fairness of the trial, can arise from the way in which evidence is collected during conflict, lack of access to information, to counsel, to interpretation, and the right not to be compelled to testify against oneself or to confess guilt. All of these pre-trial rights, reflected in IHRL treaty law and jurisprudence, are cited in the 2019 ICRC Guidelines on Investigation as rights relevant to and applicable in investigations in

[106] Noam Lubell, Jelena Pejic and Claire Simmons, 'Guidelines on investigating violations of International Humanitarian Law: Law, Policy, and Good Practice' (ICRC and Geneva Academy, September 2019) paras 55 and ff.
[107] ibid, Commentary to Guideline 11.
[108] *See* e.g. Jöbstl (n 6) 578; Sivakumaran (n 2) 503.
[109] Amnesty International, *Fair Trial Manual* (Amnesty International Publications, 2nd edn, 2014) xvi.
[110] *Advisory Opinion OC-11/90 on the Exceptions to the exhaustion of domestic remedies*, Series C No 209 (IACHR, 10 August 1990) para 24.
[111] ICRC (n 48) includes these and other elements of core fair trial as applicable in all armed conflicts, citing IHL and IHRL sources. While some IHL provisions are more general on fair trial guarantees, Article 6(2) APII is more explicit on these protections, closely reflecting Article 14 of the ICCPR. See also e.g. Stockholm District Court, Case No: B 3787-16, Judgment (16 February 2017)
[112] The close inter-relationship between the norms is seen in e.g. ICRC (n 48), or the ICC decision in the *Al Hassan* case; see also Jöbstl (n 6) 578.

conflict situations.[113] But they are all challenging in practice in situations such as those involving the *de facto* authorities in NES.

As the ICRC Guidelines note, one challenge relates to '[t]he risk of over-classification of information in armed conflict'.[114] Where the military, intelligence agencies or indeed NSAGs have a dominant role in evidence gathering, the transparency of the investigation and crucially, the right of the accused to access and challenge evidence, may be restricted and thus interfere with the right to a real and meaningful opportunity to present a defence.[115] The problem is heightened where accused persons are not in a position to gather evidence, and there is reliance on *de facto* authorities to gather and disclose exculpatory evidence.[116] The risk that investigations become 'fishing expeditions' aimed at justifying detention or prosecution of particular detainees, or are based on preconceived ideas of the nature of the crimes or roles of individuals or groups, is real.[117] In the partisan contexts of conflict, the independence, professionalism and resources of investigators and prosecutors (as well as judges) is crucial and needs to be strictly safeguarded.

Likewise, access to counsel, during questioning, before and during trial, is an essential safeguard against abuse, as well as a fair trial right, but one that depends in practice upon there being sufficiently qualified and the availability of independent lawyers in the first place, on top of a context in which their security, and lawyer-client confidential access and communication, can be ensured.

Reprisals against victims, witnesses and accused persons who spoke to counsel in the camps in NES illustrate the grave implications of trying to give effect to these rights in certain situations. More broadly, where coercive environments arise, as in situations of mass detention or displacement in conflict settings as epitomized by the al Hol camps in NES, the feasibility

[113] Lubell, Pejic and Simmons (n 106). While the Guidelines only apply as such to states, the authors note they may be useful for other actors.
[114] ibid para 153.
[115] Eurojust, *Eurojust Memorandum on Battlefield Evidence* (Eurojust, September 2020) 8. The obligation of sufficient notice under Article 14(3)(a) of the ICCPR; see also Article 9(2) of the ICCPR, Article 75 of the API to the 1949 Geneva Conventions, specifically on confronting witnesses, and broader provisions on essential guarantees e.g. Article 6 of AP II or Article 14 of the ICCPR.
[115] See e.g. Model Code of Criminal Procedure (MCCP) (30 May 2006) Article 34, cited in UNODC, 'Access to Justice, The Prosecution Service' (2006) 7. Article 34 requires that the office of the prosecutor investigates both incriminating and exonerating circumstances equally as do many domestic systems. See also *Asani v The Former Yugoslav Republic of Macedonia* (2018) App no 27962/10 (ECHR, First Section) [36–37].
[116] See e.g. Model Code of Criminal Procedure, Article 34 cited in UNODC (n 115).
[117] OHCHR, Statement by Ms. Fionnula Ni Aolain, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on 'The role of judges, prosecutors and defence counsel in bringing terrorists to justice, including the effective use of battlefield or military-collected evidence' (12 November 2020) <https://www.ohchr.org/EN/Issues/Terrorism/Pages/Statements.aspx> accessed 5 December 2022.

