Non-state armed groups as providers of justice during non-international armed conflicts

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List of abbreviations

AANES	Autonomous Administration of North and East Syria
ICC	International Criminal Court
ICRC	International Red Cross Committee
IHL	International humanitarian law
IIIM	International Impartial and Independent Mechanism
IS	Islamic State
LNA	Libyan National Army
NGOs	Non-governmental organisations
NIAC	Non-international armed conflict
NSAG	Non-state armed group
PRCs	Peace and Reconciliation Committees
SDF	Syrian Democratic Forces
YPG/YPJ	People's Protection Units/Women's Protection Units

1. Introduction

While intra-state wars were the norm decades ago, non-international armed conflicts (NIACs) are now the most prevalent form of armed conflict in the world, with their number having doubled since the early 2000s.[1] There is currently seventy active NIACs, which are considered the most violent form of armed conflict because, among other things, of their unpredictability, the high number of potential actors, and the complex interconnections between them.[2]

Apart from the violence of the conflict itself, the International Red Cross Committee (ICRC) reported 60 to 80 million civilians under the control of non-state armed groups (NSAGs) in 2020.[3] While it is common for scholars and professionals in the field to examine NSAGs only as military actors, the activities rebel groups are undertaking in terms of governance should not be ignored. Indeed, since the Second World War, one third of NSAGs were involved in some sort of rebel governance by creating institutions and practices to regulate the political and social lives of the population under their control, including law and order functions.[4]

Even though NSAGs are often seen as law-takers rather than law-makers, because of their non-participation in the creation of new international norms and their identity as sole subjects of international and domestic law, one of the keystones of the rebel governance of NSAGs is the creation of a judicial system or similar judicial processes.[5] The During-Conflict Justice dataset reports that between 1946 and 2011, 10% of the judicial or quasi-judicial processes during armed conflicts were provided by NSAGs, with an increasing resort to trials every year.[6] One example of an NSAG judicial system is the Liberation Tigers of Tamil Eelam group, which was active in Sri Lanka from 1976 until 2009 and constituted a hierarchical

[1] 'ICRC Engagement with Non-State Armed Groups. Why, How, for What Purpose, and Other Salient Issues' (ICRC 2021) 4.
[2] ibid; Ben Saul, 'Enhancing Civilian Protection by Engaging Non-State Armed Groups under International Humanitarian Law' [2016] Journal of Conflict and Security Law 39-66, 39–40.
[3] 'ICRC Engagement with Non-State Armed Groups. Why, How, for What Purpose, and Other Salient Issues' (n 1) 2.
[4] René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford University Press 2021) 10.
[5] C Ryngaert and A Van de Meulebroucke, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms' (2011) 16 Journal of Conflict and Security Law 443-472, 443.
[6] Cyanne E Loyle and Helga Malmin Binningsbø, 'Justice during Armed Conflict: A New Dataset on Government and Rebel Strategies' (2018) 62 Journal of Conflict Resolution 442-466, 450.

system of seventeen courts. They relied on a penal and civil code and trained their future lawyers and judges in a law college.

This thesis aims to answer the following question: What are the potential benefits of NSAG's quasi-judicial processes for peace and justice during and after a non-international armed conflict? To answer this question, after an overview of the legal and political context surrounding NSAG judicial processes, three potential benefits of those judicial processes will be explored and illustrated with a case study, the Syrian Democratic Forces (SDF). A literature review will start this thesis to provide an overview of the current state of research on the subject.

1.1. Literature review

The discussions surrounding judicial processes led by NSAGs in NIACs can be divided into three categories. First, numerous scholars have been working on rebel governance and therefore, have explored rebel judicial processes in this context. Indeed, cases of rebel governance are numerous, and scholars have been trying to understand why and how rebel groups choose to deliver certain governance activities compared to others. Related specifically to judicial processes in rebel governance, Berti has identified three main reasons why NSAGs decide to provide justice while having control over a territory: expediency, control, and legitimacy.[7] Other authors, such as Loyle or Ginsburg, have focused on previous indicators that could explain why some rebel groups have chosen certain types of judicial processes, such as the level of support from civilians for the NSAG or the legal traditions in which the NSAG developed.[8]

The second focus of scholars has been on the legality of NSAG courts and judicial processes under international humanitarian law (IHL) and international criminal law. Two legal cases, one in front of the International Criminal Court (ICC) and one in front of the Swedish courts, have been widely used in articles and books to provide a legal analysis of the establishment of rebel courts. For example, Sivakumaran and Klamberg both used the case of Haisam Sakhanh in Sweden to argue that NSAG courts are not ruled out by IHL if

[7] Benedetta Berti, 'Rebel Justice? Rule of Law and Law Enforcement by Non-State Armed Groups' in Linda Hamid and Jan Wouters (eds), *Rule of Law and Areas of Limited Statehood* (Edward Elgar Publishing 2021) 119-136, 122.
[8] Cyanne E Loyle, 'Rebel Justice during Armed Conflict' (2021) 65 Journal of Conflict Resolution 108-134, 128.

both the requirements of independence and impartiality are fulfilled.[9] Other authors, such as Amoroso, use the case of *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli* before the ICC to examine whether NSAG judicial investigations satisfy the requirements under the complementarity principle in the Rome Statute.[10]

The third aspect of the literature discussing NSAG judicial processes is very diverse and usually only touches upon the subject while discussing compliance with IHL, transitional justice, and other subjects related to peace and justice during and after NIACs. Authors such as Willms highlight the greater effectiveness of NSAG judicial processes because of their proximity and visibility to soldiers, providing a better deterrent effect on the commitment of international crimes.[11] Mitra and Dudai's work on the transitional justice movement acknowledges the possibility of using NSAGs to overcome some of the disadvantages of using external enforcement, which is not always sensitive to the cultural or religious habits and beliefs of the community and victims.[12] A few scholars, such as Daly or Provost, provide in-depth analysis of specific cases of NSAGs and their rebel governance.[13]

To conclude, while the legality of NSAG courts and the rebel governance field have been widely explored, a few research gaps can be highlighted. Indeed, while NSAG judicial processes are talked about during discussions surrounding compliance with IHL or the transitional justice movement, they are almost never the main subject of the research. The effects of those NSAG judicial processes on peace and justice during and after a NIAC need to be more thoughtfully explored. While literature from both the first and second categories will be mostly used to establish the legal and political context surrounding judicial processes led by NSAGs, this thesis will synthesize subjects tackled in the third category in order to provide an overview of the potential benefits of judicial or quasi-judicial processes led by NSAGs during NIACs.

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[9] S Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 Journal of International Criminal Justice 489-513, 498; Mark Klamberg, 'The Legality of Rebel Courts during Non-International Armed Conflicts' (2018) 16 Journal of International Criminal Justice 235-263, 262.

[10] Alessandro Mario Amoroso, 'Should the ICC Assess Complementarity with Respect to Non-State Armed Groups?' (2018) 16 Journal of International Criminal Justice 1063-1091, 1063.

[11] Jan Willms, 'Justice through Armed Groups' Governance - An Oxymoron ?' (Collaborative Research Center (SFB) 700 2012) 40 20.

[12] Arpita Mitra, 'Developing Transitional Justice for Youth: An Assessment of Youth Reintegration Programmes in Colombia' (2022) 16 International Journal of Transitional Justice 82-100, 84; Ron Dudai, 'Closing the Gap: Symbolic Reparations and Armed Groups' (2011) 93 International Review of the Red Cross 783-808, 807.

[13] Sarah Zukerman Daly, 'Determinants of Ex-Combatants' Attitudes toward Transitional Justice in Colombia' (2018) 35 Conflict Management and Peace Science 656-673; Provost (n 4).

1.2. Research question

This thesis aims to answer the following main research question:

What are the potential benefits of NSAG quasi-judicial or judicial processes for peace and justice during and after a non-international armed conflict?

To answer the above question, sub-questions will be explored in this paper:

- What is the current legal and political frameworks surrounding NSAG judicial processes?
- What are the potential benefits of judicial processes led by NSAGs?
- What have been the effects of NSAG judicial processes on peace and justice in the case of the Syrian Democratic Forces?

1.3. Argument

This thesis contends that judicial processes conducted by NSAGs can promote peace and justice at various levels during and after an NIAC and should not be disregarded by researchers and practitioners. Indeed, considerations of recognition and legitimacy should not prevent engagement by international actors with NSAGs surrounding those judicial processes while the group has full control over civilians. It is a reality for 70 million people to be under the control of an NSAG, and a considerable portion of those civilians will be impacted by judicial processes or decisions made by the rebel judicial system during or after the NIAC. As the ICRC stated in a 2009 report on the protection of civilians: "[…], while engagement with non-State armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflict".[14] The judicial protection of millions of civilians cannot be overlooked because those people are ruled by groups that are considered terrorists or lawless by the international community.

Moreover, numerous scholars have been recognizing, even though not consistently, some benefits rebel courts and judicial processes could bring to NIACs. Indeed, they could

[14] UN. Secretary-General, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflicts' (United Nations 2009) S/2009/227 para 40.

have an effect on IHL compliance and non-impunity; and could better satisfy victims by providing judicial processes more adapted to their cultural and religious beliefs, alongside the transitional justice movement.

