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Should the ICC Assess Complementarity with Respect to Non-state Armed Groups?

Hidden Questions in the Second Al-Werfalli Arrest Warrant

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Abstract

On 4 July 2018, the International Criminal Court issued a second warrant for the arrest of Mahmoud Mustafa Busayf Al-Werfalli, a commander within General Haftar's Libyan National Army. Already wanted by the Court since August 2017, Al-Werfalli remains at large. The LNA maintains that he is facing justice in Libya, implicitly excluding the surrender of the suspect to the ICC. As a result, in the second arrest warrant the ICC Pre-Trial Chamber I addressed the admissibility of the case and declared that the proceedings initiated by the LNA do not satisfy the requirements of the complementarity test. This unexpected finding presents the Court with an inescapable question concerning its relationship with non-state entities, that the PTC I deliberately avoided answering: is the ICC required to assess its complementarity with respect to criminal prosecutions undertaken by non-state actors? ICC Judge Kovács, presiding over the chamber, had already suggested that a rigid approach should be rejected when dealing with entities having both undisputed control over a territory and the capacity to exercise criminal jurisdiction. Moving from that hint, this article first shows that the issue is not unique to the Libyan situation and that the ICC can easily find itself confronted with criminal proceedings run by courts of non-state actors. It then restricts the analysis to non-state actors that control a territory, are capable of exercising criminal jurisdiction and have a legal basis in international law to do so. Finally, it submits that the combined effect of the ne bis in idem principle and the command responsibility regime under the Rome Statute provides a solid argument allowing the Court to answer the question in the affirmative.

1. The Libyan Twist

On 4 July 2018, the International Criminal Court (ICC) issued a second warrant for the arrest of Mahmoud Mustafa Busayf Al-Werfalli, a senior commander in the elite military unit known as Al-Saiqa Brigade.[1] As described by the ICC Pre-Trial Chamber I (PTC I) in the first arrest warrant of 15 August 2017, Al-Werfalli joined Al-Saiqa, formerly Libyan Special Forces, after it defected from the Libyan Army in the early stages of the 2011 uprising, and followed the armed group when it affiliated to General Khalifa Haftar's self-styled Libyan

[1] Second Warrant of Arrest, *Al-Werfalli* (ICC-01/11-01/17-13), Pre-Trial Chamber I, 4 July 2018.

National Army (LNA), taking part in Operation Dignity in 2014.[2] He swiftly gained notoriety as a brutal killer amongst the LNA ranks and on social media by repeatedly appearing in video footage depicting him executing or ordering the execution of captives belonging to enemy 'terrorist' groups.[3] Allegedly responsible for the killing of 33 persons *hors de combat* in seven separate incidents in Benghazi and its surrounding areas, Al-Werfalli was charged by the Court with murder as a war crime.[4] After the first warrant, some observers endorsed the ICC's renewed effort to exercise its jurisdiction in the Libyan situation, welcoming the first proceedings initiated against a member of the former opposition to the Gaddafi regime[5] and the first arrest warrant based entirely on evidence collected from social media.[6] Only a few days later, however, it was disclosed that General Haftar, leader of the LNA, had reportedly ordered Al-Werfalli's arrest on 2 August 2017, two weeks before the issuance of the ICC warrant, and that Al-Werfalli had since then been detained and investigated by a Libyan military prosecutor on the identical charge of war crimes. In a public statement, a spokesperson clarified that the General Command of the LNA disavowed his officer's actions, adding that an investigation to ensure justice was ongoing under Libyan military law and that General Haftar's decision was intended to implement international conventions, international humanitarian law and the teachings of Islamic Sharia.[7] At the same time however, the spokesperson implicitly excluded the possibility of surrendering Al-Werfalli to the ICC, announcing instead the group's readiness to cooperate with the Court by simply sharing the result and course of the case.[8] The Governments of France, the United Kingdom, and the United States of America immediately endorsed the announcement in a joint

[2] Warrant of Arrest, *Al-Werfalli* (ICC-01/11-01/17-2), Pre-Trial Chamber I, 15 August 2017.
[3] *Ibid*., §§ 11-22.
[4] *Ibid*., at 16-17.
[5] M. Kersten, 'Will the International Criminal Court's Latest Target in Libya Be Brought to Justice?', The Washington Post, 31 August 2017, available online at https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/31/will-the-international-criminal-courts-latest-target-in-libya-be-brought-to-justice/?utm_term=.59f80803b9a2 (visited 10 August 2018).
[6] E. Irving, 'And So It Begins… Social Media Evidence in an ICC Arrest Warrant', Opinio Juris, 17 August 2017, available online at http://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant/ (visited 10 August 2018).
[7] A. Assad, 'Libya's Eastern Self-Styled Army Says ICC-Wanted Executioner Is under Investigation', The Libya Observer, 17 August 2017, available online at https://www.libyaobserver.ly/news/libyas-eastern-self-styled-army-says-icc-wanted-executioner-under-investigation (visited 10 August 2018).
[8] A. Lewis, 'East Libyan Forces Say Have Arrested Commander Sought by ICC', Reuters, 18 August 2017, available online at https://www.reuters.com/article/us-libya-security-icct/east-libyan-forces-say-have-arrested-commander-sought-by-icc-idUSKCN1AX2X2 (visited 10 August 2018).

statement.[9] Yet, immediately after the publication of the arrest warrant the ICC Registrar released a request for cooperation addressed to Libya seeking the arrest and surrender of the suspect.[10] While typically a routine act, the request for cooperation in this case raises genuine and complex questions given the Libyan scenario: which institutions represent Libya? Which authorities should regard themselves as the request recipients? Are those who claimed jurisdiction over Al-Werfalli's acts the same authorities recognized by the international community as representatives of the Libyan state?

Libya's political and military context fails to provide clear answers to these questions.[11] After the 2011 revolution and the ousting of Muammar Gaddafi, the National Transitional Council (NTC) was rapidly recognized as the legitimate government of Libya.[12] Following the UN Security Council referral of the situation in the country to the ICC,[13] the NTC, in a letter dated 23 November 2011, announced its commitment to cooperate with the Court and at the same time reaffirmed the primacy of the Libyan judiciary over potential crimes as well as its willingness and ability to prosecute them.[14] Nonetheless, when the ICC Appeals Chamber (AC) adopted two judgments on admissibility in May and July 2014 relating to the situation in Libya,[15] the circumstances on the ground were rapidly changing.

In May 2014, General Haftar, at the head of the LNA, launched Operation Dignity. In July the newly elected parliament, the House of Representatives, was forced by the ensuing fighting to leave Tripoli and flee east to the city of Tobruk, under the protection of General Haftar.[16] In December 2014, as reported by Human Rights Watch, the Ministry of Justice of the Tobruk-based government, at that moment enjoying international support, disclaimed

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[9] Joint Statement by the Governments of France, the United Kingdom, and the United States of America, 'ICC Arrest Warrant for Major Mahmoud Al-Werfalli in Libya', 18 August 2017, available online at https://www.state.gov/r/pa/prs/ps/2017/08/273542.htm (visited 10 August 2018).

[10] Request to Libya for Cooperation in the Arrest and Surrender of Mahmoud Mustafa Busayf Al-Werfalli, *Al-Werfalli* (ICC-01/11-01/17-3), Pre-Trial Chamber I, 21 August 2017.

[11] For a comprehensive reconstruction of the history of the conflict, the parties involved and the most recent developments, see S. Arraf, 'Libya: Conflict and Instability Continue', in A. Bellal (ed.), *The War Report: Armed Conflicts in 2017* (Geneva: The Geneva Academy of International Humanitarian Law and Human Rights, 2017) 71-83.

[12] Chair's Statement, Fourth Meeting of the Libya Contact Group, 15 July 2011, available online at https://af.reuters.com/article/commoditiesNews/idAFLDE76E0W120110715 (visited 10 August 2018).

[13] SC Res. 1970, 26 February 2011.

[14] National Transitional Council, Letter Dated 23 November 2011, Implementation of the "Decision to Add Document to Case Record", *Saif Al-Islam Gaddafi* (ICC-01/11-01/11-34-Anx), 28 November 2011.

[15] Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled "Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi", *Saif Al-Islam Gaddafi* (ICC-01/11-01/11-547-Red), Appeals Chamber, 21 May 2014; Judgment on the Appeal of Mr. Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled "Decision on the Admissibility of the Case against Abdullah Al-Senussi", *Al-Senussi* (ICC-01/11-01/11-565), Appeals Chamber, 24 July 2014.

[16] Arraf, *supra* note 11, at 73.

responsibility for trials conducted in other areas of the country, including the ongoing prosecutions against Saif Al-Islam Gaddafi and Gaddafi's era officials in Tripoli and, in July 2015, invited the international community to disavow any verdicts resulting from those trials.[17] Eventually, the UN-sponsored Libyan Political Agreement led to the formation of a Government of National Accord (GNA) in January 2016, endorsed by the UN Security Council 'as the sole legitimate government of Libya'.[18] Nevertheless, in December 2017 General Haftar, who initially appeared to endorse the GNA, declared the Libyan Political Agreement 'void' and continued supporting the rival Tobruk-based government.[19] It is essential to remind that the LNA, despite its name, cannot be identified with the Libyan Army, part of the national armed forces of Libya before the revolution, and is instead an armed group comprised of a coalition of former army units, police forces and tribal and regional-based militias controlling the eastern part of Libya.[20] When claiming jurisdiction over Al-Werfalli's acts, therefore, the LNA far from representing the Libyan state constitutes a non-state actor (NSA) party to the ongoing non-international armed conflict (NIAC) in Libya.