of a fair trial is seriously jeopardized. Safeguarding voluntariness, and absence of any direct or indirect coercion, are particularly essential if guilty pleas or confessions are to be relied upon, which authorities may seek to pursue in the face of mass criminality and limited resources.[118]

It is again a question of fact whether non-state actors can on a 'material' rather than a 'formal' level deliver justice according to the basic international standards reflected in IHRL and IHL. The challenges that arise are context specific, and one should be wary of generalisations as to NSA processes, just as about state systems. However, it is also important to recognize the apparent absence of good practice to date in NSAGs prosecutions, particular deficits in diverse contexts, and to grapple with what it would take to change this for the future.

C. Charging Considerations, International or National Crimes and the Terrorism Trap

In practice, NSAGs may prosecute a range of different crimes by different actors for different purposes, including ordinary common crimes, and crimes by subordinates as part of military discipline. They may also, as in the situation in NES, seek to prosecute serious crimes related to the armed conflict, and serious core crimes under international law, which raise particular international legal issues. The question of *which crimes* may be prosecuted by NSAGs, and on *what legal basis*, raise fundamental questions – first, as to whether the core requirements of legality are met, and second as to the purpose and impact of criminal charges, including on the operation of IHL in armed conflict.

1. Legality, Non-retroactivity and Choice of Law

The principle of legality in criminal law (captured in the rules of *nullum crimen sine lege* and *nulla poena sine lege*), is reflected in justice systems around the globe, in IHL, ICL, and IHRL,

[118] Duffy (n 10).

including Article 15 of the ICCPR.[119] It is a core rule of law principle applicable at all times, explicitly non-derogable,[120] and part of customary IHL.[121]

One key element is the principle of *non-retroactivity* requiring that the impugned conduct and intent were criminalised at the relevant time. As noted above (in relation to the requirement that a tribunal is 'established by law'), there is growing support for the view that NSAs may pass their own laws, but undoubtedly criminal law can only have prospective effects – unlike jurisdiction, which can be conferred by law after the crimes were committed.[122] For crimes committed prior to the NSAG gaining control and passing legislation, any criminal process must therefore be based on some form of pre-existing law, raising at least two options.

First and perhaps most obviously, the authorities may rely on pre-existing domestic law in the relevant state. National systems all enshrine common crimes, and a growing number of states have also incorporated international crimes in their domestic systems. However, any domestic law relied on must meet the requirements of legality – including clarity, certainty and foreseeability – and basic principles of criminal law, requiring that responsibility is individual and commensurate with the conduct and intent of the individual.[123] Particular concerns arise where *de facto* authorities seek to rely on deeply problematic pre-existing anti-terrorism laws.[124] This problem was highlighted by the Autonomous Authority's proposal to prosecute ISIL crimes, not as crimes against humanity or war crimes, but as terrorism-related crimes such as membership or support for a banned group.[125]

It is perhaps unsurprising that NSAGs, like states around the world, would seek to use such laws precisely as the enshrine crimes tend to be broader in scope and easier to prove. However, relying on pre-existing anti-terrorism legislation in the NES context, for example, could mean reliance on the Syrian anti-terrorism law, broadly condemned by international

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[119] Article 15(1) of the ICCPR: 'No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence, under national or international law, at the time when it was committed…'; Article 11(2) of the Universal Declaration of Human Rights (UDHR); Article 7(1) of the European Convention on Human Rights; Article 9 of the American Convention on Human Rights (ACHR); see also Articles 22 (*Nullum crimen sine lege*) and Article 23 (*Nulla poena sine lege*) of the Rome Statute of the International Criminal Court and Article 6(2)(c) of APII.

