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The Procedural Right to a Remedy When the State has Left the Building? A Reflection on Armed Groups, Courts and Domestic Law

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Abstract

This article analyses the procedural right to a remedy under human rights law when applied to armed groups controlling territory and exercising governance. Using the *Al Hassan* case before the International Criminal Court as a reference point and drawing on literature on rebel governance from other disciplines, the article conducts a critical review of the application of the right to a remedy to armed groups. Finding that the right to a procedural remedy applied to armed groups can be useful and realistic, the articles evaluates how the main tools of the right to a remedy (1) domestic law and (2) domestic courts, can and should be treated, when dealing with territory controlled by armed groups. Adopting a high-altitude perspective that identifies and discusses the dynamics within the discourse that resist recognition of armed groups' law and courts under human rights law, the article highlights key tensions within the system of international law and reflects on what the legal framework, taken as a system, can expect and require from armed groups.

Keywords: armed groups; human rights; international humanitarian law; procedural remedies

1. Introduction

In 2020, the International Committee of the Red Cross (ICRC) estimated that around 66 million civilians are living under the exclusive control of armed groups (ICRC 2020). This statistic reinforces how important it is for lawyers and practitioners to seek a better understanding of how the international legal framework applies to everyday life in territory under the control of armed groups. It also highlights the importance of seeking a better understanding of

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human rights law, as a complementary regime to international humanitarian law. When armed groups control territory and exercise governance, it is increasingly argued that human rights law can add significant normative value (Fortin 2016a; Henckaerts and Wiesener 2020: 152). In order to better understand how human rights law applies to armed groups, detailed studies are still needed on how different norms may remain relevant in territory under the control of armed groups. Key questions that need to be asked relate to the ability and feasibility of asking different armed groups to carry out particular norms; the extent to which (and how) different norms may be applied differently when applied by armed groups; the way in which any obligations binding upon armed groups interact with residual obligations of the government in these territories; and how they may relate to similar, complimentary or conflicting obligations in other bodies of law, for example, international humanitarian law and international criminal law. Several studies have already been conducted on armed groups and prosecutions, detention, the right to health, and legal identity but it is clear that more studies on discrete norms are needed (Murray 2016; Fortin 2021a). This article adds to this growing body of research by conducting an appraisal of the procedural right to a remedy as applied to armed groups. The procedural aspect of the right to a remedy is the duty to provide effective domestic remedies by means of unhindered and equal access to justice (van Boven 2009: 22). It includes, among other things, an obligation for authorities to conduct an effective and thorough investigation into violations leading to the identification of the perpetrator. In many ways, it can be seen to give material effect to the whole human rights framework.

By focusing on the procedural right to a remedy in relation to armed groups, this article addresses a question that was first raised as an 'emerging concept' during the drafting of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005 (Basic Principles) (Zwanenburg 2006: 652). In the light of the Guiding Principles' 'victim-orientated' stance, there were discussions during the drafting process about whether individuals in the territory of an armed group could also enjoy the right to a remedy under human rights law (UN 2003). This question was not answered definitively at the time, but the fact that Principle 3(c) calls for equal and effective access to justice 'irrespective of who may ultimately be the bearer of responsibility for the violation' has been interpreted to mean that this outcome was not excluded (Zwanenburg 2006: 652). In analysing this idea more thoroughly, this article builds upon research that has already been done on the *substantive* right to a remedy and armed groups, some of which by the editors of this special edition (Lawther et al. 2019; Lawther 2014; Dudai and McEvoy 2012; Dudai 2011). In line with recent calls for literature dealing with transitional justice themes to address situations where conflict is still occurring, it studies the procedural right to a remedy as it applies in territory under the control of armed group (rather than in the post-conflict landscape) (Sarkin 2016). Considerations surrounding the right to a remedy are completely different when armed groups control territory, because at this point in the conflict they still have obligations under international humanitarian law and arguably human rights law too. In these contexts, the jurisdiction of the national courts is generally rejected by armed groups who promulgate their own laws and set up their own courts. This makes it especially interesting and important to consider whether the procedural right to a remedy has value in these contexts.