In the meantime, Al-Werfalli remained at large, maintained command positions and was involved in further incidents: in January 2018, new videos showed him executing 10 blindfolded prisoners in front of a mosque in Benghazi, following which Al-Werfalli seemingly handed himself over to the military police, but was shortly thereafter released upon completion of an investigation.[21] In a statement, the ICC Prosecutor expressed dismay at the open defiance of the Court's authority by the leadership of the LNA.[22]

As a result, on 4 July 2018 the PTC I issued a second warrant of arrest, adding this crime to the charges brought against Al Werfalli.[23] The Chamber however, in a new composition, decided this time to exercise its discretion to address the admissibility of the case at the pre-

[17] Human Rights Watch, *Libya: Flawed Trial of Gaddafi Officials* (2015), available online at https://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials (visited 10 August 2018).
[18] SC Res. 2259, 23 December 2015.
[19] D. Child, 'Q&A: What's Happening in Libya?', Al Jazeera, 20 December 2017, available online at https://www.aljazeera.com/news/2017/12/qa-happening-libya-171220114305008.html (visited 10 August 2018).
[20] Warrant of Arrest, *Al-Werfalli*, *supra* note 2, § 6.
[21] C. Triebert, 'What Werfalli Did – Haftar's Commander Continues Executions in Defiance of ICC Arrest Warrant', Bellingcat, 9 February 2018, available online at https://www.bellingcat.com/news/mena/2018/02/09/what-werfalli-did/ (visited 10 August 2018).
[22] Statement, 'ICC Prosecutor, Fatou Bensouda, Condemns Recent Violence in Benghazi, Libya', 26 January 2018, available online at https://www.icc-cpi.int/Pages/item.aspx?name=180126-otp-stat (visited 10 August 2018).
[23] Second Warrant of Arrest, *Al-Werfalli*, *supra* note 1.

trial stage, pursuant to article19(1) ICC Statute.[24] The relevant paragraphs contain an unexpected ruling: the judges determined that the proceedings allegedly initiated by the LNA authorities against Al-Werfalli do not render the case inadmissible before the ICC, because they fail the test of 'tangible, concrete and progressive investigative steps' required by the Court's case-law.[25] Therefore, 'The Chamber finds that irrespective of whether the entity exercising authority in the territory controlled by the LNA can be considered a State for the purposes of article 17 of the Statute, there remains a situation of inactivity.'[26] In other words, the PTC I for the first time assessed the complementarity of the ICC to the courts of an entity whose status is, in the opinion of the same Chamber, disputed, and deliberately avoided answering the inevitable questions raised by its finding: should the ICC assess its complementarity with respect to criminal prosecutions conducted by the courts of armed groups? Should the Court declare a case inadmissible in the presence of proceedings conducted by the court of an armed group which satisfy all the requirements of the complementarity test?

2. Wording Complementarity in the Rome Statute

The question addressed here is at the frontier of the ICC system. The principle of complementarity is central to the admissibility regime designed by the Rome Statute[27] and 'one of the cornerstones' on which the Court was built.[28] Without complementarity 'it is doubtful that the Rome Statute could have been adopted.'[29] Complementarity expresses, more so than any other procedural mechanism within the treaty, the operative rationale of the ICC: a judicial institution that should only exercise its jurisdiction when the prosecution of the most heinous crimes at the national level is hindered by the inactivity, unwillingness or inability of domestic criminal courts, which otherwise preserve primary jurisdiction. The complementarity principle is therefore alternative to the primacy principle marking the operation of the ad hoc international criminal tribunals created by the UN Security Council.

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[24] *Rome Statute of the International Criminal Court*, UN Doc. A/CONF/183/9, 17 July 1998.
[25] Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, *Simone Gbagbo* (ICC-02/11-01/12-47-Red), Pre-Trial Chamber I, 11 December 2014, § 65.
[26] *Ibid*., § 27.
[27] *Rome Statute of the International Criminal Court*, UN Doc. A/CONF/183/9, 17 July 1998.
[28] J. T. Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court: The Making of The Rome Statute - Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 41-78, at 73.
[29] W. A. Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford: Oxford University Press, 2016), at 447.

Although the Rome Statute does not provide a definition of complementarity,[30] Article 17[31] sets forth the conditions to determine whether a particular case respects the principle. The negative formulation of its chapeau ('the case is inadmissible where') reveals the balance between states' sovereign rights and ICC's complementary prerogatives on which the Rome Statute is founded: a state's right to exercise criminal jurisdiction should prevail; yet, since the prosecution of international crimes is a concern of the international community as a whole, the ICC can intervene each time the domestic criminal systems remain inactive or deliver forms of justice which would not serve the final aim to fight impunity.

If the criteria of the complementarity test attracted so far the attention of most commentators, nearly 20 years after the adoption of the Rome Statute, a debate on the *actors* of complementarity is still lacking. Although the interpretation of several provisions of the ICC Statute can be and is reasonably disputed, the wording of both the Preamble and Article 1 describing the ICC as 'complementary to national criminal jurisdictions' suggests excluding on one side any non-judicial forms of justice and on the other any non-national prosecutions. Yet, when the drafters of the Rome Statute imagined an international criminal court based firmly on the principle of complementarity, they probably did not anticipate either the possibility that the Court would eventually be confronted with prosecutions carried out by courts of non-state actors or the complex legal and factual questions it would need to resolve before reaching reliable conclusions on its residual jurisdiction. This leaves open an interesting albeit unsettled question: can the ICC consider criminal prosecutions carried out by courts of non-state actors when it decides on the admissibility of cases? Should the answer depend on the level of organization of the specific NSAG and on the institutional features the trial assumes?

A closer analysis of the provisions regulating the admissibility mechanism in the Rome Statute and a parallel broader cognizance of the principles guiding the functioning of the

[30] M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Martinus Nijhoff Publishers, 2008), at 157.

[31] Article 17 - Issues of admissibility
1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

Court seem to provide an answer. The purpose of this study is to demonstrate that, while the text of the ICC Statute does not explicitly rule out NSAs from the complementarity test, the combined effect of the command responsibility regime in Article 28 and the *ne bis in idem* principle in Article 20(3) offers a solid argument to allow the Court to answer the question in the affirmative. Part Three will show that the Court, as in the Libyan situation, could easily find itself confronted with the possibility of criminal prosecutions by NSAs. Part Four, in turn, will restrict the analysis to non-state actors that control a territory and have not only the capacity to exercise criminal jurisdiction but also a legal basis in international law to do so. Finally, Part Five will submit five different arguments supporting a positive solution to the question.

3. Non-State Entities before the ICC

The *Al-Werfalli* case presented for the first time the ICC with a concrete instance of concurrence between its jurisdiction and criminal proceedings before the court of an NSA. Yet, in the past the Court was more than once called to adopt a position on legal issues involving its relationship with non-state entities. One of these occasions resulted precisely from the Libyan situation: faced with the inability of Libya to execute the request for arrest and surrender of Saif Al-Islam Gaddafi, on 26 April 2016 the ICC Prosecutor asked the PTC I to issue an order instructing the Registrar to transmit the request to the leader of the armed group detaining the suspect, the Zintani militias.[32] In her submission, the Prosecutor openly contends that in similar cases of inability, 'the Court should directly address the *de facto* authorities with actual custody' of the suspect.[33] Surprisingly, the request tackles the legal complexities arising from the establishment of a formal channel of communication between the ICC and an NSA, and appears to be grounded on two arguments: first, an analogical application of Articles 57(3)(a) and (d) ICC Statute, granting the Prosecutor, duly authorized by the Pre-Trial Chamber, the ability to conduct investigative activities in the territory of a state which is clearly unable to execute a request for cooperation; second, the Court's inherent powers necessary 'to ensure that its basic judicial functions may be fully discharged and its judicial role safeguarded'.[34] Both lines of reasoning were however rejected on 21 November

[32] Request for an Order Directing the Registrar to Transmit the Request for Arrest and Surrender to Mr al-'Ajami Al-'Atiri, Commander of the Abu-Bakr al-Siddiq Battalion in Zintan, Libya, *Saif Al-Islam Gaddafi* (ICC-01/11-01/11-624), Office of the Prosecutor, 26 April 2016.
[33] *Ibid*., § 18.
[34] *Ibid*., §§ 20-21.

2016 by the PTC I. The Chamber on the one hand argued that recourse to the Court's inherent powers was not warranted since cooperation requests are clearly regulated in the ICC Statute and in the Rules of Procedure and Evidence (ICC RPE); on the other hand, it recalled that application of Articles 57(3)(a) and (d) ICC Statute is limited to the fulfilment of investigative activities and does not apply to cooperation requests. More importantly, the judges implicitly set aside any possibility of direct communication between the ICC and NSAs for the purpose of cooperation, explaining that it is for the competent national authorities to identify the channels of communication with the Court; absent a formal designation, 'the Court cannot but deal with the *de jure* government'.[35] The decision confirms therefore the deference of the Court towards states' prerogatives in the domain of criminal justice. It however shows little of the complexity of the question at issue: other cases required the Court to assess more closely the risk of concurrent prosecutions by courts of NSAs.