[120] Article 4 of the ICCPR, Article 15 of the European Convention on Human Rights and Article 27 of the ACHR all expressly proscribe derogations from this right.

[121] ICRC, Customary IHL Database, Rule 101 on the Principle of Legality <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule101> accessed 5 December 2022.

[122] *Prosecutor v Dusko Tadic* (Jurisdiction) IT-94-1-AR72, App Ch (ICTY, 2 October 1995) [41] and ff.

[123] Andrew Ashworth and Lucia Zedner, *Preventive Justice*, (Oxford University Press 2014) 113–114.

[124] E.g. Human Rights Council, 'Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders', Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (1 March 2019) A/HRC/40/52.

[125] AA courts have prosecuted men associated with IS, and proposed new courts to charge women, on the basis of terror-related offences.

authorities for its vagueness and scope, and abusive application against opponents for decades.[126]

There may be scope for some flexibility, and creativity, where NSAGs find themselves seeking to apply pre-existing national law to meet requirements of non-retroactivity, but where the scope of that law was problematically broad or vague. It would arguably be possible to provide a more restrictive interpretation of that law, to alleviate concerns. The International Criminal Tribunal for the former Yugoslavia (ICTY) reasoned that legality would not be offended where 'the conduct, rather than […] the specific description of the offence in substantive criminal law'[127] was pre-established, provided 'the act of the accused was a crime as generally understood at the time of the offence charged'.[128] Caution is undoubtedly due, however, not to undermine legality and admit retroactivity through the back door, or to endorse national standards that fail the clarity and foreseeability tests, essential to the quality of law. Moreover, removing the most problematic aspects of terrorism laws is unlikely to address the profoundly problematic and politicised nature of the crimes in question and their susceptibility to abuse.

2. Charges and IHL

Particular tensions would also arise from the prosecution by NSAGs of members of other NSAGs for participation in hostilities *per se*, whether under anti-terrorism legislation or otherwise. The inherent nature and asymmetry of NIACs, and IHL's convenient selectivity when it comes to NSAGs was referred to in part I of this chapter. State parties to a conflict commonly prosecute members of armed non-state parties, often invoking the 'terrorism label' to this end.[129] However, IHL provisions encourage amnesty at the end of the conflict, to facilitate peace-building and conflict resolution, as opposed to amnesty for war crimes or serious violations which is prohibited.[130] This enables distinctions to be drawn between conduct consistent with the object and purpose of IHL and conduct that undermines it.[131] If a NSAG were to prosecute crimes that essentially amount to prosecuting participation in conflict, some

[126] Duffy (n 10) para 173.
[127] *Prosecutor v. Hadžihasanović and Others* (Jurisdiction) ICTY-01-47-AR72, App Ch (ICTY, 16 July 2003).
[128] ibid.
[129] Duffy (n 26) 16–17.
[130] E.g. *Barrios Altos v. Peru*, Series C No 75 (IACHR, 14 March 2001); the European Court of Human Rights and African Commission on Human and Peoples' Rights have both referred to the prohibition as customary law.
[131] Helen Duffy, *Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters' within a Human Rights Framework* (OSCE Office for Democratic Institutions and Human Rights 2018).

of the same tensions would arise as for states, but they may be heightened. It would seem particularly problematic, or even paradoxical, for an armed group to prosecute members of another party to a conflict for participation in the conflict (as opposed to war crimes), which may entail prosecuting the same conduct being engaged in routinely by its own members. Criminality signifies harm to an essential protected value of any society, which must be applied objectively, and cannot simply reflect who is in power at any point of time. International law provides parameters for distinguishing serious criminality (such as war crimes) which can serve to underscore the moral and legal authority of the criminal process.