This thesis does not ignore the negative impacts that could derive from those judicial processes, however, these negative impacts have been the subject of much scholarly research, whereas the benefits of the processes have not. This is why this thesis will deliberately focus only on the potential benefits those judicial processes could bring to peace and justice.

1.4. Methodology and cases

To answer the research questions, this thesis will be based on a qualitative analysis of the existing literature and a case study of the Syrian Democratic Forces. This thesis will use doctrinal research to expose the current legal situation surrounding judicial processes led by NSAGs, with primary sources (the Rome Statute, the Four Geneva Conventions of 1949, the related Additional Protocols, and past legal cases) and secondary sources (articles of legal scholars). The rest of the thesis will rely on scholarly articles and books in order to identify potential benefits and also obtain information on the case study selected for this thesis.

Indeed, a case study will be used in this thesis to illustrate the potential benefits of judicial processes led by NSAGs. The Syrian Democratic Forces and the connected Autonomous Administration of North and East Syria (AANES) have been chosen for multiple reasons. First, they are supported politically and materially by numerous powerful states and share values with the international law system, such as democracy and equality. This permits an examination of the potential benefits of judicial processes led by the group with less difficulty because of the apparent sympathy countries have for the group and their fight. While many scholars and professionals are for now reluctant to interact with NSAGs as providers of justice, it is more conceivable to cooperate with rebels who are positively seen by the majority of the international community because it causes fewer political issues. Second, the quasi-total absence of international judicial processes to punish violators of international law in the Syrian civil war makes it a good case study for this thesis because the judicial processes led by the SDF and the AANES are the only option for justice. Third, because of the length of the Syrian civil war, the AANES and the SDF have had the time to

implement judicial processes, which is not the case in other NIACs that are more recent or less stable.

Some limitations of this thesis must be highlighted. Indeed, this thesis will rely exclusively on information from secondary sources, which are themselves very limited due to the ongoing conflict and the difficulty for scholars or experts to travel to the territory. Additionally, the neutrality of these secondary sources towards the Syrian civil war is not guaranteed and could affect the information provided.

1.5. Outline

The next chapter will give an overview of the current legal and political frameworks surrounding judicial processes led by NSAGs. It starts with the legal framework, which will include the status of NSAG courts under IHL and two legal cases. Then, the political framework will be examined with an overview of the relationship between states and NSAGs and between non-governmental organisations (NGOs) and NSAGs. In chapter 3, the thesis will synthesize the scholarly work on the potential benefits of rebel judicial processes. In turn, the increase in compliance, the anti-impunity effect, and the transitional movement will be studied. The case study of the Syrian Democratic Forces will be explored in chapter 4. A context of the war will be given, followed by an explanation of the current judicial structures established by the SDF. Finally, the three potential benefits established in chapter 3 will be examined in this specific case. This thesis will end with a conclusion.

2. Current legal and political frameworks

This chapter will explore the legal and political frameworks surrounding judicial processes led by non-state armed groups during non-international armed conflicts. Indeed, as mentioned in the introduction of this thesis, NSAGs are widely involved in the governance of the territories they control, including by creating judicial institutions. However, NSAGs are rarely regarded as providers of justice during NIACs, and the potential benefits of rebel judicial processes are frequently neglected. This thesis argues that, while international law allows NSAGs to lead judicial processes in NIACs if certain conditions are met, the political implications of those judicial processes, as well as their implications for concepts of state, jurisdiction, and legitimacy, are the reasons why NSAGs are not regarded as justice providers.

This thesis will first examine the legal context surrounding those processes, including the legality of NSAG courts under IHL and some important legal cases that show an increasing acceptance of judicial processes led by NSAGs in international law and its scholars. The following parts will look at different political considerations that affect the attitude of states and international organizations towards NSAGs.

2.1. Current legal framework

2.1.1. NSAG courts under IHL

The recognition of NSAG courts creates tension between the principle of equality of belligerents and the idea that states are the only holders of sovereign power.[15] While looking at the legality of NSAG courts under IHL, two articles predominate importance and will be examined in turn: common article 3 of the four Geneva Conventions of 1949 and article 6 of Additional Protocol II of 1977.

First, common article 3 of the four Geneva Conventions of 1949 establishes the equality of belligerents in NIACs. It states that both parties to the conflict must follow some provisions, including article 3(1)(d), which prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly

[15] Klamberg (n 9) 236.

constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized peoples".[16]

At first glance, this article would seem to indicate that only 'regularly constituted courts', which would be established under the regular constitutional law of the states, could be deemed legal by IHL. All NSAG courts would therefore be considered illegal. However, as the ICRC argues, this article should not be interpreted in this manner because it would mean that NSAGs would never be able to comply with this article, which would severely undermine the principle of equality of belligerents established.[17]

During the diplomatic conferences leading to the Additional Protocols, participants highlighted the difficulty posed by the wording of common article 3, which would systematically put the NSAGs in violation of article 3(1)(d). Consequently, when article 6 of the APII was agreed upon, the wording of the requirements was modified from 'regularly constituted courts' to 'essential guarantees of independence and impartiality' in article 6(2). Independence would include requirements such as the lack of political interference and protection against any conflict of interest or intimidation, while impartiality would be examined both on a subjective level (such as the state of mind of the judges) and an objective level.[18] The common article 3 and article 6 APII should then be interpreted in a way that sets aside any discrepancies and enables NSAGs to establish courts that uphold "essential guarantees of independence and impartiality" to fulfill article 3(1)(d).

Many authors also argue that interpreting common article 3 strictly according to its words would put the equality of the belligerents principle and the command responsibility principle in opposition. Indeed, the command responsibility principle in IHL is also applicable in NIACs and requires commanders of NSAGs to take necessary and reasonable measures to punish or prevent subordinates from committing prohibited acts.[19] However, it is unreasonable to ask commanders to send their soldiers guilty of crimes to the national judicial institutions against which the group is fighting. Consequently, NSAGs should be able to establish judicial mechanisms to uphold discipline in their armed forces and, therefore,

[16] Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (75 UNTS 287) art 3.
[17] Klamberg (n 9) 242–243.
[18] ibid 244.
[19] Sivakumaran (n 9) 497.

respect their command responsibility obligations without being in breach of international law.[20]

The 'indispensable' character of the judicial guarantees from common article 3 has been discussed by legal scholars. They point to two areas of law that need to be examined to define this criterion: IHL and international human rights law. This thesis will not go into more details about this subject, but the conclusion of Sivakumaran on this issue was that article 6 of the APII is already based on the International Covenant on Civil and Political Rights, and therefore, to establish which guarantees are taken into account, article 6(2) of the APII should be the primary source.[21] When Sivakumaran suggests rights, such as the right to be tried without undue delay or the right to an interpreter, he highlights the importance of interpretation. Indeed, he considers that interpreting the provisions "[…]in a way that both respects their substance yet modifies them so as to take into account the particular nature of the conflict should not be cause for concern for there is a history of their differential interpretation based on the exigencies of the situation".[22]

While I will not elaborate more on the international law framework surrounding judicial processes led by NSAGs, this chapter demonstrates that international law is not an impediment to the development of such judicial procedures by NSAGs. Indeed, while some requirements need to be met, those judicial processes are increasingly encompassed by international law, for example, by the modification of the wording by article 6 APII but also by scholars such as Amoroso and Klamberg who argue for the legality of those rebel courts and their inclusion in the complementarity principle of the ICC.[23] Additionally, as will be explored in the next part of the thesis, it is also the case in international and domestic courts, which are starting to see prosecutions related to rebel courts.

2.1.2. Case law

Two cases have been widely used by legal scholars because of their unprecedented nature. Indeed, there have been very few instances of international or domestic courts

[20] Klamberg (n 9) 256; Amoroso (n 10) 1081.
[21] Sivakumaran (n 9) 503.
[22] ibid 505.
[23] Klamberg (n 9) 262; Amoroso (n 10) 1069.

taking decisions in case law related to the legality of rebel courts or the legal effect of their decisions; therefore, these two cases have an innovative and founding character in international law by establishing a new jurisprudence.

First, Haisam Sakhanh was convicted on February 16, 2017 by the Stockholm District Court for crimes he committed during the 'Arab Spring'.[24] Indeed, he was part of the NSAG known as 'Suleiman's Company' and participated in the execution of Syrian soldiers.[25] When a video of the execution was released, Sakhanh was on Swedish territory, and the prosecutor of the Stockholm District court started to investigate his actions. Sakhanh denied criminal responsibility, stating that a trial conducted by a military council linked to Suleiman's Company had sentenced the Syrian soldiers to the death penalty and that he was therefore only applying a judicial decision.