In the trial against Jean-Pierre Bemba Gombo, the ICC adjudicated its first case based on the responsibility of a military commander pursuant to Article 28(a) ICC Statute, which led to a conviction by the Trial Chamber III (TC III)[36] lately reversed by the Appeals Chamber.[37] In the confirmation of charges proceedings, Amnesty International filed *amicus curiae* observations arguing, inter alia, that superiors of armed groups can only avoid command responsibility for crimes committed by their subordinates by referring the matter to a competent state or international authority.[38] According to Amnesty's observations, mere prosecution 'by a judicial body of his or her own non-state group', on the contrary, would not satisfy the commander's duty because courts created by armed groups cannot be 'established by law'.[39] The consequences of such a stance are further reaching than one would expect: not only courts of armed groups could never be legal, but any exercise of judicial authority by such courts would constitute a war crime under Article 8(2)(c)(iv) ICC Statute, which

[35] Decision on the Prosecutor's "Request for an Order Directing the Registrar to Transmit the Request for Arrest and Surrender to Mr al-'Ajami Al-'Atiri, Commander of the Abu-Bakr Al Siddiq Battalion in Zintan, Libya", *Saif Al-Islam Gaddafi* (ICC-01/11-01/11-634-Red), Pre-Trial Chamber I, 21 November 2016, §§ 13-15.
[36] Judgment pursuant to Article 74 of the Statute, *Bemba* (ICC-01/05-01/08-3343), Trial Chamber III, 21 March 2016.
[37] Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", *Bemba* (ICC-01/05-01/08 A), Appeals Chamber, 8 June 2018.
[38] Amicus Curiae Observations on Superior Responsibility Submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, *Bemba* (ICC-01/05-01/08-406), 20 April 2009, § 48.
[39] *Ibid.*, §§ 22-23.

prohibits '[t]he passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court'.[40]

Understandably, in the confirmation of charges decision the Pre-Trial Chamber II (PTC II) took the exactly opposite view: if charges against Bemba predicated on command responsibility could be brought, it was also because the suspect had the 'material ability to prevent and repress crimes', thanks to 'a functional military judicial system within the MLC [Movement for the Liberation of the Congo]'.[41] As Jan Willms aptly points out, the PTC II's decision indicates that, at least in the view of the ICC, armed groups are capable of creating 'regularly constituted court[s]':[42] any other interpretation would result in the Court condoning the commission of a war crime under Article 8(2)(c)(iv) ICC Statute. The conclusions reached by the PTC II were confirmed by the trial judgment, whose conviction verdict explicitly took into consideration the existence of criminal courts to assess the commander's failure to discharge its responsibility,[43] and referred to the structure of the MLC's judicial system[44] to demonstrate that Bemba could have 'properly tried and punished any soldiers alleged of having committed crimes'.[45] The AC's reversal acquitting Bemba did not contest this point. Quite the opposite, the appeal judgment confirms that commanders of armed groups can establish a judicial process: in the opinion of the AC, this is precisely one of the actions that the trial judges should have considered as measure to prevent or repress the commission of crimes or to submit the matter to competent authorities, regardless of the manner of its execution.[46]

Despite this conclusion and the implications it entails, in its 27 January 2016 decision authorising a Prosecutor's *proprio motu* investigation into the situation in Georgia, the PTC I took the chance to clarify that 'any proceedings undertaken by the *de facto* authorities of South Ossetia are not capable of meeting the requirements of article 17 of the Statute, due to

[40] Article 8(2)(c)(iv) ICC Statute punishes, if 'committed against persons taking no active part in the hostilities', '[t]he passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.'
[41] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba* (ICC-01/05-01/08-424), Pre-Trial Chamber II, 15 June 2009, § 501.
[42] J. Willms, *Justice through Armed Groups' Governance – An Oxymoron?*, Collaborative Research Center (SFB) Governance Working Paper Series no. 40, 2012, at 8.
[43] Judgment pursuant to Article 74 of the Statute, *Bemba*, *supra* note 36, §§ 205-209.
[44] *Ibid*., §§ 402-403.
[45] *Ibid*., § 729.
[46] Judgment on the appeal of Mr Jean-Pierre Bemba Gombo, *Bemba*, *supra* note 37, § 180.

South Ossetia not being a recognized state.'[47] The same view had been endorsed by the ICC Prosecutor in her Request for authorization of an investigation, maintaining that '[s]ince article 17 is premised on national investigations or prosecutions "by a State which has jurisdiction", the Prosecution does not consider that the South Ossetian *de facto* authorities would have standing before this Court to lodge an admissibility challenge pursuant to article 19(2)(b).'[48] Interestingly, the meaning of the text of the Rome Statute did not sound plain to the entire Court. In his separate opinion, ICC Judge Péter Kovács, who will later act as Presiding Judge of the PTC I issuing the second arrest warrant in the *Al-Werfalli* case, pointed out:

> [t]he question of recognition of certain acts of entities under general international law is much more complex. Within the context of the Rome Statute, I find that automatically following a too rigid approach might result in some absurd conclusions. For instance, there may be some entities whose status is contested, yet they still enjoy an undisputed control over the territory and have the capacity to exercise criminal jurisdiction.[49]

After all, the same Prosecutor, in her Request, had provided, 'for sake of completeness', an overview of ongoing criminal prosecutions in South Ossetia.[50]

In addition to the divergence of views between the ICC's Pre-Trial Chambers on the ability of NSAs to establish courts and exercise criminal jurisdiction, Hamas' control over the judicial mechanisms in the Gaza Strip, in conjunction with Palestine's recent accession to the Rome Statute, highlights the very real possibility that the Court will be again confronted with criminal prosecutions by courts of NSAs. After it gained exclusive control of the Gaza strip in June 2007, Hamas underwent an overall reorganization of the governmental institutions. The judiciary did not remain immune: the incumbent Attorney General was arrested and replaced; a Higher Justice Council took the place of the former Higher Judicial Council, and the chief of the newly established judicial body installed himself as the president of Gaza's Supreme Court. Additionally, new judges, prosecutors and legal staff were appointed, all without the

[47] Decision on the Prosecutor's Request for Authorization of an Investigation, *Situation in Georgia* (ICC-01/15-12), Pre-Trial Chamber I, 27 January 2016, § 40.
[48] Request for Authorisation of an Investigation pursuant to Article 15, *Situation in Georgia* (ICC-01/15-4), Office of the Prosecutor, 13 October 2015, § 322.
[49] Separate Opinion of Judge Péter Kovács, Decision on the Prosecutor's Request for Authorization of an Investigation, *Situation in Georgia* (ICC-01/15-12-Anx-Corr), Pre-Trial Chamber I, 27 January 2016, § 65.
[50] Request for Authorisation of an Investigation pursuant to Article 15, *Situation in Georgia*, *supra* note 48, § 322

President of the Palestinian National Authority's (PNA) approval.[51] This series of events clearly demonstrates that the judiciary functioning in Gaza after that moment not only operates independently from the PNA but is also strongly influenced by, if not under the control of, Hamas' rulers.[52] Both civilian and military courts in Gaza's judicial system exercise criminal jurisdiction, with the latter applying Palestinian criminal law to soldiers, officers, and other members of the security forces. Since 1 April 2015, Palestine is a member state of the Rome Statute and, by a declaration under Article 12(3), has accepted the ICC's jurisdiction from 13 June 2014,[53] thereby including the entire time frame of Israel's Operation Protective Edge. The possibility that the ICC will need to address the validity of criminal prosecutions conducted by Hamas-controlled courts in Gaza may soon be no longer theoretical.

4. Armed Groups' Criminal Justice

As the prior part demonstrates, the possibility of both the ICC and NSAs exercising criminal jurisdiction concurrently is a frequent one. Criminal prosecution carried out by courts of NSAs is an even bigger reality, which raises several legal dilemmas in addition to those glimpsed in the examples above. An empirical study of the forms of criminal justice undertaken by NSAs is beyond the scope of this work, which will specifically focus in the following sections on courts of non-state armed groups (NSAG) in order to address the question set forth in the opening part. It is important however to note that a high number of non-state entities conduct criminal prosecutions, as it is essential to fully grasp the extent and importance of the matter addressed.

Entities who exercise or have exercised in the recent past some form of prosecution include, but are not limited to: Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka; Farabundo Martí National Liberation Front (FMNLF) in El Salvador; Taliban in Afghanistan, including after losing control of the Government; Maoist insurgents (CPN-M) in Nepal; Revolutionary United Front (RUF) in Sierra Leone; various groups of rebels involved in the non-international armed conflict in Syria; National Democratic Front of the Philippines

[51] For a detailed and recent account of these events, see B. Brenner, *Gaza under Hamas: from Islamic Democracy to Islamist Governance* (London: I.B. Tauris, 2017), at 141-170.
[52] Human Rights Watch, *Abusive System. Failures of Criminal Justice in Gaza* (2012), available online at https://www. hrw.org/report/2012/10/03/abusive-system/failures-criminal-justice-gaza#fc27a0 (visited 10 August 2018).
[53] ICC Press Release, 'The State of Palestine Accedes to the Rome Statute' (ICC-ASP-20150107 PR1082), 7 January 2015.