The question of how the procedural right to a remedy applies to armed groups is also extremely pertinent to some of the issues currently under deliberation by the International

Criminal Court (ICC) in the *Al Hassan* case. More than any other case before the ICC, this case places rebel governance initiatives firmly under the legal microscope. The accused in the case, Mr Al Hassan, was a member of the Islamic Police of the Ansar Dine armed group which together with Al Qaeda in the Islamic Maghreb (AQIM) took control of Timbuktu in Northern Mali for a period of nine months between 1 April 2012 and 28 January 2013. The groups imposed harsh rules upon the civilian population and destroyed mausoleums. Mr Hassan was the *de facto* police chief and he had various roles and functions. He acted as an interpreter between the superiors of the Islamic Police and the local population. Based at the police headquarters, he received complaints from the local population, mediating in local debt cases, deciding whether to refer cases to the Islamic Tribunal and sometimes recommending punishments and ordering detention. He also organized police patrols and wrote reports relating to cases that came to the police station. He was involved in the enforcement of the religious and behavioural rules imposed by Ansar Dine in the territory, the arrest of suspects and the investigation of complaints, questioning and interrogating complainants and suspects. He is also accused of having participated in physically and psychologically abusing detainees, both within detention and during formal public punishments. Mr Al Hassan was also involved in the hearings of the Islamic Tribunal, taking on a variety of roles during the hearings that included providing translations to the police chief and communicating the basis for the charge to the defendant. He also accompanied detainees between the police station, court and place of punishment and is accused of having facilitated marriages between members of the police force and the local population. In its Confirmation of Charges decision dated November 2019 (CoC decision), Pre-Trial Chamber I of the ICC concluded that there are substantial grounds to believe that Mr Hassan is responsible for crimes against humanity (torture, rape, sexual slavery, and other inhumane acts, including forced marriage and persecution) and war crimes (torture; cruel treatment; outrages upon personal dignity; passing of sentences without previous judgement pronounced by a regularly constituted court affording all judicial guarantees, which are generally recognized as indispensable; intentionally directing attacks against buildings dedicated to religion and historic monuments; rape and sexual slavery).

When viewed against the figures given above, indicating that 66 million people are currently living in territory under armed group control, it is clear that the contextual set of facts on which the *Al Hassan* case is based is certainly not extraordinary. Indeed, it seems likely that there are probably very many individuals like Mr Al Hassan around the world, taking on official roles relating to the administration of justice in territory controlled by armed groups. This makes it especially relevant for practitioners to pay attention to how the Trial Chamber will handle the non-violent 'everyday' aspects of Mr Al Hassan's role as a police officer, which may not obviously consitute international crimes. For the purposes of this article focusing on the procedural right to a remedy, it is particularly interesting that Mr Hassan is being prosecuted for the war crime of 'passing of sentences without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples' (Article 8(2)(c)(iv) of the Rome Statute) due to the functions he carried out in his role as a police officer and his relationship with the Timbuktu court. While similar charges have been heard at national level in recent years (Klamberg 2018), this will be the first time that an International Criminal Court Trial Chamber will consider what kinds of standards are required from an armed group court. Indeed, the existence of these charges against Mr Al Hassan illustrates the reality that by providing individuals with access to justice and prosecuting crimes in territory under their

control, armed group members run the risk of committing war crimes. In other words, the case highlights what can be at stake when armed groups take care of justice and law enforcement activities in situations where—in the words of Al Hassan's defence lawyer—the 'State has left the building' (CoC Hearing 2019: 27).

The article proceeds by first exploring the manner in which the procedural right to a remedy has been interpreted when applied to States. It then continues to consider whether the right to a remedy can be useful or relevant when applied to armed groups. In addition to using the *Al Hassan* case before the International Criminal Court as a reference point, the article also refers to literature from the emerging field of 'rebel governance' and emerging legal practice relevant to the right to a remedy. It also compares the right to a remedy under human rights law with the norms that are binding upon armed groups and their members under international humanitarian law and international criminal law. Finding quite some practice in which armed groups have sought to provide remedies and human rights bodies have called upon them to do so, the article goes on to consider how the main tools of the right to a remedy—(1) domestic law and (2) domestic courts—can and should be treated, when dealing with territory controlled by armed groups. The examination of armed group courts at the end of the article is conducted with reference to an analysis of the *Al Hassan* case. It points out some issues with the approach that has been taken by the Pre-Trial Chamber regarding the crime defined by Article 8(2)(c)(iv) referred to above.