The Swedish District Court admitted that NSAGs needed to be able to establish courts for two reasons: to uphold discipline amongst their own forces, and, "secondly, when relying on trained judges to apply existing laws, and possibly new laws that do not deviate in a manifest way from existing laws, to uphold order".[26] Ultimately, if the trials in a NSAG court were conducted with respect for common article 3(1)(d), article 6 of the APII, and customary international law, they would be deemed legal.[27] In the case of Sakhanh, those requirements were considered not to have been fulfilled by the rebel court, and Sakhanh was therefore convicted.

The second case concerns Mahmoud Mustafa Busayf Al-Werfalli, a senior commander in a Libyan military unit called 'Al-Saiqa Brigade'.[28] The ICC issued a second arrest warrant against Al-Werfalli in 2018, while he was detained and investigated by a Libyan military prosecutor of the Libyan National Army (LNA) for identical charges to the ones at the ICC.[29] The Libyan political environment was highly unstable at the time, and the LNA constituted a NSAG involved in a NIAC. The ICC concluded that the proceedings led by the LNA against Al-

[24] *Prosecutor v. Omar Haisam Sakhanh* [2017] B 3787-16 (Stockholm District Court).
[25] Klamberg (n 9) 254.
[26] ibid 257.
[27] ibid 258.
[28] Amoroso (n 10) 1064.
[29] *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli* (Decision on Second Arrest of Warrant) ICC-01/11-01/17-13 (4 July 2018).

Werfalli did not fulfill the requirements of article 17 for the complementarity principle of the Rome Statute and, therefore, the case was admissible to the ICC. Without explicitly stating it, by verifying the admissibility principle in relation to the LNA court, the ICC implicitly opened a door to NSAG courts under the principle of complementarity of the Rome Statute.

2.1.3. Conclusion

As Sivakumaran states,

"international humanitarian law does not, then, 'rule out, a priori, the initiation of criminal proceedings by armed groups'. International humanitarian law may not explicitly create a right for armed opposition groups to set up courts; neither does it prohibit their establishment".[30]

Both the text of the different agreements and the jurisprudence of the ICC and the Swedish court open a door for NSAGs to establish their own judicial processes in respect of international law. However, the requirements established previously are extremely hard to fulfill for rebel groups in a non-international conflict. Indeed, in a situation of war and with a lack of funding, it is doubtful that NSAGs could ever be considered fulfilling the requirements of independence and impartiality required by international law if the standards applied are kept that high. While the legal situation surrounding rebel judicial processes seems to develop positively, their encompassing is still severely hampered by political pressures, which will be explored in the next part of this thesis.

2.2. Current political framework

2.2.1. States and NSAGs

One important moment in the relationship between states and NSAGs have been during the drafting of the Additional Protocols of 1977 which was done in the presence of NSAGs, more specifically, national liberation movements groups.[31] Even though they were only

[30] Sivakumaran (n 9) 498.

[31] Hyeran Jo, 'Compliance with International Humanitarian Law by Non-State Armed Groups: How Can It Be Improved?' in Terry D Gill and others (eds), *Yearbook of International Humanitarian Law Volume 19, 2016*, vol 19 (TMC Asser Press 2018) 63-88, 71.

observers, and it raised a lot of controversies, it was a powerful sign of the participation of NSAGs in international law, blurring their image as outlaws. While this event could have changed the relationship between the international community of states and NSAGs drastically, the political context surrounding judicial processes led by NSAGs is still very challenging. Indeed, States are extremely wary of letting NSAGs participate in international law-making, and one of the major reasons is legitimacy. States tend to feel in opposition with the NSAGs in terms of legitimacy; only the state or the NSAG can have legitimacy in the conflict, not both.[32] NSAGs are effectively using international law to boost their legitimacy, either towards the population under their control or in opposition to the state, creating a legitimacy battle between the two sides of the conflict.[33] Additionally, if the state starts a dialogue with the NSAG, it could be seen as giving them recognition of their status as belligerent, and potentially, signifying that their grievance has a foundation.[34] For NSAGs, a formal dialogue with the state could give them a forum to express their desires or ideologies but also make them vulnerable to surveillance and intelligence gathering from the opposing side.[35]

Moreover, it is the very concept of state and its related concept of jurisdiction that tend to prevent states from accepting or encouraging judicial processes led by NSAGs. Indeed, the traditional conception of law and justice is that its main actors are the state and its institutions. It is the state that elaborates the laws, executes them, and maintains their respect inside its territory. The state has sole jurisdiction over its civilians. NSAGs are challenging the state and its jurisdiction; therefore, governments are very wary of recognizing judicial processes of NSAGs, which are deemed non-legitimate because they are not led by state institutions. By encouraging or acknowledging them, the opposition state is granting recognition to the NSAGs as having jurisdiction over its citizens and granting some state-like powers to the enemy. Moreover, states that are not directly impacted by the conflict are often reluctant to grant NSAGs recognition because of the precedent it could establish. Overall, dialogue or collaboration between opposing states and NSAGs is hardly

[32] Hyeran Jo, 'Law-Making Participation by Non-State Armed Groups: The Prerequisite of Laws Legitimacy?' in Heike Krieger and Jonas Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar Publishing 2021) 357- 374, 370.
[33] ibid.
[34] Claudia Hofmann, 'Engaging Non-State Armed Groups in Humanitarian Action' (2006) 13 International Peacekeeping 396-409, 398.
[35] ibid 397.

imaginable, or at least highly impacted by political considerations, therefore, the UN has been encouraging NGOs to close the gap and engage with NSAGs where states are not able or willing to.[36]

2.2.2. NGOs and NSAGs

NGOs have the privilege of being able to undertake initiatives without the political or diplomatic pressure generally resting on governmental structures. They are able to establish an informal or unofficial diplomacy, which grants them better access to NSAGs.[37] NSGAs are also often more willing to discuss with neutral organizations, which can also better adapt to the actors with whom they are engaging. However, in recent decades, states have increasingly labeled NSAGs as terrorist groups, which renders the possibility of engaging with them legally and practically more difficult.[38] While NGOs were already suffering from practical access to NSAGs in controlled or unstable territories, a lack of founding, and other preoccupations, the labeling of NSAGs as terrorist groups interfered gravely with their activities, adding the fear of criminal responsibility and prosecutions.

This has been the case for the NGO Geneva Call, which during the *Garance Talks I*, highlighted the impossibility of helping the Syrian Democratic Forces with their investigations because of the political consequences it could have on the organization.[39] Apart from the significant high compliance reported by Geneva Call, this organization shows that NSAGs are willing to accept external oversight and to cooperate in relation to their compliance with IHL norms.[40] It demonstrates an opportunity to tackle humanitarian issues by engaging with NSAGs.[41]

2.2.3. Conclusion

While NSAGs are key actors nowadays in NIACs, both in military terms and as providers of justice, political considerations are hampering their collaboration with the international

[36] ibid 401.
[37] ibid 399.
[38] Sukanya Podder, 'From Spoilers to Statebuilders: Constructive Approaches to Engagement with Non-State Armed Groups in Fragile States', vol 6 (2012) OECD Development Co-operation Working Papers 6 17.
[39] Annyssa Bellal, 'Positive Obligations of Armed Non-State Actors: Legal and Policy Issues. Report Form the 2015 Garance Talks' (Geneva Call 2016) 16.
[40] Ezequiel Heffes, 'Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020) 427-451, 441.
[41] Hofmann (n 34) 404.

community and, most importantly, with states. While the benefits of judicial processes led by NSAGs will be examined in the next chapter, this chapter exposes the different threats states experience towards NSAGs as providers of justice. Indeed, considerations of legitimacy and jurisdiction are key concepts for governments, which are witnessing the increasing role NSAGs have for populations under their control in NIACs as providers of state-like activities. While NGOs have been trying and encouraged to fill this gap left by states, they face difficulties raised by hostile political and economic environments. In the next chapter, the potential benefits of judicial processes led by NSAGs in NIACs will be examined.

3. Potential benefits

This chapter will explore the potential benefits of judicial or quasi-judicial processes led by non-state armed groups in non-international armed conflicts. Although the legal and political structures addressed in the preceding chapter hinder greater involvement of the international community in judicial proceedings led by NSAGs, these proceedings can contribute to peace and justice in NIACs in three significant ways. First, they can enhance adherence to IHL norms. Second, they can have an anti-impunity impact. Lastly, they can offer advantages to the transitional justice movement. This chapter will therefore go through all three potential benefits in order to analyze them in light of the case study in the next chapter. While the negative effects of the judicial processes and the political considerations that could prevent engagement with NSAGs are not the focus of this chapter or thesis, they will be mentioned when necessary.

3.1. Compliance

With the growing involvement of NSAGs in NIACs, rebels' compliance with IHL norms became increasingly important for the international community and the communities affected by armed conflicts. The Secretary-General of the UN identified rebel compliance with IHL as one of the five core challenges in a 2009 UN report about the protection of civilians in armed conflict.[42]

NSAGs' compliance with IHL is influenced by a wide range of factors, including economic and social benefits as well as political incentives. Some examples often mentioned in the literature are the knowledge of the rules by the NSAG's members as well as the similarities between IHL rules and the cultural or religious context in which the NSAG is evolving.[43] One important incentive to compliance for NSAGs is the potential support from the domestic and international communities if the group is seen as respecting international norms. Then, complying with IHL is seen as a means of gaining political recognition and being viewed

[42] UN. Secretary-General (n 14) para 5.