(NDFP) and Moro Islamic Liberation Front (MILF) in the Philippines; National Movement for the Liberation of Azawad (MNLA) in Mali; Armed Forces of the Forces Nouvelles (FAFN) in Ivory Coast; the Islamic State (IS) in Iraq and Syria; Free Aceh Movement (GAM) in Indonesia; Sudan People's Liberation Movement (SPLM) in South Sudan; Movement for the Liberation of the Congo (MLC) in the Democratic Republic of the Congo; Kosovo Liberation Army (UÇK-KLA) in Kosovo; People's Defence Forces (HPG) in Turkish Kurdistan; Naxalites in India; Republic of Biafra in Nigeria; Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN) in Colombia; Karen National Union (NKU) in Myanmar; National Resistance Army (NRA) in Uganda.[54]

These examples, as it can be easily understood, differ enormously with respect to quality, complexity, territorial and temporal application, ability to enforce convictions, the extent to which such groups respect (or fail to respect) fair trial guarantees, the NSA's own popular legitimacy, and the procedures followed.[55] For this reason, a solid argument on the complementarity of the ICC to courts of NSAs needs to rely on a preliminary delimitation of the actors concerned.

A. Attributes of Relevant Non-State Armed Groups

Jann K. Kleffner, who published the only study specifically focused on complementarity in the Rome Statute and non-national courts,[56] considered all types of organized non-state armed groups. A similar approach has been taken by Willms[57] (although only discussing *ne bis in*

[54] All examples mentioned in the non-exhaustive list provided are widely documented in the doctrine along with detailed analysis of the procedures followed by the armed group. The most comprehensive collection can be found in S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), at 549-555. See also J. Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict', 89 *International Review of the Red Cross (IRRC)* (2007) 655-690, at 678-682; M. Klamberg, 'The Legality of Rebel Courts during Non-International Armed Conflicts', 16 *JICJ* (forthcoming 2018); S. Sivakumaran, 'Courts of Armed Opposition Groups. Fair Trials or Summary Justice', 7 *JICJ* (2009) 489-513, at 490-495; D. Murray, *Human Rights Obligations of Non-State Armed Groups* (Oxford and Portland: Hart Publishing, 2016), at 206-236; A. Bellal, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, The Geneva Academy of International Humanitarian Law and Human Rights, Academy in-Brief No. 7, 2016; Willms, *supra* note 42, at 16-20.

[55] One of the most interesting aspects, although beyond the scope of this paper, is the level of sophistication of the rules applied. For an extensive overview, see O. Bangerter, *Internal Control. Codes of Conduct within Insurgent Armed Groups*, Small Arms Survey, Graduate Institute of International and Development Studies, 2012.

[56] J. K. Kleffner, 'The Law and Policy of Complementarity in Relation to "Criminal Proceedings" Carried Out by Non-State Organised Armed Groups', in C. Stahn and M. M. El Zeidy (eds), *The International Criminal Court and Complementarity: from Theory to Practice* (Cambridge: Cambridge University Press, 2011) 707-720.

[57] Willms, *supra* note 42, at 13-16.

idem instead of complementarity broadly) and Peter Rowe.[58] It is submitted here that the decision to take all kinds of NSAGs into consideration risks depriving the analysis of a stronger foundation. To the extent the Rome Statute permits the Court to assess prosecutions by NSAGs in its complementarity analysis, as the present work argues, it should do so only for those NSAGs that satisfy three conjunctive attributes.

First, the category of non-state actors is defined negatively, as actors of international law that, by definition, cannot become members of the Rome Statute. This feature, as Philip Alston stressed, is meant to 'reinforce the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve.'[59]

The second attribute relies on a de facto consideration that has been sketched by William A. Schabas and Mohamed M. El Zeidy: repeating almost *verbatim* the suggestion given by ICC Judge Kovács in the separate opinion mentioned above,[60] the two authors point out that if a progressive interpretation shall be put forward, it must concern all 'entities whose status is contested but which enjoy an undisputed control of the territory and have the capacity to exercise jurisdiction.'[61] In other words, the conclusions of this study only extend to NSAGs that actually possess the material ability to conduct a criminal trial, a capacity which necessarily hinges upon the group's stable control over a defined territory. This second attribute serves a key purpose in the interests of justice: it excludes forms of rudimentary justice, at least when such justice takes the shape of 'basement' or 'portable' courts as those mentioned by Jonathan Somer.[62]

These first two conditions are however still insufficient by themselves to support the contention that the ICC should include prosecutions by NSAG courts in its complementarity assessment. And it could not be otherwise, as the present study does not argue for a separate regime of complementarity with respect to NSAG prosecutions under the Rome Statute. While one could legitimately propose this option, it would necessarily be limited to a proposal

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[58] P. Rowe, 'War Crimes', in D. McGoldrick, P. Rowe, and E. Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Portland: Hart, 2004) 203-232, at 227.
[59] P. Alston, 'The 'Not-a-cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?', in P. Alston (ed.), *Non-State Actors and Human Rights*, Collected Courses of the Academy of European Law (Oxford: Oxford University Press, 2005) 3-36, at 3-4.
[60] Separate Opinion of Judge Péter Kovács, *Situation in Georgia*, *supra* note 49, §§ 64-66.
[61] W. A. Schabas and M. M. El Zeidy, 'Article 17. Issues of Admissibility', in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, München, Oxford, Baden-Baden: C. H. Beck, Hart, Nomos, 2016) 781-831, at 795.
[62] Somer maintains that for these courts 'it will be very difficult to meet the "regularly constituted" standard, even in a loose interpretation', see Somer, *Jungle Justice*, *supra* note 54, at 687. For a more nuanced position, see Sivakumaran, *Courts of Armed Opposition Groups*, *supra* note 54, at 506-507.

de lege ferenda, in other words, a policy recommendation. What I am trying to demonstrate, on the contrary, is that the *current* legal framework of the Rome Statute allows the ICC to consider trials before non-state entities' courts. And since the current legal framework of the Rome Statute not only *authorizes* but also *compels* the Court to assess its complementarity with state criminal jurisdiction, the application of those rules to courts of NSAGs must lead to the same result, provided those actors satisfy the same conditions of legitimacy required from states. This requirement creates the greatest challenge to this study's central thesis: while states' authority to conduct criminal trials cannot be questioned as it rests squarely on a sovereign right, non-state armed groups must derive legitimacy from some other basis. Inevitably, the third attribute NSAGs must fulfil is a *de jure* one: having a legal basis in international law to exercise criminal jurisdiction. Absent such a basis, only weaker options remain available. For example, Kleffner is satisfied that the legal framework of the Rome Statute can 'accommodate' proceedings carried out by non-state armed groups. For this reason, he proposes that the ICC Prosecutor make a policy choice by considering NSAG prosecutions while exercising her discretion under Article 53 ICC Statute.[63] This work argues, on the contrary, that the role of NSAG courts under the Rome Statute should not be left to policy considerations.

B. Quest for a Legal Basis

Actors of prosecution are the only element of the complementarity test this study will address. The present analysis is therefore neither concerned with the willingness or ability of non-state armed groups to conduct criminal proceedings, nor with the application of human rights norms to their courts. Indeed, as for the evaluation of a NSAG's willingness or ability to genuinely prosecute, this work must stop one step before: what it wants to prove is that the ICC *must* assess complementarity with NSAG courts. *How* it should do it is a question which presupposes acceptance of the fact that the Court is allowed to apply the complementarity test. The answer to this question, however, should not raise additional legal concerns: if one purports to apply the existing regime and not to create a new one, the elements of a NSAG's willingness or ability must be examined through the same existing legal canons the Court applies with respect to state courts.[64] This also answers the second question: the respect of fair

[63] Kleffner, *The Law and Policy of Complementarity*, *supra* note 56, at 707-708 and 720.
[64] Note that the criteria of unwillingness and inability should be assessed for states and non-states entities separately and that the application of complementarity to non-state actors is not contingent upon a previous

trial guarantees by NSAG courts cannot be a precondition for the application of the complementarity test, simply because it is not a precondition for states' courts. With regard to states however, most scholars deny that respect of human rights guarantees can be an element in the willingness component of the complementarity test under Article 17(2), and even the former Prosecutor made it clear that the ICC is 'not a human rights court.'[65] We will shortly see, on the contrary, that, differently from states, when it comes to NSAG courts the respect for fair trial guarantees is embedded in the same legal basis for the exercise of jurisdiction.[66]

International human rights law, as said, is not part of the picture when considering the conditions of applicability of the complementarity test. In addition, it is submitted that it cannot be of help in the research of a legal basis for non-state armed groups' authority to prosecute. To begin with, the extent to which NSAGs have IHRL obligations, if any, is presently disputed under international law. Even assuming for argument's sake that the dilemma can be solved in the affirmative, it still doubtful that IHRL would provide NSAGs with the power to conduct criminal trials. As a matter of fact, the contention that NSAGs must abide by, and are bound by, the standards of fair trial and effective remedy at most indicates that, under IHRL, such groups are deemed able to comply with those standards; it does not *ipso facto* imply any endowment of legal authority to conduct trials.

The question thus remains: what, if anything, provides NSAGs having stable control over a defined territory with the necessary legal basis to lawfully exercise criminal jurisdiction? While international criminal law, which is concerned with individuals, and international human rights law, which is concerned with obligations of authorities, both fail to confer NSAGs any authority to prosecute criminal cases, the answer has to be found in international humanitarian law (IHL): it is submitted that Common Article 3 to the 1949 Geneva Conventions (CA 3) vests NSAGs with an inherent power to conduct proceedings in NIACs.