The article does not address the question of whether armed groups are bound by human rights law in the first place because this question has been addressed at length in much longer studies and the arguments are too complex to recite (Henckaerts and Wiesener 2020; Fortin 2017; Murray 2016; Mastorodimos 2017; Clapham 2006; Rodley 2014). Indeed, it is asserted that even if readers are not convinced by the legal legitimacy of the practice, the reality that the application of human rights to armed groups controlling territory and exercising functions of government is now fairly commonplace provides enough of a reason to study how different human rights norms (i.e. in this case the right to a remedy) can be operationalized, when applied to such groups. In examining this right, the article takes a different approach from the plethora of detailed legal studies on armed groups and courts in recent years which, among other things, provide valuable information on drafting histories of the various legal provisions relating to international humanitarian law and courts (Somer 2007; Sivakumaran 2009; Klamberg 2018; Spadaro 2020; Amoroso 2020; Jöbstl 2020, Provost 2021). Instead, it largely adopts a higher-altitude perspective focusing on the dynamics within the discourse that resist recognition of armed groups' law and armed group courts under human rights law. In exploring these questions, the article addresses some of the questions at the centre of the debate regarding whether armed groups should be bound by human rights law at all. This foundational discussion is necessary (and perhaps inevitable) in a study on the right to a remedy, because the right gives material effect to the whole human rights system.

2. The procedural right to a remedy under human rights law

Before considering how the procedural right to a remedy should be applied to armed groups, it is first important to understand the scope of the right when applied to States. It is notable that the right to a remedy is not a modern invention or product of case law. In fact, it already appeared in Article 8 of the 1948 Universal Declaration of Human Rights, which provides 'Everyone has the right to an effective remedy by the competent national tribunals

for acts violating the fundamental rights granted him by the constitution or by law'. The right to an 'effective remedy' is also set out in numerous international and regional treaties, including the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights, the American Convention of Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Within these different systems, it has become common to understand the right to a remedy as comprising two components: (1) the procedural right to a remedy, and (2) the substantive right to a remedy (van Boven 2009: 22; Shelton 2015: 14). While the procedural right, which is the subject of this article, refers to the processes by which claims of human rights violations are heard and decided, the substantive right to a remedy usually refers to the outcomes of such processes and the 'relief' granted to the claimant (Shelton 2015: 14).

The procedural right to a remedy has been said to amount to a duty upon States to provide effective domestic remedies by means of 'unhindered and equal access to justice' (van Boven 2009: 22). It is generally understood as an obligation upon States to carry out an independent and effective investigation into violations that is thorough enough to be capable of leading to the identification, prosecution and punishment of those responsible.[1] As was made clear in the Basic Principles, there is a synergy between the separately articulated right to a remedy that exists in many human rights treaties and States' positive obligations to 'respect', 'ensure' and 'implement' individual international human rights.[2] Both concepts can be relied upon as forming the basis for the obligation upon States to investigate and prosecute alleged violations of the Covenant, which also applies when the harm has been committed by private actors in the context of common crime.[3] The right to a remedy is also generally thought to mean that States are under an obligation to extend the victim due protections and participation within those processes.[4] The idea that victims should be able to participate in procedures is closely connected to the right to truth which in some human rights systems is treated as part of the right to a remedy and in others is treated as a separate right.[5]

The right to a remedy has been said to be one of the basic pillars of the rule of law in democratic society and it is a crucial tool in the area of victims' rights (van Boven 2009: 22–3). Because of its emphasis on the obligation of authorities to investigate, it has been

1 *Nachova v Bulgaria*, ECtHR, Application 43577/98 and 43579/98, Judgment, 6 July 2005.