[43] Ezequiel Heffes, 'Compliance with IHL by Non-State Armed Groups: Some Practical Reflections at the 70th Anniversary of the 1949 Geneva Conventions' (*EJIL: Talk!*, 21 August 2019) para 8 <https://www.ejiltalk.org/compliance-with-ihl-by-non-state-armed-groups-some-practical-reflections-at-the-70th-anniversary-of-the-1949-geneva-conventions/> accessed 21 May 2023.

favorably by both the domestic and international communities.[44] It follows that legitimacy-seeking groups are expected to better comply with IHL norms than other groups because of the importance they attribute to their reputation and perceived legitimacy.[45]

Consequently, compliance with IHL is not an off-on switch but rather should be seen as a gradual scale on which NSAGs are evolving. NSAGs are constantly weighing the costs and benefits of their compliance with each particular norm, resulting in context-dependent and time-sensitive respect for IHL norms.[46] In the following sections, I identify two incentives to compliance that are relevant in judicial processes led by NSAGs. Indeed, scholars have identified the sense of ownership and the deterrence effect as factors for compliance by NSGAs.

3.1.1. Sense of ownership

Numerous scholars have been highlighting the importance of a sense of ownership over international laws to increase compliance. Indeed, even though NSAGs are bound by IHL norms and customary international law, without a sense of ownership, the rules tend not to take root and be internalized by the group because they are considered not worthwhile and meaningful.[47] NSAGs did not have the opportunity to participate in the codification of IHL norms, and their participation in the creation of new customary laws is also controversial; therefore, by not having their voices heard in the process, NSAGs tend to feel detached from IHL norms, which are imposed and are often enforced, by external actors. For example, the Viet Cong in 1965 declared that they did not consider themselves bound by the Geneva Conventions because they were not given the opportunity to participate in their creation.[48]

Additionally, the equality of belligerents is not entirely respected in NIACs, with a different legal regime applicable to both parties to the conflict. Indeed, among other things,

[44] Heffes, 'Non-State Actors Engaging Non-State Actors' (n 40) 14.
[45] Heffes, 'Compliance with IHL by Non-State Armed Groups' (n 43) para 4.
[46] Ezequiel Heffes, 'Responsible Rebels: Exploring Correlations Between Compliance and Reparations in Non-International Armed Conflicts' (2022) 14 Journal of Human Rights Practice 415-433, 421; Heffes, 'Compliance with IHL by Non-State Armed Groups' (n 43) para 5.
[47] Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (1st edn, Cambridge University Press 2015) 255.
[48] Sandesh Sivakumaran, 'Implementing Humanitarian Norms through Non-State Armed Groups' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law* (1st edn, Cambridge University Press 2015) 125-146, 131.

NSAG's combatants do not benefit from combatant immunity.[49] While combatants from the national armed forces, under certain conditions, benefit from combatant immunity under article 4 of the third Geneva Convention, members of NSAGs do not. It follows that this disparity can discourage the NSAGs because of the unequal gain they obtain from compliance compared to the opposing state actors.[50]

An increased sense of ownership permits the rules to be implemented better inside NSAGs because they are seen as more legitimate. Indeed, the legitimacy granted to certain rules has more importance than the possible consequences of their violation.[51] Rules must be internalized in order to be self-implemented and to hold weight in the balance.[52] Additionally, as Jo argues, "genuine home-grown compliance will always be more durable than imposed compliance."[53]

Consequently, judicial or quasi-judicial processes led by NSAGs could increase the group's sense of ownership over IHL and, therefore, its compliance with the rules. Indeed, as argued by Sivakumaran, giving an actor the possibility to enforce IHL will provide them with an enhanced sense of ownership and, therefore, higher compliance.[54] Moreover, by erasing the differences between states and NSAGs in terms of rights arising from IHL norms, such as the right to establish courts, NSAGs would likely feel more equal in the relationship and, therefore, legitimize the application of IHL norms to their actions. In the next part of this thesis, a second incentive to compliance that could be increased by judicial processes led by NSAGs will be explored, the deterrence effect.

3.1.2. Deterrence effect

The deterrence theory is about the prevention effect of the threat of punishment. It is the idea that the threat of punishment prevents individuals from committing crimes by exposing them to the potential consequences of their actions. Nagin defined it as "[…] a theory of choice in which would-be offenders balance the benefits and costs of crime".[55] In

[49] AO Petrov, 'Non-State Actors and Law of Armed Conflict Revisited: Enforcing International Law through Domestic Engagement' (2014) 19 Journal of Conflict and Security Law 279-316, 281.
[50] Saul (n 2) 44.
[51] Ezequiel Heffes and Annyssa Bellal, '"Yes I Do": Binding Armed Non-State Actors to IHL and Human Rights Norms through Their Consent' (2018) 12 Human Rights & International Legal Discourse 120-136, 128.
[52] Jo, *Compliant Rebels* (n 47) 255.
[53] ibid.
[54] Sivakumaran (n 9) 512.
[55] Daniel S Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 Crime and Justice 199-263, 205.

this same article, Nagin argues that it is not the severity of the punishment that has the greater deterrent effect, but the certainty of apprehension.[56] NSAG's members are no different than ordinary human beings, and their decision to commit a crime is affected by the deterrence effect. As Willms argues, judicial processes led by NSAGs can deter potential perpetrators of IHL violations more efficiently.[57] Indeed, by bringing the judicial processes closer to the combatants and the conflict, the threat of punishment becomes more realistic and visible.[58] Moreover, prosecutions in international courts take time and are often held post-conflict, which greatly decreases the deterrence effect. NSAG judicial processes have the benefit of being on the ground, closer to the victims and potential violators of international law, and are more immediate, representing a more realistic and important threat for combatants than international judicial processes.

Consequently, NSAG judicial or quasi-judicial processes can have a better deterrence effect than international courts and, consequently, increase the compliance of NSAG's members with IHL norms. Indeed, the deterrent effect of the judicial or quasi-judicial processes led by NSAGs can be more effective because of their proximity and immediacy of the threat of punishment.

3.2. Anti-impunity effect

NSAG judicial processes in NIACs have already been praised by scholars for the gap they are filling in terms of domestic affairs. Indeed, some NSAGs have established complex domestic judicial processes in order to maintain law and order in territories they control. For example, the Liberation Tigers of Tamil Eelam have been successful in maintaining social order in their territories by resolving tens of thousands of civil disputes and keeping crime rates low.[59] As Sivakumaran stated "they may also go some way toward reducing the climate of impunity that so often arises during insurrectional uprisings".[60] When perpetrators of international crimes are not held accountable for their actions because of the lack of effective and available judicial mechanisms, an impunity gap is created, which

[56] ibid 201.
[57] Willms (n 11) 20.
[58] ibid.
[59] Tom Ginsburg, 'Rebel Use of Law and Courts' (2019) 15 Annual Review of Law and Social Science 495-507, 504.
[60] Sivakumaran (n 9) 490.

undermines the principles of justice and accountability but also perpetuates a cycle of violence and hampers reconciliation. This part of the thesis will identify how judicial or quasi-judicial processes led by NSAGs in NIACs can be the only forum available for justice and fulfill the impunity gap left by both national and international justice. As Duffy states: "They could be the only realistic option for accountability and victim-centered justice in the context or aftermath of conflict".[61] It follows that they fill a gap and provide justice where it is otherwise inaccessible.

At the domestic level, state courts tend to be highly affected or totally collapsed due to the conflict, and more precisely, due to the military operations, the lack of funding, and the political instability.[62] This is even more enhanced in territories controlled by NSAGs, where the state has limited access and support. The Syrian national judicial institutions are a good example of having lost their legitimacy during the civil war because of accusations of corruption.[63] Additionally, some perpetrators of IHL violations could be under the control of the NSAG, either because they are directly part of the rebel group or because they have been made prisoners by the rebels. In a situation where the NSAG is fighting against a state, it can be highly doubted that the NSAG would deliver its own combatants or its prisoners to the opposing party. It follows that it is common in NIACs that the national judicial institutions are not always the most legitimate or capable institutions to prosecute international crimes, which leaves some international crimes unpunished and, therefore, creates an impunity gap.