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declaration of inability of the state to investigate or prosecute under Art. 17(3) ICCSt., although normally the exercise of territorial control by a NSAG implies the material inability of the territorial state to exercise criminal jurisdiction over persons residing on that territory (with the exception of trials in absentia).

[65] Statement, Former ICC Prosecutor Luis Moreno-Ocampo, Tripoli, 23 November 2011, available online at https://www.aljazeera.com/news/africa/2011/11/201111239582117090 9.html (visited 10 August 2018). The debate was partially reopened by the Appeals Chamber, when they stated that 'human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted "independently or impartially" within the meaning of article 17(2)(c).' See Judgment on the Appeal of Mr Abdullah Al-Senussi, *Al-Senussi*, *supra* note 15, § 220. See also F. Mégret and M. G. Samson, 'Holding the Line on Complementarity in Libya. The Case for Tolerating Flawed Domestic Trials', 11 *JICJ* (2013) 571-589.

[66] See *infra* section C of this part.

C. Legal Basis for Criminal Courts Established by NSAGs

At first glance, the possibility that a non-state armed group can carry out criminal proceedings is often met with scepticism, if not complete mistrust. Nevertheless, according to Sandesh Sivakumaran, NSAG courts 'have the potential to constitute an alternative to summary execution, to contribute to the maintenance of law and order in territory controlled by the armed group, and to reduce the climate of impunity that so often exists in times of non-international armed conflict.'[67] While these are strong policy arguments supporting the legality of armed groups' prosecutions, policy arguments are not sufficient to provide a legal basis.[68] The solution is to be found in one provision of IHL: CA 3 to the Geneva Conventions. In addition, if the state on the territory of which the armed group exists has ratified Protocol Additional II (AP II) and its higher threshold of application has been satisfied, Article 6 AP II would also provide NSAGs with the necessary legal basis to carry out prosecutions. The higher threshold required by Article 1 AP II to trigger its application suggests, however, that the present argument should be built upon CA 3, which applies to all NIACs.

1. Interpretation of the 'Regularly Constituted Court' Requirement

In CA 3, paragraph 1(d) concerns the exercise of jurisdiction in NIACs.[69] Its regime revolves around the requirement of a 'regularly constituted court'. Clearly, not just the implementation but the same applicability of this provision to NSAGs depends on the meaning ascribed to this expression. Indeed, a high standard of 'regularity' would make it practically impossible for most, if not all, NSAGs to establish the necessary type of court. This is for example the inevitable conclusion of the interpretation given by Nehal Bhuta, according to whom 'regularly constituted' under IHL is 'normally taken to mean constituted under regular, constitutional laws of the state'.[70] A similar yet alternative and more nuanced reading is provided by the International Committee of the Red Cross (ICRC) study on customary international humanitarian law, where regular constitution is equated with 'established and

[67] Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 54, at 550.
[68] For further policy considerations related to the interest of upholding order in territories controlled by NSAGs, see Klamberg, *supra* note 54.
[69] CA 3(1)(d) prohibits, if realized against 'persons taking no active part in the hostilities', '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 recognized as indispensable by civilized peoples'.
[70] N. Bhuta, 'Joint Series on International Law and Armed Conflict: Fair Trial Guarantees in Armed Conflict', EJIL: Talk! Blog of the European Journal of International Law, 22 September 2016, available online at https://www.ejiltalk.org/joint-series-on-international-law-and-armed-conflict-fair-trial-guarantees-in-armed-conflict/ (visited 10 August 2018).

organized in accordance with the laws and proceedings already in force in a country.'[71] Here too, although putting aside any express reference to a state's constitutional framework, the interpretation impliedly excludes NSAGs from creating 'regularly constituted' courts by requiring that such courts be established pursuant to a law 'already in force in a country'. Given that NSAGs cannot exercise legislative authority in accordance with a state constitutional or ordinary law, positions denying that international law provides a legal basis for armed groups to establish courts in NIACs necessarily imply that only states are capable of creating 'regularly constituted' courts as mandated by CA 3: even imagining that a NSAG could be able and willing to respect the applicable domestic law to set up its own judicial system, it would clearly not qualify as the legal agent foreseen by the norm, and its activity would therefore anyway fall outside the scope of the provision.

Both interpretations, to the extent they preclude non-state armed groups from establishing courts and conducting criminal proceedings, are incompatible with the text of CA 3 and the principle of equality – one of the central pillars underpinning the application of IHL to all parties to a conflict. First, the chapeau of CA 3 clearly identifies its addressees: it applies to 'each Party to the conflict'. As both states and NSAGs are parties to NIACs, the plain language of CA 3 indicates that Paragraph 1(d) applies with equal force to NSAGs. Although the principle of equality might be one of the most controversial aspects of the IHL applicable to NIACs, and of course it does not imply any parity of status,[72] there could be no serious and legitimate expectation of compliance with IHL by armed groups if treaty and customary international law, with respect to its scope of application, did not recognize the same rights and obligations of all those involved in an armed conflict.[73] This must also include, as argued

[71] J.M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, vol. 1: Rules (Cambridge: ICRC – Cambridge University Press, 2005), at 355.
[72] Somer provides an exhaustive argumentation of the reasons to uphold the equality principle in NIACs and a comprehensive explanation of its practical implications, including the useful distinction between parity and equality, see Somer, *Jungle Justice*, *supra* note 54, at 656-664.
[73] This remains true under International Humanitarian Law, even if under domestic law state and armed groups' fighters do not enjoy the same rights. The legal literature consulted for the present paper agrees that the principle of equality implies an entitlement to establish courts in NIACs. In addition to Somer and the authors mentioned in note 55, see also A.-M. La Rosa and C. Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law', 90 *IRRC* (2008) 327-341, at 338; D. Murray, 'Non-State Armed Groups in NIAC: Does IHL Provide Legal Authority for the Establishment of Courts?', EJIL: Talk! Blog of the European Journal of International Law, 4 June 2014, available online at https://www.ejiltalk.org/non-state-armed-groups-in-niac-does-ihl-provide-legal-authority-for-the-establishment-of-courts/ (visited 10 August 2018).

by Ezequiel Heffes, the possibility for armed groups to establish criminal courts on the basis of their own legislation.[74]

The plain meaning of CA 3 and the principle of equality therefore conflict with an *a priori* exclusion of NSAG courts from the category of 'regularly constituted courts' and return the present analysis to its starting point: how should the expression be interpreted? Does it include courts established by NSAGs in accordance with their own legislation? As already mentioned, the answer set forth in this work does not amount to a newly submitted proposal *de lege ferenda*, but conversely stems directly from applicable international law and is confirmed by way of authoritative interpretation. Article 6 AP II has expanded the legal framework applicable to penal prosecutions conducted in NIACs, including by courts of armed groups. While the insertion in the Protocol of an article regulating the exercise of criminal jurisdiction by NSAGs does not in and of itself constitute a legal basis for their establishment, the text of the provision helps find the answer to our interpretive question. Indeed, the chapeau of Article 6(2) AP II, while nearly identical to CA 3(1)(d), replaces the phrase 'regularly constituted court' with 'a court offering the essential guarantees of independence and impartiality.' This shift in wording, far from expressing a mere stylistic variance, must be traced back to a deliberate choice made during the Drafting Conference for AP II, as disclosed in the ICRC's 1987 Commentary:

> some experts argued that it was unlikely that a court could be 'regularly constituted' under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula taken from Article 84 of the Third Convention, which was accepted without opposition.[75]

While this proves that the standard adopted in AP II to recognize legal effects to convictions by NSAG courts is different and arguably lower than 'regularly constituted court', the Protocol only applies under a restrictive set of conditions, to a narrower range of cases than CA 3. One needs to turn to the ICRC updated commentary on Geneva Convention I (2016), and precisely to the paragraphs on CA 3, to fully understand the rationale and impact

[74] E. Heffes, 'The Establishment of Courts by Armed Groups: What is the Legal Basis?', Humanitarian Law and Policy Blog, 11 October 2016, available online at http://blogs.icrc.org/law-and-policy/2016/10/11/courts-armed-groups-legal-basis/ (visited 10 August 2018).
[75] Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht: ICRC – M. Nijhoff, 1987), at 1398, mn. 4600.

of that wording choice.[76] The commentary, after noting that the opening sentence of Article 6(2) AP II 'focuses more on the capacity of the court to conduct a fair trial than on how it is established', connects the new formulation with the specific intention to take into account the reality of NIACs,[77] thereby confirming awareness among states negotiating IHL norms of the need to adapt international law to the complexities of modern warfare.