3. Prosecuting International crimes

Alternatively, Article 15 of the ICCPR explicitly recognises that prosecution can proceed on the basis that crimes were established in *international law* at the time of their commission. When addressing serious atrocity crimes, and in circumstances where evidence can be obtained, an NSAG tribunal may therefore prosecute war crimes, crimes against humanity and/or genocide as crimes under international law. This would provide a solid international legal basis for the process. As several reports have noted, such prosecutions would also potentially better reflect the nature and gravity of certain crimes,[132] and garner added legitimacy by representing the interests of the international community in accountability for such crimes, and the rights of victims.

In conclusion, while most analysis of NSAGs and the administration of justice overlooks the nature of the charges, it is submitted that it matters not only *who* prosecutes, and *how*, but also *what* is prosecuted. Terrorism crimes often fall short of the principle of legality and are abused as a method of lawfare against opponents, while punishing participation in armed conflict may conflict with principles of IHL and the amnesties intended to incentivise peace. The fact that many states do the same does not detract from their problematic nature. Particular issues of legitimacy that may arise from potential weaponization of terrorism by the same actors dubbed as terrorists by others, deserve further consideration. By contrast, punishing crimes under international law that would otherwise remain unpunished pursues the interests of the international community, the obligations of states (and perhaps NSAGs) under IHRL to investigate and prosecute, and provides a less contested legal framework for distinctions to be drawn, based not on subjective criteria or who happens to be the victor

[132] E.g. Genocide Network (n 20).

between opposition armed groups in the moment, but on objective criteria. While prosecuting international crimes may carry important benefits, it may only be possible with international support and capacity building which, as noted in the next section, may be less forthcoming for NSAGs.

V. The Role of Third States

One final, very important and underexplored piece of the normative puzzle, relates to whether third states are precluded from supporting these *de facto* justice processes, and the implications of such processes for those states.

A. Sovereignty, Non-Intervention & Cooperation with *De Facto* Justice?

A key concern for some states is whether recognising or cooperating with *de facto* justice processes, administered by *de facto* actors in control of parts of a state's territory, would constitute a violation by third states of the territorial state's sovereignty.[133] Certain forms of support to NSAGs operations may very well constitute such a violation, but the nature of that support, its purpose and impact, must be distinguished. The question here is whether providing support for fair, effective and independent trials of serious crimes would do so. Answering this question may require the same pragmatic approach enshrined in international law discussed elsewhere in this chapter, which is reflected in the '*de facto* control' doctrine[134] in international law.

As the International Court of Justice noted in the *Namibia* Advisory Opinion, even where States are under a legal obligation *not* to recognise a government, they may nonetheless have to recognise certain acts of that government as valid, particularly when they are essential for the protection of the public.[135] The 'principle of effectiveness', the maintenance of the rule of international law, and avoiding 'vacuums of protection', all speak to the distinction between recognising or even supporting particular conduct of the NSAG linked to its exercise of control,

[133] For some of the concerns within states, see e.g. Dutch Advisory Committee on Public International law, 'The provision and funding of "non-lethal assistance" to non-State armed groups abroad', Advisory report no. 35 (25 June 2020) <https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2020/06/25/non-lethal-assistance-to-non-state-armed-groups-abroad> accessed 5 December 2022.
[134] Albert Constantineau, *A Treatise on the De Facto Doctrine* (Canada Law Book Company 1910) para 1, referred to in Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016).
[135] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J Reports 1971, 16 [54], [119] and [125], in Murray (n 135).

and legitimising the actor or its territorial control.[136] Of course, in practice there may be an inevitable 'feedback loop of legitimacy',[137] but this cannot justify disregarding the rights of the many millions (victims, perpetrators and others) that live in areas under the exclusive control of *de facto* authorities.

Likewise, it is doubtful that the principle of non-intervention could be seen to bar states from interacting with or assisting *de facto* criminal justice processes. Founded on the notion of the respect for sovereign equality, non-intervention is a customary norm,[138] and a 'cornerstone' principle enshrined in the UN Charter,[139] but it also only precludes *unlawful* interventions involving 'methods of coercion' in respect of 'matters in which each State is permitted […] to decide freely'.[140] The UN General Assembly's Declaration of Principles of International Law concerning Friendly Relations and Cooperation between States refers to 'economic, political or any other type of measures *to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights* and to secure from it advantages of any kind'.[141]

While the administration of criminal justice within a state's territory undoubtedly normally falls within the exercise of state sovereignty, if the support was not coercive, precluding or limiting the exercise of sovereignty by the state, but simply reflecting a reality on the ground in which control of territory has been lost by the state, this would not appear to constitute an unlawful intervention under international law. Cooperation that seeks to ensure fairer trials and rights protection, and bring a rule of law framework to bear, must be distinguished from other forms of cooperation with NSAs that contribute to maintaining their control and which raise legally more complex questions.