While the ICC and other international judicial institutions can fulfill part of this impunity gap created by the lack of national judicial mechanisms, the international institutions are also confronted with difficulties. Indeed, most international tribunals do not have the capacity to prosecute low-ranking combatants for their crimes against IHL norms.[64] Because of jurisdictional and resource limitations, international tribunals will only judge the gravest crimes and criminals and will not prosecute all the other combatants who could have

[61] Helen Duffy, 'De Facto Justice: Prosecution by Non-State Actors in Armed Conflict' in Katharine Fortin and Ezequiel Heffes (eds), *Armed Groups and International Law: in the Shadowland of Legality and Illegality* (Edward Elgar Publishing, forthcoming in September 2023) 1-38, 31–32.
[62] Sivakumaran (n 9) 510.
[63] Jessica Doumit, 'Accountability in a Time of War: Universal Jurisdiction and the Strive for Justice in Syria Notes' (2020) 52 Georgetown Journal of International Law 263-288, 268.
[64] Willms (n 11) 20.

committed violations of IHL norms that are considered less grave. Article 4 of the Rome Statute delimiting the jurisdiction of the ICC states: "the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole".[65] It follows that this impunity gap is maintained because of the exclusion of a significant part of the combatants from the international judicial system from being prosecuted. As Aptel highlights, the judgment of lower-ranking criminals can be very important for victims who want to see their direct perpetrator face justice.[66] In the same article, he also argues that the crimes that end up not being prosecuted are, in the end, forgotten in history, and their victims suffer the same fate. More importantly, "given that the ICC works only on those cases where impunity prevails at the domestic level, the victims so excluded by the ICC have little of any hope of a remedy before any forum".[67]

While Aptel argues that no forum exists for those forgotten victims, this thesis highlights the potential of judicial processes led by NSAGs for those cases that suffer from the impunity gap left by national and international judicial institutions. Indeed, NSAG judicial processes could fulfill an impunity gap left by national institutions that have been weakened or collapsed during the conflict. Subsequently, rebel judicial processes could fill an impunity gap by having the capacity to judge violators of IHL norms who would otherwise not be prosecuted by international courts because of the relative inferiority of their crimes. Courts of armed groups "[…] could be the only forum in which violations of international humanitarian law will actually be prosecuted".[68]

3.3. Transitional justice

Transitional justice refers to processes that are used to help societies address past serious human rights abuses, including war crimes, by promoting accountability and reconciliation but, most importantly, by concentrating on the needs of the victims.[69] It includes processes such as truth commissions, reparations, trials, or institutional reforms.

[65] International Criminal Court, Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 4.
[66] C Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 Journal of International Criminal Justice 1357-1375, 1370.
[67] ibid 1373.
[68] Sivakumaran (n 9) 510.
[69] 'What Is Transitional Justice? | International Center for Transitional Justice' <https://www.ictj.org/what-transitional-justice> accessed 28 April 2023.

The goal is to focus on and acknowledge the needs and suffering of the victims and not solely focus on individually punishing perpetrators of IHL violations in international tribunals, which do not fulfill all the needs of the affected community. [70] As stated by Bellal, "holding an individual criminally responsible for the international crimes he or she committed is necessary, but criminal trials are also reductive, tending not to account for a group's dynamic in inciting crimes."[71]

It is also important to reconcile the combatants and society after the conflict to be able to establish sustainable peace in the community and prevent future conflicts and war crimes. As Dudai highlights, the loyalty of the supporters of the NSAGs and the latter's influence on the community are not limited to the conflict but can survive after the end of the hostilities. It is therefore important to take them into account in transitional justice processes and to consider them not only as perpetrators of IHL violations but also as key actors whose involvement in judicial or quasi-judicial processes could benefit peace and justice. [72]

Consequently, rebel judicial or quasi-judicial processes, included in the transitional movement, could benefit peace and justice during and after a NIAC. Indeed, there have been multiple examples of NSAGs providing reparations or participating in truth commissions, which have been well received and appreciated by the victims and communities affected by the NIACs. For example, the Irish Republican Army provided symbolic reparations, such as acknowledgment of crimes, which have led to positive results for families affected by the rebels past actions, who stated they felt relief after the symbolic reparations and that it helped them reach closure.[73] Moreover, truth and acknowledgment provided by the perpetrators of war crimes, as well as commemorations and tributes, are often seen as more important than material reparations by the victims.[74] It highlights the importance of the victims being recognized as such and being able to obtain and share the truth about the conflict and the harm they had to suffer. As a major actor in current armed conflicts, the involvement of NSAGs in transitional justice movements is therefore needed in

[70] Annyssa Bellal, 'Non-State Armed Groups in Transitional Justice Processes Adapting to New Realities of Conflict' in Paul Seils and Roger Duthie (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (International Center for Transitional Justice 2017) 15.
[71] ibid.
[72] Dudai (n 12) 807.
[73] ibid 804.
[74] ibid 788.

order for the needs of the victims to be fulfilled in the NIACs. Apart from acknowledging their crimes, they are also necessary in order to establish the facts and, consequently, the truth.

3.4. Conclusion

To conclude, judicial or quasi-judicial processes led by NSAGs can have positive effects on peace and justice in NIACs at multiple levels. First, their participation in the enforcement of justice could enhance their sense of ownership over the international rules, which can in turn increase their incentive to comply with them. Additionally, judicial processes led by NSAGs can have a better deterrent effect on the commission of international crimes by combatants because of the more realistic and immediate threat of punishment. Secondly, rebel judicial processes can fill an impunity gap left by defecting national institutions and unavailable international ones. Those NSAG processes could permit the investigation of more combatants, including low-ranking fighters, and offer a forum for justice where otherwise none exists. Thirdly, NSAG quasi-judicial or judicial processes can benefit peace and justice in NIAC through their involvement in the transitional justice movement by promoting reconciliation, accountability, and reparation for the victims. The next chapter of this thesis will be dedicated to the case studies. Indeed, the arguments advanced in the present chapter will be applied to the Syrian Democratic Forces, involved in the Syrian Civil War, to be able to illustrate these potential benefits.

4. Syrian civil war

In this chapter, the case of the Syrian Democratic Forces and the Autonomous Administration of North and East Syria, also called Rojava, will be used to illustrate the potential benefits of quasi-judicial or judicial processes led by NSAGs for peace and justice during and after a NIAC. This chapter will start with the context of the Syrian conflict. While it will not go into great detail about all the aspects of the Syrian conflict, including its development and origins, the chapter offers relevant context for the following analysis. The subsequent section will focus on the three potential benefits identified in chapter 3, which will be applied to the Syrian confllict and, more specifically, to the SDF and Rojava.

4.1. Context

The Syrian civil war started in 2011 in the midst of the Arab Spring, which had been sweeping through the Middle East and North Africa since the last months of 2010. While the trigger was the arrest and subsequent torture of teenagers who had written anti-government graffiti in Daraa, the protests quickly spread past the city to the rest of the country. Syrians were motivated by multiple grievances, including the corruption of the government and rural poverty, and were demanding changes in the governance of their country.[75] The situation deteriorated quickly with a violent response from the government of President Bashar Al-Assad, who deployed military and security forces against its citizens.

While the ICRC concluded that the hostilities between the government and a number of armed opposition groups reached the threshold for a NIAC in July 2012[76], there are now multiple overlapping NIACs with rebel groups fighting between themselves but also fighting against or next to the Syrian government or other nations involved in the conflict. There is also an IAC between the Syrian state and the international US-led coalition.[77]

[75] Hilly Moodrick-Even Khen, Nir T Boms and Sareta Ashraph (eds), *The Syrian War: Between Justice and Political Reality* (1st edn, Cambridge University Press 2019) 81.
[76] 'Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting - ICRC' para 3 <https://www.icrc.org/en/doc/resources/documents/update/2012/syria-update-2012-07-17.htm> accessed 6 May 2023.
[77] 'Syria' (*Geneva Academy*) <https://www.rulac.org/browse/countries/syria> accessed 11 May 2023.

A myriad of actors started to be involved in the Syrian conflict, either in support of the government or rebel groups, but also against Islamist groups such as Daesh. Indeed, while countries such as Iran and Russia supported the government of Al-Assad, other countries intervened in Syria with a US-led coalition against the rapid rise of the Islamic State (IS) in the country. The US-led coalition was composed of the United Kingdom, France, Germany, and other nations such as Jordan and Saudi Arabia. They intervened on Syrian soil in 2014 without the consent of the Syrian government and conducted airstrikes against IS targets. In the eight years the coalition has been conducting military operations in Syria, there have been more than 19,000 airstrikes on Syrian soil, with their share of civilian casualties.[78] In April 2017, the Trump administration authorized the first airstrikes directly against the Syrian government, allegedly in response to the use of chemical weapons by the regime.[79] The coalition also supported financially and materially some rebel groups included in the Syrian Democratic Forces, which are themselves fighting against the government but also other rebel groups.