The same awareness later guided the positions of states in the negotiation of ICL norms. Article 8(2)(c)(iv) ICC Statute, already mentioned in this study, makes violations of CA 3(1)(d) a war crime: it punishes '[t]he passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court'. In turn, the ICC Elements of Crimes relating to that norm provide, in pertinent part, that the Prosecutor must establish that 'the court that rendered judgment was not "regularly constituted", *that is*, it did not afford the essential guarantees of independence and impartiality'.[78] Interestingly thus, the Elements of Crimes explicitly equate the meaning of the two expressions. Knut Dörmann's Commentary on the Elements of War Crimes, moving from the observation that 'the material elements of Article 6(2) AP II may be an indication for the respective elements of Art. 8(2)(c)(iv) ICC Statute', confirms that 'the problem of courts set up by rebel groups led to a change of wording in the drafting of Art. 6(2) AP II that was thought to clarify the general rule of common Art. 3 GC.' Therefore, 'one may conclude that independence and impartiality are the main features of a "regularly constituted court"'.[79] In the light of all that, the ICRC updated commentary on CA 3 concludes that that the wording chosen for AP II and the Elements of Crimes represents nowadays the correct interpretation of the expression 'regularly constituted court': '[a]ccording to these texts, the requirements of independence and impartiality are the touchstones for interpreting the meaning of this term.'[80] This conclusion is granted, not surprisingly, by the principle of equality of the parties to a conflict:

> Common Article 3 requires 'a regularly constituted court'. If this would refer exclusively to State courts constituted according to domestic law, non-State armed

[76] J.M. Henckaerts et al. (eds), *Commentary on the First Geneva Convention* (Cambridge: ICRC – Cambridge University Press, 2016).
[77] *Ibid*., at mn. 678.
[78] *Elements of Crimes of the International Criminal Court*, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3), part II.B, Article 8(2)(c)(iv): War crime of sentencing or execution without due process (emphasis added).
[79] K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: ICRC – Cambridge University Press, 2003), at 412-413.
[80] Henckaerts et al., *supra* note 76, at mn. 678.

> groups would not be able to comply with this requirement. The application of this rule in common Article 3 to 'each Party to the conflict' would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed group. Alternatively, armed groups could continue to operate existing courts applying existing legislation.[81]

Both these options, be the court newly established under the NSAG's legislation or a pre-existing one which continues operating under the new regime, could potentially give rise to legal effects, provided the requirements expounded in the next section are fulfilled.

2. Interpretation of the 'Independence and Impartiality' Requirement

Having established that a 'regularly constituted court' can include an independent and impartial court operated by a NSAG, the inquiry must now turn to a related but distinct question: can an organized armed group establish a court that satisfies the necessary requirements of independence and impartiality? Two judgments – from the ICC and a Swedish District Court – answer this question in the affirmative. First, as previously discussed, the ICC PTC II confirmed the charges relating to command responsibility against Bemba also on the basis of the fact that a 'functional military judicial system [existed] within the MLC',[82] and the TC III later convicted the accused also because, by means of his authority over the armed group's courts,[83] he could have 'properly tried and punished any soldiers alleged of having committed crimes'.[84] As explained, the AC's reversal of the TC III conviction did not refute this conclusion but rather confirmed that commanders can establish a judicial process, and that this initiative must be taken into consideration as a measure to prevent or repress the commission of crimes or to submit the matter to competent authorities.[85] In so doing, three ICC chambers assumed that the MLC's military judicial system was 'regularly constituted' or, in other words, that it afforded the required essential guarantees of independence and impartiality. Any other interpretation would lead to an absurd result: the Court would have otherwise implicitly invited military and civilian leaders to

[81] *Ibid*., at mn. 692.
[82] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Bemba*, *supra* note 41, § 501.
[83] Judgment pursuant to Article 74 of the Statute, *Bemba*, *supra* note 36, §§ 402-403.
[84] *Ibid*., § 729.
[85] Judgment on the appeal of Mr Jean-Pierre Bemba Gombo, *Bemba*, *supra* note 37, § 180.

commit the war crime proscribed by Article 8(2)(c)(iv) in order to avoid command responsibility for crimes of their subordinates.

Second, a case recently decided before Swedish courts recognized, probably for the first time explicitly, the legitimacy of criminal prosecutions conducted by NSAGs. On 16 February 2017, the Stockholm District Court adopted the verdict against Haisam Sakhanh, a Syrian refugee residing in Sweden who had allegedly participated in the summary execution of members of the Syrian regime armed forces pursuant to an order issued by a rebel-led tribunal. The Court had to decide whether the sentence issued by a NSAG's court can be used as ground for excluding criminal responsibility by the defendant who on the basis of that verdict had carried out an execution. Even though it eventually established that the required conditions were not met in that case, and therefore convicted the accused, the Stockholm District Court used the same argumentative path described in this work to conclude that NSAGs can establish courts under IHL, although only when two situations occur: that the court is composed of trained judges appointed before the conflict and applying the law already in force in the territory, and that the court exercises jurisdiction to uphold discipline among the NSAG forces, as required by CA 3.[86] Both the Svea Court of Appeal and the Supreme Court of Sweden later upheld the sentence.[87] While those conditions seem to rely more on policy considerations than on the interpretation of the current legal framework, the need shown by the judges to 'open the floodgates, controlling the flow', as figuratively summarized by Somer,[88] leads to the conclusion of this part. In the first section, it was noted that the search for a legal basis cannot be contingent whether NSAG courts respect or fail to respect fair trial guarantees under IHRL, as such a requirement would deviate from the complementarity test applied by the ICC to states. However, CA 3, besides providing parties to a NIAC with a legal basis to set up criminal courts, does it on the condition that those courts afford 'all the judicial guarantees which are recognized as indispensable by civilized peoples.' This specification must be read as a conjunctive requirement, meaning that NSAG

[86] *Prosecutor v. Omar Haisam Sakhanh*, Stockholm District Court, B 3787-16, Judgment of 16 February 2017, available online at http://www.ejiltalk.org/wp-content/uploads/2017/03/Stockholms-TR-B-3787-16-Dom-2017-02-16.pdf (visited 10 August 2018).
[87] For a thorough analysis of these decisions, see Klamberg, *supra* note 54, arguing that the conditions described in the District Court judgment only amount to 'model situations'.
[88] For a comment on the decision, see J. Somer, 'Opening the Floodgates, Controlling the Flow: Swedish Court Rules on the Legal Capacity of Armed Groups to Establish Courts', EJIL: Talk! Blog of the European Journal of International Law, 10 March 2017, available online at https://www.ejiltalk.org/opening-the-floodgates-controlling-the-flow-swedish-court-rules-on-the-legal-capacity-of-armed-groups-to-establish-courts/ (visited 10 August 2018).

courts only have a legal basis to exercise jurisdiction under international law they are independent and impartial and, at the same time, they respect all indispensable judicial guarantees.[89] Both Somer and Mark Klamberg, analysing the wording of the Elements of Crimes for Article 8(s)(c)(iv), criticize the choice to equate the regular constitution of the court with its capacity to afford the essential guarantees of independence and impartiality, for this confuses somehow the legal basis to establish courts with the requirement of respecting judicial guarantees.[90] Differently from the opinion of these authors, it is here submitted that the current status of international law only provides a legal basis for the establishment of criminal courts by NSAGs if those courts are able to comply with a well-defined set of judicial guarantees: this last requirement is therefore integrated into the international law basis of NSAG criminal prosecutions. As pointed out by Klamberg, the 'indispensable judicial guarantees' can be understood by reference to at least three alternative sets of rights: the guarantees listed in Article 6 AP II, the fair trial rights enumerated in Article 75 AP I applicable to international armed conflicts, and the standards of IHRL.[91] Considering that the different catalogues of judicial rights provided in AP I and AP II reflect the different realities of IACs and NIACs, the first of these options appears the most suitable to NSAG courts.

We can conclude that international law provides in the IHL applicable to NIACs a legal basis for the establishment by NSAGs of criminal courts which are independent and impartial and uphold all the judicial guarantees recognized as indispensable by civilized peoples: on these conditions, a criminal trial by a NSAG would be lawful under international law.

5. Arguments for the Inclusion of Armed Groups' Courts in the Complementarity Test

Objections to the application of the complementarity test to criminal proceedings run by NSAGs mainly rely on an overly restrictive reading of the provisions incorporating the ICC's complementarity regime. As already mentioned, paragraph 10 of the Preamble and Article 1 ICC Statute refer to complementarity only with respect to 'national criminal jurisdictions'. The limitation to national courts is, in turn, confirmed by Article 17(1)(a) and (b), both of which are expressly limited to investigations and prosecutions conducted by 'States'.

[89] For a proposed list of indispensable guarantees, see L. Doswald-Beck, 'Judicial Guarantees under Common Article 3', in A. Clapham, P. Gaeta, and M. Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2017) 469-494, at 473-484.
[90] Somer, *Jungle Justice*, *supra* note 54, at 674-675; Klamberg, *supra* note 54.
[91] Klamberg, *supra* note 54.