B. Obligations *Not* to Cooperate under Human Rights Law?

[136] ibid.
[137] Fortin (n 1).
[138] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, 14 [202]. For forms of intervention see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, 168 [161-165].
[139] E.g. Article 2(7) of the UN Charter, noting the obligation of non-intervention incumbent upon the United Nations.
[140] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment, I.C.J. Reports 1986, 14 [205].
[141] UNGA, Resolution 2625 (XXV) Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, adopted at the 1883rd Plenary Meeting (24 October 1970) (emphasis added).

There are undoubtedly circumstances in which cooperation with foreign processes may be prohibited under IHRL. International jurisprudence and standards make clear that states should *not* cooperate with processes that violate core fair trial standards to such a degree as to amount to a 'flagrant denial of justice'.[142] These standards generally relate to the rules of non-refoulement, that prevent transfer of persons from a state's territory where serious risks of violations such as torture, flagrantly unfair trial arise on the other states – which are unlikely to arise in practice in this context. But similar principles may be considered to apply to other forms of cooperation or support with such processes, in respect of investigation, capacity building and the like. It should be noted though that this is 'a stringent test of unfairness', which 'goes beyond mere irregularities or lack of safeguards in the trial procedures'.[143]

In addition, it is arguable that, applying by analogy the rules of state responsibility applicable to inter-*state* relations, states must ensure they are not 'aiding and assisting' violations by the NSAG. However, this would arise where the aid or assistance is given with a view to facilitating specific wrongful acts, and actually does so, with (at least) knowledge that assistance would be used to carry out such wrongs.[144]

As noted above, trials that fail to meet the basic justice requirements under current international law would be unlawful for the NSAG. At least in some circumstances, certain forms of cooperation could indeed constitute a violation of IHRL and could conceivably be inconsistent with the spirit of the rules on state responsibility. Conversely, if the NSAG *de facto* justice process meets those standards, and especially if the cooperation is explicitly directed at preventing violations and safeguarding the fairness and legitimacy of trials, it follows that the concerns regarding state cooperation should not arise.

C. Obligations to Cooperate or to Recognise?

[142] 'Flagrant denial of justice' means 'manifestly contrary' to fair trial provisions and principles; see e.g. *Othman (Abu Qatada) v. UK* (2012) App No 8139/09 (ECHR, Fourth Section) [258]; *Husayn (Abu Zubaydah) v. Poland* (2014) App no 7511/13 (ECHR, Former Fourth Section) or *Al Nashiri v. Poland* (2014) App no 28761/11 (ECHR, Former Fourth Section) [563–569].
[143] *Othman (Abu Qatada) v. UK* (2012) App No 8139/09 (ECHR, Fourth Section) [260], *Husayn (Abu Zubaydah) v. Poland* (2014) App no 7511/13 (ECHR, Former Fourth Section) [563].
[144] International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts, with commentary' (2001). Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Chatham House, The Royal Institute of International Affairs, 14 July 2016) para 70, noting that aid or assistance must be provided in the 'knowledge or virtual certainty' that the assistance will be used unlawfully.

While not the main focus of this chapter, important and underexplored questions also arise as to whether there is ever an *obligation* for states to cooperate or engage with *de facto* justice processes. Cooperation is an area that is generally not prescriptive, and all the more so in a novel area such as NSAG administration of justice. Asserting that there is a legal obligation to cooperate with *de facto* tribunals would likely stretch the law as it stands too far.