Two important international mechanisms have been created to investigate the situation in Syria. The United Nations Human Rights Council established the Commission of Inquiry on Syria (CoI) in 2011 to investigate and document human rights violations in Syria.[80] The Commission provides a vast array of reports and also informs the Human Rights Council several times a year about the situation. While the Commission never received the authorization of the Syrian state to investigate on its territory, they were able to conduct interviews and investigations by different means, collecting a wide range of information and evidence of potential violations of international law.[81]

In 2016, the UN General Assembly created the International Impartial and Independent Mechanism (IIIM), which, similar to the Commission of Inquiry on Syria, is not directly engaged in criminal prosecution but rather has the mandate to gather evidence for

[78] 'US-Led Coalition in Iraq & Syria' (*Airwars*) <https://airwars.org/conflict/coalition-in-iraq-and-syria/> accessed 7 May 2023.
[79] Spencer Ackerman and others, 'Syria Missile Strikes: US Launches First Direct Military Action against Assad' *The Guardian* (7 April 2017) para 1 <https://www.theguardian.com/world/2017/apr/06/trump-syria-missiles-assad-chemical-weapons> accessed 7 May 2023.
[80] Doumit (n 63) 267.
[81] ibid 271.

accountability and to prepare and facilitate potential future criminal proceedings.[82] The Mechanism is prepared to share information for criminal investigations, but only with jurisdictions and authorities that respect basic international human rights standards.[83] Apart from those two mechanisms, many organizations have been active in gathering information on the Syrian conflict, and according to Doumit, it is the most well-documented conflict in history.[84]

In their report covering July to December 2022, the IIIM estimated that 90% of Syrian civilians lived in poverty and that an estimated 15.3 million people were in need of humanitarian assistance.[85] The Mechanism also highlighted the displacement crisis with more than 13 millions of people displaced or having the status of refugees but also the commission of crimes by most of the parties to the conflict including the Syrian state, and rebel groups. Indeed, the IIIM considers that the Syrian government has been exhibiting patterns of crime against humanity and war crimes, while the SDF has been urged to control their detention camps with greater respect for international law.

4.2. Current judicial structure

"Despite some notable convictions in criminal proceedings in Europe, there was no comprehensive accountability for serious human rights violations and war crimes committed by the Syrian Government, armed groups, listed terrorist groups and foreign powers."[86]

The impunity surrounding violations of international law in the Syrian civil war has been staggering. Indeed, there have been no real attempts to establish an institution or state-wide prosecutions against violators of international law. While many actors have discussed the potential role of the ICC and ad hoc or hybrid tribunals, many issues stand in the way of such judicial processes. Indeed, while the UNSC has an important role both in the attribution

[82] ibid 272.
[83] Milena Sterio, 'Sequencing Peace and Justice in Syria' (2018) 24 ILSA Journal of International & Comparative Law 345-358, 357.
[84] Doumit (n 63) 266.
[85] Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (United Nations General Assembly 2022) A/HRC/52/69 para 8 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/010/21/PDF/G2301021.pdf?OpenElement>.
[86] ibid 11.

of jurisdiction for the ICC and the creation of hybrid or ad hoc courts, it has been unable to pass resolutions because of the veto powers exercised by China and Russia, who have been supporters of the Al-Assad regime.[87] Other avenues have been discussed to establish the jurisdiction of the ICC in the Syrian situation (even though the country has not ratified the Rome Statute), such as establishing jurisdiction via Jordan in relation to the crime of deportation, but for now, no viable option for justice at the ICC has been reached.[88] Moreover, as Reynolds stated, "[…] the greatest obstacle to justice lies in the Al-Assad regime's unwillingness to cooperate with, or accept, any tribunal that investigates the wrongdoings of the government".[89] Indeed, the uncooperativeness of the Al-Assad regime also precludes the creation of an ad hoc or hybrid tribunal, which would require its consent or a UNSC resolution.

Moreover, the national Syrian courts are not a viable option for accountability because of the strong corruption of the judicial institutions, the lack of due process, and the absence of independence vis-à-vis the military command of the country.[90] Additionally, as Sterio highlights, because of the devastating effect of the conflict on the country, it is doubtful that Syrian domestic courts will have the capacity to lead complex investigations and collect enough evidence for the conduct of fair trials.[91] While the different mechanisms explained before, such as the IIIM, could provide assistance in this field, the Mechanism has the rule of not sharing its information with jurisdictions that do not abide by basic international human rights standards.[92] Considering the human rights record of the Al-Assad government and its judiciary, it is highly doubtful that the international community would agree to share the information collected with the Syrian domestic courts or help them in their pursuit of justice. In the words of Krause, "[…] justice in the Syrian system, without due process and the protection of the rights of an accused, is not the type of accountability that would be palatable to the international community".[93]

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[87] Luke Reynolds, 'A Path towards Syrian Justice: Identifying and Circumventing the Barriers of Traditional Justice Mechanisms' (2022) 37 Connecticut journal of international law 92-114, 4.
[88] Doumit (n 63) 269–270.
[89] Reynolds (n 87) 2.
[90] Doumit (n 63) 268; Sterio (n 83) 351; Reynolds (n 87) 5.
[91] Sterio (n 83) 350.
[92] ibid 357.
[93] Matthew Krause, 'Notheastern Syria: Complex Criminal Law in a Complicated Battlespace' (*Just security*, 28 October 2019) para 11.

Importantly, some countries, such as Germany, have started prosecuting violations of international law in their domestic courts under the universal jurisdiction principle.[94] The principle permits national courts to prosecute grave violations of international law, whether the perpetrator, the victims, or the location of the crime were on national territory or not. In 2022, it amounted to 60 cases concerning the Syrian war that were either currently on trial, subject to indictment, or resulted in a verdict.[95] While universal jurisdiction can fill a certain gap in terms of justice, there are often difficulties accessing evidence and witnesses. There are also doubts about the willingness of countries to undertake expensive prosecutions.[96] Additionally, critics have expressed doubts about the capacity of universal jurisdiction in terms of reconciliation and rehabilitation within the affected communities, which is needed for lasting peace.[97]

4.3. The Syrian democratic forces and the Rojava

The SDF was created in 2015 and is composed of multi-ethnic groups of fighters reunited under one banner. They are fighting not only against the Al-Assad government but also against other rebel groups and the Turkish Armed Forces occupying parts of northern Syria. The SDF is composed of mostly Kurdish fighters but also includes other Arab and Assyrian forces. The coalition is led militarily by the People's Protection Units (YPG) and the Women's Protection Units (YPJ) and is primarily located in northern Syria, with an estimated 100,000 fighters in 2019. The SDF is also the official military force of the Autonomous Administration of North and East Syria, which is a de facto autonomous region in north-eastern Syria with approximately 50,000 km^2 of territory. The AANES do not have an interest in establishing an independent state, but they desire a certain autonomy within the Syrian federal system, as stated in their constitution, named the Social Contract of Rojava Cantons in Syria, in article 12.[98] While it is not recognized by any nation as autonomous from the government of Syria,

[94] Syria Justice and Accountability Center, 'The State of Justice in Syria 2023' (2023) 15.
[95] ibid 20.
[96] Kassaye Ka, 'The Long Road towards Justice in Syria: Challenges and Perspectives on War Crimes' (2018) 07 Journal of Civil & Legal Sciences 2.
[97] ibid.
[98] Jane Arraf, '"Revenge Is For The Weak": Kurdish Courts In Northeastern Syria Take On ISIS Cases' *NPR* (29 May 2019) para 39 <https://www.npr.org/2019/05/29/727511632/revenge-is-for-the-weak-kurdish-courts-in-

it has been praised for its democratic ideals, its promotion of equality, and its tolerance for diversity.

While the SDF has been supported by many nations in its fight, it has not been totally exempt from violations of international law, and one of the major concerns for the international community is the management of their prisoners and camps. According to the IIIM report for the last months of the year 2022, the SDF continued to detain more than 10,000 suspected Daesh fighters and other men and boys allegedly affiliated to the group.[99] This represents the largest concentration of alleged terrorists and one of the highest incarceration rates in the world.[100] Additionally, two detention camps, namely Al-Hol Camp and Roj Camp, hold more than 65,000 women and children in 2022 who would somehow be affiliated with IS and are not officially under arrest.[101] With no realistic perspective of development in their cases in the near future and the precarious situation in those settlements with soaring insecurity and violence, the international community has warned the SDF and the AANES that it could constitute a violation of human rights.[102]

Additionally, the countries of origin of the foreign fighters have been very reluctant to repatriate their nationals, despite being urged to do so by the IIIM in their latest reports and by other international organizations.[103] It increases the burden supported by the rebels, who have to detain and prosecute more fighters, even though the judicial system of the country of origin would often be a better solution by having a system not impacted by the effects of war.

4.3.1. Judiciary system in the Rojava

The AANES developed a judicial system with the goal of providing justice for the victims of the conflict and keeping the region safe from internal and external threats.[104] The system

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northeastern-syria-take-on-isis-cases> accessed 10 May 2023; Tanya Mehra and Matthew Wentworth, 'New Kid on the Block: Prosecution of ISIS Fighters by the Autonomous Administration of North and East Syria' (*International Centre for Counter-Terrorism - ICCT*) para 9 <https://www.icct.nl/publication/new-kid-block-prosecution-isis-fighters-autonomous-administration-north-and-east-syria> accessed 10 May 2023.

[99] Human Rights Council (n 85) para 114.

[100] Índigo Uriz Martínez, 'A New Justice System To Deal With Islamic State Detainees In Syria | Leuven Transitional Justice Blog' (*Leuven Transitional Justice Blog*, 21 September 2022) para 1 <https://blog.associatie.kuleuven.be/ltjb/a-new-justice-system-to-deal-with-islamic-state-detainees-in-syria/> accessed 10 May 2023; Syria Justice and Accountability Center (n 94) 16.

[101] Uriz Martínez (n 100) para 3; Syria Justice and Accountability Center (n 94) 5.