Furthermore, even though Article 17(1)(c) does not expressly refer to states, there seems to be no manifest reason to conclude that the drafters of the Rome Statute intended to give a different meaning to one component of a broader mechanism which has internal coherence. Indeed, other provisions relating to the Court's complementarity regime only envisage a role for states. Under Article 18, a deferral is only possible in relation 'to a State's investigation'. Likewise, only the interested person, a State which has jurisdiction over the case, or a State from which acceptance of jurisdiction is required under article 12 ICC Statute can challenge the Court's admissibility decisions.[92] According to Article 89 ICC Statute, if a person sought for surrender by the ICC lodges a challenge in national courts predicated on the *ne bis in idem* principle, only the state to which the request for arrest and surrender has been transmitted is required to 'consult with the Court to determine if there has been a relevant ruling on admissibility.' Moreover, while the *ne bis in idem* among national courts is a well-established principle of most domestic legal systems ('internal' *ne bis in idem*), the extension of the principle to transnational judicial relations ('international' *ne bis in idem*) cannot be deemed to rest on a general principle[93] or on customary international law.[94] Therefore, when the *ne bis in idem* is applied to relations between states and international courts ('vertical' international *ne bis in idem*), it must find its legal basis either in an international treaty, such as the Rome Statute, or in a UN Security Council Resolution, as was the case for the ad hoc international criminal tribunals.[95]

In addition to the above textual arguments, there is also a policy consideration that militates against the central thesis of this study. States firmly contend that any newly proposed role for NSAGs in international law, including recognition of NSAGs as rights holders and obligation bearers in international criminal law, gives such groups unwarranted political legitimacy and strengthens their claims to obtain international legal personality.[96]

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[92] On this point see K. J. Heller, 'Could a Non-State Actor Challenge Admissibility?', Opinio Juris, 19 August 2012, available online at http://opiniojuris.org/2012/08/19/could-a-non-state-actor-challenge-admissibility/ (visited 10 August 2018).
[93] A. J. Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory', 86 *Washington University Law Review* (2009) 769-857, at 815-817.
[94] R. Geiß, 'Ne Bis in Idem', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013), § 4.
[95] I. Tallgren and A. R. Coracini, 'Article 20. Ne Bis in Idem', in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, München, Oxford, Baden-Baden: C. H. Beck, Hart, Nomos, 2016) 899-931, at 916.
[96] A. Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups', 6 *JICJ* (2006) 899-929, at 924.

The textual and policy objections outlined above, while raising reasonable concerns, can be rebutted and more convincing arguments seem to lean towards the opposite conclusion. As will be shown in the following sections, five different lines of argumentation stand in support of the inclusion of NSAG criminal prosecutions in the ICC's complementarity test. They are based on: (1) the text of the relevant provisions; (2) the rationale of the ICC's admissibility regime; (3) the mechanism and implications of command responsibility under the Rome Statute; (4) the rationale underlying *ne bis in idem* and its protected interests; and (5) the necessity to foster compliance with IHL by NSAGs while at the same time upholding the respect of fair trial guarantees.

A. Text of the Provisions

As explained, the strongest argument against a role for NSAG courts in the assessment of complementarity rests on the precise wording of the relevant articles. Yet, an attentive analysis of Article 17(1) ICC Statute does not completely rule out non-state courts from the scope of application of the norm, and instead gives leeway to a different, so far overlooked interpretation of the provision.

First, while the grounds for inadmissibility listed in Article 17(1)(a) and (b) ICC Statute explicitly refer to the unwillingness or inability of *states* to genuinely prosecute a case,[97] Article 17(1)(c), which incorporates the *ne bis in idem* principle into the admissibility test, makes a case inadmissible if a second trial against an already prosecuted person 'is not permitted under' Article 20(3).[98] This latter provision, in turn, governs the so-called upwards *ne bis in idem*, providing that the ICC cannot retry an individual who has been previously tried by '*another court* for conduct' falling within the ICC's subject matter jurisdiction.[99] However, in order to preserve the rationale of Article 17, trials conducted by other courts cannot be awarded an absolute preclusive effect on the jurisdiction of the ICC. On the contrary, the Court must be allowed to retry a case each time the same flaws described in

[97] Emphasis added.
[98] Article 20 - Ne bis in idem
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.
[99] Emphasis added.

Article 17(2) compromised the national prosecution.[100] Consequently, Article 20(3) provides two exceptions to *ne bis in idem* that reiterate *verbatim* the specific factors of states' unwillingness to genuinely investigate or prosecute set forth in Article 17(2)(a) and (c) with one main difference: while those factors expressly refer to *states* and to *national decisions*, the general presumption against double jeopardy established in Article 20(3) generically refers to trials by 'another court'.[101] From the same textual observation, Kleffner infers that the 'wording suggests that the exception to the *ne bis in idem* principle pertains to 'any other court' regardless of whether that court is one of a state or a non-state entity'.[102] This work does not share the opinion that the drafters of the Rome Statute intended to include NSAG courts in the *ne bis in idem* rule; it observes however that the difference in wording at the very least proves that the text of the provision is not an obstacle to include a broader category of actors of prosecution in the complementarity test.

Second, in contrast to Article 17(1)(a) and (b), which both refer to a state having 'jurisdiction' over a particular case, Article 17(1)(c) carefully avoids any reference to jurisdiction, which is a legal concept that is strictly linked to the notion of sovereignty and that could have been at odds with the more nuanced wording of Article 20(3). Instead, Article 17(1)(c) only refers to a previous trial for 'conduct which is the subject of the complaint'.

Third, scholars commenting on the *ne bis in idem* principle as expressed in the Rome Statute already accepted that the expression 'another court' in Article 20(3) can encompass international and internationalized tribunals.[103] Given that internationalized tribunals are typically considered as integrated in national judicial systems, the extension of the complementarity test to them falls under the same rationale of the first two prongs of the complementarity test (Article 17(1)(a) and (b)). The same cannot be said for other international courts: if commentators accept that courts other than national ones are included in the complementarity test, this can also hold true for NSAG courts as long as the rationale of the proposal fits the rationale of the admissibility regime under the Rome Statute.

The observations just expounded should not be underestimated. If they open the door to new interpretive solutions, they at the same time restrict the application of those solutions to one component of the complementarity regime: Article 17(1)(c) relying on *ne bis in idem*.

[100] For obvious reasons, while Art. 17 ICCSt. is concerned also with inactivity and inability of domestic judicial systems, issues of *ne bis in idem* can only arise in case of unwilling prosecution, since the application of the principle obviously assumes that a trial took place.
[101] The same wording is used in Rule 168 of the ICC RPE.
[102] Kleffner, *The Law and Policy of Complementarity*, *supra* note 56, at 718.
[103] Tallgren and Coracini, *supra* note 95, at 905.

Therefore, while the arguments proposed in the following sections remain virtually valid for the entire admissibility regime under the Rome Statute, if applied beyond the *ne bis in idem* clause they conflict with the express reference to criminal prosecutions by *states* in Article 17(1)(a) and (b). In this sense, they would inevitably amount to *a contra legem* proposal. Yet, as stated multiple times, it is not the purpose of this work to submit recommendations *de lege ferenda*; rather, the aim is to demonstrate that the existing legal framework of complementarity can be applied by the ICC beyond the limits of domestic prosecutions.

B. Rationale of the Admissibility Regime before the ICC

As briefly mentioned at the beginning of this study, the Rome Statute's admissibility regime serves different purposes and its focal point is undoubtedly the complementary character of the ICC's jurisdiction vis-à-vis the primary obligation of national courts to prosecute serious international crimes. The mechanism set up under the Rome Statute to put complementarity into effect, however, goes beyond mere deference towards states' sovereign right (and duty) to exercise criminal jurisdiction; it exists to further the realization of other aims.

First, the complementarity principle, as a mechanism of 'forum allocation',[104] endows national jurisdictions with the primary responsibility to prosecute also because it seeks to identify the *forum conveniens*, i.e. the jurisdiction that is best suited to hear a particular case since both the suspect and the evidence can be more easily found, and that is closer to the affected community.[105] In so doing, complementarity promotes judicial economy, avoiding the Court to be overburdened, but can also better promote justice and accountability. Normally, all these criteria are verified for state courts. Nothing, however, prevents NSAG courts from meeting those same criteria, and thus be the *forum conveniens* in the particular case. On the contrary, it is precisely the existence of another competing authority over the same territory that might be one of the reasons for states' inability to prosecute.

Second, criminal prosecution by NSAGs, if in compliance with the standards established by Article 20(3)(a) and (b), can contribute to filling the impunity gap, which is the ultimate purpose of the ICC. Conversely, a blunt denial of relevance for criminal trials by NSAGs would discourage prosecution of cases that neither states (who no longer control the territory

[104] Schabas and El Zeidy, *supra* note 61, at 783.
[105] A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *European Journal of International Law* (1999) 145-171, at 158.

in question) nor the ICC (whose limited resources do not permit to reach most perpetrators) can cover, thereby increasing the impunity gap.

Third, reasons of judicial economy also stand in favour of NSAG prosecutions, at least when there is a reasonable expectation that a retrial before the ICC would not produce a different outcome. Evidently, this argument can only be valid if the trial by a NSAG respects those same indispensable judicial guarantees that the accused would enjoy before the ICC.

Fourth, to stress the autonomous role played by the *ne bis in idem* clause within the complementarity test, some authors read in Article 17 three different components, namely complementarity, double jeopardy and gravity.[106] The present article does not take a stance on this alternative classification, which in any case has more didactic purposes than practical significance, but the mentioned opinion shows how the rationale of *ne bis in idem* can be functional to the admissibility test without necessarily following the same criteria as the first two paragraphs of Article 17(1).