However, there are developments that at least raise questions as to how the law may be evolving, and whether in some limited circumstances obligations to protect rights may fall on third states.[145] For example, a recent legal analysis by two UN Special Rapporteurs on women and children detained in Syrian camps in NES, suggests that: 'states, in their view, have a positive obligation to take necessary and reasonable steps to intervene in favour of their nationals abroad, should there be reasonable grounds to believe that they face treatment in flagrant violation of international human rights law'.[146] While the obligations at issue relate to repatriation from NES of nationals, if nationals face a flagrant denial of justice that the state could intervene to avoid, the same principle may apply.[147] States also have broader obligations to investigate, prosecute and provide reparation for serious violations of international law, which may also, at a minimum, inform the exercise of states' discretion whether and how to cooperate with such processes.[148]

Cooperation with *de facto* authorities, in a way that contributes to accountability and to fairer trials, that ascertain the truth and protect victims' rights, in a context in which alternatives are notoriously lacking, may certainly be seen as consistent with the spirit of international standards, even if not strictly obliged by them.

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[145] E.g. OHCHR, 'Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic' (2020) <https://www.ohchr.org/Documents/Issues/Executions/UNSRsPublicJurisdictionAnalysis2020.pdf> accessed 5 December 2022; Helen Duffy, 'French Children in Syrian Camps: The Committee on the Rights of the Child and the Jurisdictional Quagmire', Case Note 2021/3 (*Leiden Children's Rights Observatory*, 18 February 2021) <https://www.childrensrightsobservatory.nl/case-notes/casenote2021-3> accessed 2 December 2022; Francesca Capone, Rebecca Mignot-Madhavi and Christophe Paulussen, *Returning Foreign Fighters: Responses, Legal Challenges and Ways Forward* (T.M.C. Asser Press, Forthcoming 2023).

[146] OHCHR (n 146).

[147] ibid. On the jurisdictional links that may arise in special situations of dependency and where particular states have the capacity to prevent violations, see also UNHRC, *A.S. et al v Italy*, Comm No 3042/2017 (28 April 2021) CCPR/C/130/D/3042/2017; Committee on the Rights of the Child, *L.H. et al v. France*, Comm No 79/2019 and 109/2019 (2 November 2020) CRC/C/85/D/79/2019–CRC/C/85/D/109/2019and *F.B. et al v. France*, Comm No 77/2019 (25 February 2021) CRC/C/86/D/R.77/2019;and Duffy (n 146).

[148] E.g. UNSC, Resolution 2354 (2017) S/RES/2354; UNSC Resolution 2367 (2017) S/RES/2367; UNSC, Resolution 2368 (2017) S/RES/2368; UNSC Resolution 2370 (2017) S/RES/2370; UNSC Resolution 2379 (2017) S/RES/2379; UNSC Resolution 2396 (2017) S/RES/2396.

D. Recognition and Impact on Trials in Third States?

Finally, third states are similarly unlikely to be considered obliged to recognise the judgments of these novel justice fora, to which applicable bilateral or multilateral agreements governing the enforcement of judgments would not apply. In general, '[i]n the absence of treaty commitments, countries are under no obligation to recognise and/or enforce foreign judgments.'[149] By contrast, consistent with the foregoing, if the judgments result from a process that amounts to a flagrant denial of justice, states would be obliged not to recognise and give effect to them.[150] The international framework again provides a basis for principled distinctions to be drawn based on the nature of the processes and of the crimes being investigated and prosecuted.

It has been argued with some force, including in the NES context that, where possible, states should repatriate nationals and ensure a fair trial in established systems, rather than look to NSAG processes to step into the breach. States' reluctance to do so is political not legal, but the issue does raise the question whether states of return would be able to prosecute individuals present on their territories who had previously been subject to *a de facto* justice process. In other words, does the *ne bis in idem* principle – the international law rule that generally prevents double prosecution or punishment for the same facts[151] – preclude this possibility? International human rights standards suggest that it does not. The UN Human Rights Committee underlined that the principle 'does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States', but 'prohibits double jeopardy only with regard to an offence adjudicated in a given State'.[152] While arguably human rights principles would favour states preventing retrial for the same criminal offence, strictly speaking states of return would appear not to be precluded from prosecuting by the fact of these processes having taken place elsewhere. They may of course take into account previous processes and punishment, just as they would take into account periods in pre-trial detention, in assessing the appropriateness in all the circumstances of prosecuting, and the determination of appropriate sentences. States