[102] Syria Justice and Accountability Center (n 94) 6.

[103] Duffy (n 61) 5.

[104] Uriz Martínez (n 100) para 5.

is focused on conflict resolution and rehabilitation without aiming for retribution. The Rojava created rehabilitation and education programs destined for convicted criminals, such as the Derik Women's Prison, in which they are trying to break the circle of violence.[105] As Uriz Martinez describes, "the project focuses on teaching a new value system based on democracy, gender equality, and peaceful coexistence, providing inmates with different daily life values to let go of authoritarian and violent ideas."[106]

The autonomous region also adopted its own constitution called 'The Social Contract of Rojava Cantons in Syria' in which common democratic principles such as the separation of power (article 13), the independence of the judiciary system (article 63) and the separation of religion from the state (article 92a) are codified. Moreover, the constitution also reaffirms the commitment of the AANES to the respect of international human rights treaties, conventions, and declarations (article 20), mentioning some important agreements such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (article 21). Finally, the constitution prohibits the use of the death penalty in its judicial institutions but also bans the extradition of prisoners to countries in which it is still legal. While the Rojava authorities previously sent prisoners to Iraq, they stopped delivering prisoners to neighbouring countries because prisoners were executed after extradition.[107]

One important part of their judicial system is the Peace and Reconciliation Committees (PRCs), which are local initiatives with the important goal of reconciliation between individuals, families, and tribes.[108] They aim to find a compromise, usually implicating compensation for the wrongs caused, and to reconstruct the damaged relations between individuals. The PRCs do not imprison people and can send the case to the courts if no reconciliation can be established. The process is deeply rooted at the interpersonal and intercommunal levels and uses experts and knowledgeable people to help with each specific complaint.[109] A good example are the cases concerning domestic violence against women, for whom the system has instituted services of protection and helped to give women the

[105] ibid 9–10.
[106] ibid 10.
[107] Arraf (n 98) para 31.
[108] Yasin Duman, 'Peacebuilding in a Conflict Setting: Peace and Reconciliation Committees in De Facto Rojava Autonomy in Syria' (2017) 12 Journal of Peacebuilding & Development 85-90, 85–86.
[109] ibid 86.

opportunity to escape a violent household and reintegrate into the community. As Duman states, "the successful experiences of the PRCs may be an inspiring source for peace and reconciliation attempts in the rest of Syria and such success may lead to the emergence of a culture of peacebuilding and reconciliation".[110]

Finally, the AANES instituted special courts to judge fighters. While the SDF and the Rojava asked numerous times for the help of the international community for those trials, their requests have never been answered. Instead of waiting for other nations to have a role in the trials, they requested coaching and support for the maintenance of some due process in the trials, such as the provision of defense lawyers.[111] Even though the system of justice is still rudimentary due to the lack of forensic and DNA capabilities, the Rojava has already tried thousands of IS members.[112] The trials are conducted with a mixed panel of judges; the accused is allowed to have or ask for a defense lawyer; and the conviction cannot be higher than 20 years in prison. The capacity of the courts is still limited, and the numbers of prisoners in the prison and the camps waiting for a trial are still staggering. Consequently, the Rojava have been giving amnesties to relive facilities. It has led to some criticism of a justice system that is too lenient.[113] However, the group claims that these amnesties have been limited to individuals who had not committed terror-related crimes.[114]

4.4. Potential benefits

4.4.1. Compliance

The SDF has shown strong interest in complying with international law, both towards the domestic and international communities. They have collaborated with the UN but also with the non-governmental organization Geneva Call on their compliance with IHL norms, particularly concerning the enlisting of children in their ranks.[115] Indeed, in 2014, after some negotiations, the YPG/YPJ and the Rojava region demobilized more than one hundred child

[110] ibid 89.
[111] Mehra and Wentworth (n 98) para 13.
[112] Krause (n 93) paras 12–13.
[113] Uriz Martínez (n 100) para 14.
[114] Mehra and Wentworth (n 98) para 16.
[115] Heffes, 'Responsible Rebels' (n 46) 427.

soldiers from their ranks in accordance with the engagement they took with Geneva Call. When the NGO reported some violations of those commitments in 2017, the rebel group quickly reacted and established new rules to address those issues.[116]

Additionally, as mentioned in the previous sections, the SDF has asked for the help of the international community to enhance their compliance with international norms. Indeed, they asked for assistance not only in the prosecution of alleged perpetrators of international crimes in a manner consistent with international law but also in the management of their infamous camps.[117] During the Garance Talks held by Geneva Call in Geneva in 2015, a judge from the region of Rojava was present to answer questions from the participants and highlight the group's desire to respect international law.[118] He explained the functioning of their two courts in the region while highlighting the lack of capacity for investigations and forensic tests. When a participant asked him about the support the group was seeking in the international community, the judge responded:

"We need training for the people working in the judicial systems and with regard to all matters that may help us to enact justice. Visit us more often. Come and see us more often. Observe the functioning of the courts and advise us accordingly "[119].

While the real motivation of the SDF and AANES behind their compliance with international law cannot be accessed, it has been politically and economically beneficial for them in terms of the support received from the international and domestic communities. Indeed, it was the case for the financial and logistical support received by the US, which was subject to the condition that the SDF commit to respecting human rights and the rule of law.[120] Consequently, while the political situation and the SDF's goals are not changing, there is no indication that the SDF will reverse the tendency and decide not to comply or try to comply with international norms. As Heffes argues, legitimacy-seeking groups are

[116] ibid.
[117] Duffy (n 61) 5.
[118] Bellal (n 39) 14–15.
[119] ibid 15.
[120] Kevin S Coble, 'Addressing the Foreign ISIS Fighter Problem: Detention and Prosecution by the Syrian Democratic Forces' (2021) 229 Military Law Review 107-154, 125.

expected to comply better with IHL norms because of the importance given to their reputation and perceived legitimacy.[121]

Without more deep research into the intentions of the SDF and the deterrent effect of their judicial processes, it is difficult to access in this thesis the potential benefits that could be obtained. However, the desire of the SDF and Rojava to comply with international norms is evident and should not be altered by the support of the international community. Both economic and political support from the international community in the judicial processes led by the SDF and the AANES is unlikely to discourage the group from complying with international law. On the contrary, it can give them a sense of recognition of their importance in the international community and a sense of ownership over the rules, which can enhance their desire for compliance. Moreover, one of the areas in which the SDF is accused of violating IHL norms is in the treatment of the accused and the delays in prosecutions; therefore, helping the rebel group in terms of investigations and forensic tests should permit the SDF to comply with the norms more efficiently.

4.4.2. Anti-impunity

In the case of the SDF and Rojava, the judicial system implemented by the rebels has given promising results in terms of domestic affairs with the PRCs and the community-oriented search for justice. While the conflict is still ongoing and the national domestic judicial system is inaccessible in the region held by rebels, the PRCs and other judicial or quasi-judicial processes implemented by the SDF and Rojava provide justice where otherwise it is unavailable.

Apart from domestic affairs, the judgment of alleged war criminals is also a sensitive issue in the Syrian case. As described in the previous parts, no international justice mechanisms have been implemented yet for this conflict, and the Syrian national courts are not a laudable option in view of their infamous human rights record. However, the Rojava is still in control of thousands of fighters and alleged war criminals, who are all waiting for a trial or other justice process. While there is no credible possibility of internationally prosecuting these fighters in the near future, the Rojava courts are the only forum in which justice can be obtained.

[121] Heffes, 'Compliance with IHL by Non-State Armed Groups' (n 43) para 4.

One other possibility explored by some countries has been the use of the principle of universal jurisdiction, which has permitted the prosecution of a few hundred alleged war criminals. However, it has been highlighted by many authors that in the case of Syria, prosecutions have been concentrated on a certain category of fighters, Daesh soldiers, and state actors have for the most part been untouched by those judicial processes.[122] Moreover, some difficulties have been highlighted in terms of gathering the evidence and having access to the alleged perpetrators while the Al-Assad government is not collaborating and giving access to Syrian soil to international institutions.[123] Finally, while appreciating the effects of universal jurisdiction, some actors highlight the importance of the participation of the Syrian community in the search for accountability.[124]

In terms of local capabilities, the SDF and the Rojava judicial or quasi-judicial system benefit from having local access otherwise refused to the international community and UN mechanisms by the Al-Assad government.[125] Apart from the proximity of the evidence and witnesses, the rebels also hold thousands of alleged perpetrators in their facilities, as well as their relatives and other actors who could provide information and testimonials in the trials. Additionally, contrary to the international judicial structures, the rebels' judicial processes could include low-ranking fighters and provide a more complete accountability and reconciliation benefit. Indeed, both in their PRCs and court processes, the Rojava judges and other important actors of the group have been highlighting the importance of reconciliation between the fighters and the community to re-establish common values necessary for peaceful cohabitation. They also insist on the desire for justice and accountability but not for revenge, which would only strengthen the hatred between the different actors.