C. Mechanism and Implications of Command Responsibility

Under both international humanitarian law[107] and international criminal law,[108] a commander of a party to a NIAC[109] is responsible for 'crimes committed by the forces under his or her effective command and control' if he or she 'knew or should have known that the forces were committing or about to commit such crimes' and 'failed to take all necessary and reasonable measures to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.' A careful assessment of this mode of indirect liability, further than proving that international law provides a legal basis for the establishment of NSAG courts as already argued, also supports the inclusion of those courts in the complementarity assessment.[110]

First, as observed by Kleffner, requiring commanders to repress crimes committed by forces under their control by submitting the matter to state authorities would be unrealistic,

[106] Schabas, *supra* note 29, at 447.
[107] Henckaerts and Doswald-Beck, *supra* note 71, Rule 153, limited to war crimes.
[108] For the International Criminal Court, Art. 28 ICCSt., covering all international crimes in the jurisdiction of the Court and extended to civilian superiors.
[109] For the application of the command responsibility doctrine to commanders in NIACS, see ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Hadžihasanović et al.* (IT-01-47-AR72), Appeals Chamber, 16 July 2003; this is confirmed by the ICRC Study on Customary IHL, Henckaerts and Doswald-Beck, *supra* note 71, Rule 153.
[110] For a discussion on the nature of command responsibility as mode of liability or crime per se see C. Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?', 5 *JICJ* (2007) 619-637.

since it would require commanders to place trust in the judicial system of the authority against which the NSAG is fighting.[111] This would admittedly result in the untenable disruption of the group's internal cohesion, leading to inevitable defections: such outcomes would be contrary to both common sense and military reason. There is no option for a NSAG leader other than to set up criminal courts to repress crimes committed by members of the group.

Second, as previously explained in this study, trials conducted by NSAGs must respect the criteria required by Article 8(2)(c)(iv) ICC Statute if the commander wants to avoid his direct responsibility for the war crime provided under that rule. These criteria include the regular constitution of the court, today interpreted in the AP II as well as in the Elements of Crimes as requiring independence and impartiality,[112] and the recognition of indispensable judicial guarantees. One can reasonably assume that a trial conducted by a court satisfying the aforementioned criteria would not fall within the two exceptions to the upwards *ne bis in idem* envisaged by Article 20(3). Indeed, a trial by a truly impartial and independent court can hardly produce the result of shielding the accused from criminal responsibility (Article 20(3)(a)). Additionally, substantively, there is little to no difference between 'judicial guarantees which are generally recognized as indispensable' (Article 8(2)(c)(iv)) and 'norms of due process recognized by international law' (Article 20(3)(b)). In conclusion, the architecture of the Rome Statute *obliges* armed groups' commanders to provide for criminal prosecution that satisfies the minimal requirements making a case inadmissible under Article 17(1)(c) read in conjunction with Article 20(3). Of course, as Article 20(3) merely requires a previous trial for conduct falling with the ICC's jurisdiction, any court procedure falling short of an actual trial would be insufficient to trigger the application of the *ne bis in idem* principle, and the case would thus be admissible before the ICC.

D. Rationale and Interests Protected by the Ne bis in idem *Principle*

Once proved that international law not only allows NSAGs to exercise criminal jurisdiction but even requires them to conduct criminal prosecutions and obliges them to afford all the judicial guarantees that make cases inadmissible before the ICC, it only remains to be seen if a retrial of the suspect could still be justified by other prevailing interests under a different norm of international law. The analysis, eventually, comes down to the rationale and interests protected by the *ne bis in idem* principle.

[111] Kleffner, *The Law and Policy of Complementarity*, *supra* note 56, at 719.
[112] *Elements of Crimes of the International Criminal Court*, Article 8(2)(c)(iv), *supra* note 78.

The upwards *ne bis in idem* provided in Article 20(3) ICC Statute, as already examined, is the only sub-provision in Article 20 that establishes exceptions allowing a retrial before the ICC. However, unlike the other paragraphs of Article 20, Article 20(3) does not require that the 'other court' prosecute the same crime; it is sufficient in order for the suspect to avoid retrial that the first court prosecuted the conduct falling under Articles 6, 7 or 8 ICC Statute. While this seems to increase the possibilities of escaping criminal justice, the choice shows how relevant were considered by the drafters of the Rome Statute the countervailing interests of the suspect not to be placed in jeopardy twice, i.e. not to be exposed twice to a progressively increased risk of being convicted.[113] In other words, the decisive factor in this prong of the admissibility test is not the states' sovereign right to try the accused but rather the respect of the human rights fair trial guarantees of the accused that are violated unfairly and disproportionately in instances of double prosecution. Article 19(4) ICC Statute highlights the importance of this interest by allowing admissibility challenges at the commencement of a trial or subsequently only if the challenge is based on Article 17(1)(c).

Second, if our argument in favour of NSAG prosecutions is limited to the application of the *ne bis in idem* clause, then the closed list of those authorized to bring a challenge under Article 19 ICC Statute no longer represents a counter-argument: indeed, under paragraph 2(a), the accused/person for whom a warrant of arrest or a summons to appear has been issued is authorized to file such a challenge.

Finally, it should be recalled that, in accordance with Article 21(3) ICC Statute, 'application and interpretation of law' by the ICC 'must be consistent with internationally recognized human rights': no doubt that the aim of avoiding the violation of the fair trial guarantees recognized by IHRL weighs in favour of the thesis of this work.

E. Fostering Compliance with IHL and IHRL

It has so far been showed that the inclusion of NSAG criminal prosecutions in the ICC complementarity assessment rests, eventually, on the combined effect of the command responsibility regime under the Rome Statute and the interests protected by the principle of *ne bis in idem*. A final argument purports to overcome the recurrent concern of states that any engagement with NSAGs could bestow upon them some form of legal recognition. The ICC

[113] Tallgren and Coracini, *supra* note 95, at 902-903.

should move away from obstructionist inclinations of states and engage directly with NSAGs for several reasons.

First, while CA 3 provides NSAGs with the necessary legal basis to establish criminal courts, it also makes it clear that its application 'shall not affect the legal status of the Parties to the conflict.' The relevance of this clause has been reaffirmed by the ICRC updated commentary on the Geneva Conventions I which, discussing the legality of courts set up by NSAGs, recalls that '[n]othing in the article implies that a State must recognize or give legal effect to the results of a trial or other judicial proceeding conducted by a non-State Party to the conflict.'[114]

Second, as extensively argued by Marco Sassòli, NSAGs should be engaged with and taken seriously to increase their compliance with IHL: '[a] step which would both make IHL more realistic for armed groups and increase their sense of ownership is to reward them for respecting IHL.'[115] Ultimately, engagement with NSAGs finds a firm basis on the principle of equality of the parties to a conflict, and no better reward for NSAGs' compliance with law could be imagined than recognising legal effects to some of their actions: as clearly expressed by Andrew Clapham, 'if we want to incentivize armed groups to respect the laws of war then we have to accept that, even if such groups have been banned under national law, some things that they do will be allowed (or at least not condemned)'.[116]

Third, respect of the law in this case entails that NSAGs respect, at a minimum, fundamental judicial guarantees. This means that the ICC would only be required to engage with NSAGs when such engagement would not pose any risks to the rights of those prosecuted. In all cases, the additional guarantees outlined in Article 20(3) ICC Statute must be added to, and read in conjunction with, the guarantees provided in CA 3. This combination satisfies the relatively low threshold of 'genuine' investigations and prosecutions that is imposed upon states under Article 17(1)(a) and (b) ICC Statute.

[114] Henckaerts et al., *supra* note 76, at mn. 695.
[115] M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law', 1 *Journal of International Humanitarian Legal Studies* (2010) 5-51, at 26-27.
[116] A. Clapham, 'Detention by Armed Groups under International Law', 93 *International Law Studies* (2017), 1-44, at 2.

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6. Conclusion

Frédéric Mégret and Marika Giles Samson, in a recent contribution on the functioning of complementarity under the Rome Statute, provided a warning that is pertinent to the present discussion:

> One of the remarkable things about the International Criminal Court's (ICC) complementarity regime is how many of the things that the field thought it knew about it have turned out to be untrue; how what was, at one point, the orthodoxy now runs the risk of becoming the minority view; how even the tidiest of schemes are put into flux.[117]

While the authors were alluding to the practice of states' self-referrals, the same observations apply with equal force to the categories of actors that should be included in the complementarity test. To a certain extent, the debate to which the present work has tried to contribute may appear to follow naturally from the divisions between a formalist and a realist approach to the role of the ICC. On one side, formalism sees the ICC to be the result of an agreement by states to limit their sovereign right to exercise criminal jurisdiction, so that any interpretive proposals of the Rome Statute should strictly adhere to what the delegations in Rome agreed upon. On the other side, realism accepts that international courts make political choices, even more than domestic courts, and that discretion of such courts cannot be limited as this would deprive them of the only means at their disposal to adapt legal texts to reality.

As is usually the case, the best answer rests somewhere in the middle. Looking at both the rationale of norms and the function they play within a given legal framework helps reach less controversial conclusions. Accepting that the ICC applies the complementarity test to courts established by NSAGs does not imply either an amendment to the Rome Statute or a political choice. It only needs to accept that, within the admissibility regime, Articles 17(1)(c) and 20(3) primarily serve the accused's interest to be free from the threat of double jeopardy. At the same time, it would help recognize that NSAGs are not necessarily actors in violation of international law but also actors that potentially promote order in the fragile contexts where they represent the only authority upon which the lives and rights of entire populations depend.[118]

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[117] Mégret and Samson, *supra* note 65, at 571-572.
[118] See Bellal, Human Rights Obligations of Armed Non-state Actors, *supra* note 54, at 33; K. Fortin, 'The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control', 63 Netherlands International

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Law Review (2016), at 163-167; R. Dudai and K. McEnvoy, 'Thinking Critically About Armed Groups and Human Rights Praxis', 4 *Journal of Human Rights Practice* 1 (2012), at 15-16.