[149] Ralf Michaels, 'Recognition and Enforcement of Foreign Judgments', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) para 11.
[150] ibid para 12. Also see *Pellegrini v. Italy* (2001) App no 30882/96 (ECHR, Second Section) [40–48].
[151] ICCPR, Article 14(7); European Convention on Humanr Rights, Protocol No 7, Article 4; ACHR, Article 8(4); African Charter on Human and Peoples' Rights, Article 7(2).
[152] UNHRC, General Comment No. 32 on the Right to equality before courts and tribunals and to fair trial (23 August 2007) 23 August 2007, para 57; UNHRC, *A.P. v. Italy*, Comm No 204/1986 (02 November 1987) CCPR/C/31/D/204/1986 , para 7.3 ; UNHRC, *A.R.J. v. Australia*, Comm No 692/1996 (11 August 1997) CCPR/C/60/D/692/1996 , para 6.4.

may also be able to receive convicted persons to serve sentences closer to home, consistent with humanitarian principles and the objective of rehabilitation.

In conclusion, cooperating with *de facto* justice processes in support of the administration of fair trials, does not *per se* impinge on the state sovereignty and states are only precluded from doing so where such processes would fall foul of basic standards of justice enshrined in international law. Likewise, the NSA processes do not preclude third states exercising their jurisdiction. But they may fill the familiar impunity gap left when neither territorial nor foreign state are able or willing to administer justice in practice.

VI. Conclusion

This chapter reveals an international shadowland between legal theory and practice, and between the state-centric legal order and realities of armed non-state actor power in the world today. In this shadowland, the treatment of NSAGs as outlaws under domestic law, and potential violators of IHL and IHRL, sits alongside their increasing role as potential enforcers of international and national law, and protectors of diverse interests of states, victims, perpetrators and the international community.

This is an area of dynamic – if fitful and selective – legal and practical development. What emerges from across diverse fora, applying intersecting branches of international law, is a strikingly functional and pragmatic approach to the application of the legal framework. The chapter has revealed a decisive shift to focus to *how* the processes operate and whether they meet fundamental standards of justice, human rights and rule of law, without which no criminal justice can be legitimate, rather than formalistic distinctions based on the status of the armed non-state actors associated with the establishment of such tribunals. As such, international law opts to constrain rather than ignore reality, and thereby assert its own relevance and impact, without *per se* conferring legitimacy on the NSAGs or the fact of their control.

NSAGs and *de facto* justice processes are vastly diverse in their conduct and impact (and still relatively under-explored), making generalisations about those actors, and justice processes established by them, problematic. *De facto* justice processes may be a vehicle for denial of justice, delivered by actors over whom there may be even less oversight and influence than state actors. But they may also be imperative to a semblance of rule of law in the large swaths of the globe that are, in fact, under the exclusive control of NSAGs. They may be the only realistic option for accountability and victim-centered justice in the context or aftermath

of conflict. The assessment of lawfulness depends upon difficult,[153] fact-specific and deeply contextual analyses of whether safeguards of independence and impartiality, fair trial, legality, and principles underpinning IHL, are respected.

Rejecting the idea that non-state actor tribunals are inherently impermissible, or that they are legitimized by engagement to secure fairer trials, is an important start. There is a follow-on need for a range of human rights actors (states, organisations and NGOs) to engage more fully with these processes, and differences between them, to ensure the effective implementation and oversight of the international law framework. Cooperation by third states with justice processes will often be essential if the requisite standards are to be met. Yet, such cooperation is elusive in practice, as states remain wary of legitimizing the role of NSAs and compromising the sovereignty-based order. It remains to be seen whether in the future, greater engagement with *de facto* justice processes can and will help ensure that, *de facto*, they deliver justice.

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