To conclude, the judicial or quasi-judicial processes already implemented by the SDF and the Rojava and those potentially developed in the future could fulfill the impunity gap that has been growing since the start of the Syrian civil war and that cannot be resolved by international or national means. While the judicial system of Rojava is still rudimentary and

[122] Doumit (n 63) 283.
[123] ibid 279.
[124] ibid 287.
[125] ibid 271.

in need of improvement in terms of the capability of investigations, it rests on praiseworthy principles also found in international law. As Uris Martinez stated:

"[…]its characteristics – the banning of the death penalty, its focus on gender equality, and the efforts to implement rehabilitation and educational programs – can be seen as a sign of its potential and with enough support it could become one of the more laudable justice system in the region".[126]

Those judicial processes implemented by the SDF and Rojava can also benefit peace and justice in Syria by being closer to the actual conflict, which provides them access to the evidence, witnesses, perpetrators, and victims, as well as the communities affected.

4.4.3. Transitional justice

In terms of the potential benefits of judicial processes led by NSAGs for transitional justice, two aspects need to be explored in this part. Indeed, the SDF and the Rojava region can have benefits both while searching for accountability for crimes committed by actors with opposing affiliations and as potential perpetrators themselves of violations of international law.

First, as highlighted previously, the justice system in Rojava is based on accountability and reconciliation, which are also highlighted by the transitional justice movement as the best way to implement lasting peace in harmed communities. The movement argues that holding the alleged perpetrators criminally responsible is important but not always sufficient in light of the complex needs of the victims and society in order to establish lasting peace after a conflict. Rojava, by implementing rehabilitation and education centers, has been following the recommendations of the transitional justice movement. Indeed, they have been concentrating their efforts on instilling democratic and peaceful values while aiming for objectives of reconciliation and rehabilitation. One senior judge in the Rojava region stated, "if I sentence a man to death, I am spreading hate. We want to give people reasons to trust us, if you take revenge, people will be radicalised. But with reconciliation we are sure we can finish the problem".[127]

[126] Uriz Martínez (n 100) para 17.
[127] ibid 11.

The SDF and Rojava have started judicial processes that are compatible with the goals of the transitional justice movement, and which should benefit peace and justice in the Syrian civil war. They adopted justice processes that consider not only the needs of the victims and the need for society to heal together in order to establish peace but also to be able to reintegrate ex-fighters into the community. To our knowledge, no processes such as truth commissions have been implemented, but the Rojava have been working with a system of reparations in their PRCs.[128] Additionally, as mentioned previously, the AANES has been granting amnesties to people who were accused of crimes of lesser gravity that were not terror-related. While the granting of these amnesties can be controversial, as can the importance of amnesties in the transitional justice movement, according to Rojava, these amnesties have been granted after careful examination of each particular case.[129]

While Gillard states, "[…]there have been virtually no instances where organized armed groups have undertaken to make reparations for violations of international humanitarian law or have made such reparations in practice", the SDF and Rojava have been involved in transitional justice processes as perpetrators themselves.[130] Indeed, the rebels have publicly apologized for the actions of their fighters that have been considered illegal or unethical. This was the case when one section of the SDF attacked a hospital and its staff, harming civilians and causing material damage.[131] They declared that they were opening investigations against the officers responsible and promised to search for accountability. Additionally, the group stated they would provide reparations for the damage caused to the hospital. Ashraph, while highlighting the importance of apologies from the Syrian government, also states that apologies and acknowledgments coming from rebels freely and with meaning could "be particularly beneficial where armed groups deepened ethnic and religious divisions among localities in near proximity to each other."[132]

Additionally, while most efforts for justice are usually done after the conclusion of the conflict, the SDF and the Rojava have here the possibility to implement transitional justice

[128] Duman (n 108) 85.
[129] Mehra and Wentworth (n 98) para 16.
[130] Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 529-553, 534–535.
[131] Heffes, 'Responsible Rebels' (n 46) 425.
[132] Sareta Ashraph, 'Transitional Justice – Without the Transition? Considering a Path to Reparations for the Syrian People' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill | Nijhoff 2020) 746-770, 768.

processes while the conflict is still developing, which could present different benefits for peace and justice. As Doumit stated, "these cases are cultivating a new way of approaching transitional justice."[133]

To conclude, the SDF and the Rojava have already been active in the transitional justice movement, searching to establish peace between victims and perpetrators and seeking accountability and reconciliation in the different judicial or quasi-judicial processes they implement in the Rojava. The group also acknowledges its violation of the law by publicly apologizing and providing reparations for the harm caused.

4.5. Conclusion

The case of the SDF and Rojava is a good example to illustrate the potential benefits of judicial or quasi-judicial processes led by NSAGs because the group already shares many values with international law standards and has been cooperative with the international community about its compliance with international norms. While NSAGs have been often discounted as legitimate stakeholders in the process of justice and the implementation of IHL, they have been crucial actors in the Syrian civil war by being the only authority over a large territory and the only provider of justice in the middle of a destructive conflict. The Syrian civil war exposes holes in the international judicial system and tests its limits.[134] Indeed, apart from a relatively small number of convictions under the principle of universal jurisdiction, the violations of international law in this NIAC have been grandly ignored and have escaped any judicial process. The judicial or quasi-judicial process led by the SDF or the AANES is therefore the only plausible wide scale justice that could be obtained in the next few years and could therefore greatly benefit peace and justice.

[133] Doumit (n 63) 283.
[134] Reynolds (n 87) 5.

5. Conclusion

It is a reality today that non-state armed groups have a strong influence and are key stakeholders in non-international armed conflicts. While they hold power over approximately 70 million people in territories they control and many more during their military activities[135], their beneficial effects on peace and justice during a NIAC have been relatively overlooked because of political considerations and legal obstacles. This thesis aims to synthesizing the potential benefits of quasi-judicial or judicial processes led by NSAGs for peace and justice in NIACs and to illustrate them in the case of the Syrian Democratic Forces and Rojava.

Three main benefits of judicial processes led by NSAGs have been discussed in this thesis: the increase in compliance, the anti-impunity effect, and the transitional justice movement.

First, while a multitude of factors influence the compliance of NSAGs with international laws, Chapter 3 highlights two incentives that could be increased in the case of judicial processes led by NSAGs. Indeed, the sense of ownership over the rules is an important incentive to compliance for NSAGs. While this sense of ownership can be obtained by having a right to participate in the creation of the norms, it can also be improved by the possibility for NSAGs to enforce the norms themselves. By enforcing the rules, they become internalized in the group and take root, which increases compliance with them.[136] The second incentive to compliance is the higher effectiveness of the deterrence effect with judicial processes led by NSAGs. Indeed, by bringing the prosecutions closer to the rebel group and the would-be offenders, the threat of punishment becomes more realistic, which is necessary for the deterrence effect to work effectively.[137]

The second benefit discussed in chapter 3 is the anti-impunity effect of judicial processes led by NSAGs. First, judicial processes led by NSAGs can fill a gap left by the collapse of national institutions and the unavailability of international processes. The SDF is a good example of this benefit; indeed, the absence of international processes and the impossibility

[135] 'ICRC Engagement with Non-State Armed Groups. Why, How, for What Purpose, and Other Salient Issues' (n 1) 2.
[136] Jo, *Compliant Rebels* (n 47) 255.
[137] Nagin (n 55) 202.

of using Syrian judicial institutions have indirectly granted impunity to perpetrators of international crimes. The judicial processes conducted by the SDF can therefore be seen as closing this impunity gap and providing some justice where otherwise none is delivered. Moreover, the SDF is also a good illustration of the local capabilities of judicial processes led by NSAGs because it can prosecute low-ranking fighters, leaving no one out of reach of justice, but also because it is the only actor having direct access to the ground, which has been otherwise hampered by the Syrian government refusing access to international actors.[138]

In conclusion, NSAG-led judicial proceedings can contribute to the transitional justice movement in two significant ways. Firstly, they can be more attuned to the cultural and religious nuances of the affected communities, fostering a greater sensitivity towards their specific needs. Secondly, these processes can play a crucial role in ensuring that victims receive acknowledgement and reparations from all parties involved in the conflict. In the Syrian case, the SDF and the Rojava had both a role as guardians and enforcers of international law while prosecuting combatants but also as alleged perpetrators themselves of violations of international law. The chapter 4 highlighted the rehabilitation process the SDF created in Rojava and the importance for the victims that they acknowledged their mistakes and provided reparations. The SDF has been actively producing transitional justice movement activities by aiming to establish peace between the perpetrators and the victims and seeking accountability both for themselves and the enemy fighters.

A limitation of this research has been the full reliance on secondary sources, which are still scarce. Indeed, faining further insights into the feelings of the affected communities regarding these judicial processes and delving deeper into the prosecutions led by Rojava can provide valuable information. Additionally, while this thesis gives an overview of potential benefits, which have been partially found in the case of the Syrian Democratic Forces, it is acknowledged that every NSAG is different and the benefits arising from their judicial processes will be diverse and fluctuating. While the SDF is a great study case because of their relative compliance with international norms and their establishment of judicial institutions, other NSAGs have totally different political aims and capabilities.

[138] Doumit (n 63) 271.

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