2 Basic Principles, Principle II, General Comment 31 of the UN Human Rights Committee (hereafter HRC), CCPR/C/21.Rev.1/Add.13, 26 May 2004 (HRC GC31), para. 8, *Velásquez-Rodríguez v Honduras*, Judgment of 29 July 1988, Series C No. 4 (hereafter *Velásquez-Rodríguez v Honduras*), para. 166, General Comment No. 3 on the African Charter on Human and People's Rights: The Right to Life, 2015 (hereafter GC No. 3 AfCHPR), para. 2 and *X and Y v the Netherlands*, ECtHR, 26 March 1985, Series A 91 (*X and Y v the Netherlands*), para. 23

3 *Velásquez-Rodríguez v Honduras*, para. 172 and 176–7, *X and Y v the Netherlands*, para. 23, General Comment 36, CCPR/C/GC/36, 30 October 2018 (HRC GC36), para. 27, GC No. 3 AfCHPR, para. 9, 38 and 39

4 *Chernov v Russian Federation*, CCPR/C/125/D/2322/2013, 4 April 2019, para. 12.3, Mayagna (Sumo) *Awas Tigni Community v Nicaragua*, IACtHR, Judgment of 31 August 2001, Series C No. 79, para. 112, GC No. 3 AfCHPR, paras. 7, 15, 37. See HRC GC36, para. 28.

5 See Article 24(1) and (2) of the International Convention for the Protection of All Persons from Enforced Disappearance. See HRC GC36, para. 28 in which the Human Rights Committee says that States need to 'establish the truth'. IAComHR, Annual Report 1985–1986, OEA/Ser.L/V/II.68, Doc. 8, rev 1, Chapter V where the Inter American Commission referred to the 'right to truth'.

particularly important for individuals seeking information from State authorities regarding family members who have been arrested, subsequently detained and killed or those whose whereabouts are unknown.[6] A State's refusal to give out information, investigate or provide remedies to the family members of persons who have disappeared has been found to constitute a violation of the right to a remedy in the different regional systems, often in conjunction with the relevant articles associated with the applicant's disappearance, for example, the right to life, the right to recognition everywhere as a person before the law, the right not to be arbitrarily detained and the right not to be subjected to torture or inhuman and degrading treatment.[7] Yet the right to a remedy is not only relevant for violations of rights such as the right to life, arbitrary detention or the prohibition of torture. It is relevant in any civil cases in which the domestic legal order does not provide a remedy for violations of individuals' rights, for example, the right to property, family life, and freedom expression. Although judicial remedies have often been said to be necessary for the most serious violations, in some other areas it has been recognized that remedies may be provided by non-judicial mechanisms such as administrative bodies or ombudspersons.[8]

For the purposes of this article, it is most important to note that the conceptual core of the procedural right to a remedy confirms that the domestic legal realm is the primary sphere in which human rights are to be respected, protected and fulfilled. The main reason for this lies in the principle of sovereignty and the notion that States should have discretion regarding how they adjudicate in the domestic sphere, as long as they meet their international obligations. There are also additional reasons. First, a reliance on the domestic system ensures that the supervisory mechanisms of the human rights system do not get overburdened, as they are only accessible by people who have already exhausted their domestic remedies at national level. Second, it reflects the idea that 'the human rights system is set up so that human rights norms are largely implemented at domestic level; a key reason why the adoption of human rights treaties by States holds the potential for far-reaching transformations at national level. Third, the drafters of human rights law clearly were of the view that national law is one of the best defences against arbitrary treatment. There are multiple references to domestic law in human rights law texts. For example, of the 27 substantive Articles contained in the ICCPR, 16 of them require recourse to the national law, in order for the right not to be violated. Of the 15 substantive articles of the International Covenant on Economic Social and Cultural Rights (ICESCR), five require recourse to the domestic legal system to be respected. These figures are testament to how interwoven

6 The right to a remedy is provided in Article 8(2) of the International Convention for the Protection of All Persons from Enforced Disappearance. See *Osorio Rivera and Family Members v Peru*, IACtHR, Judgement of November 20, 2014, Series C, 290, paras 176–180. The HRC has built up a significant body of case law on enforced disappearances.

7 *See for example*, *Bolakhe v Nepal*, UN Doc No. CCPR/C/123/D/2658/2015, 4 September 2018, para. 7.20 and *Velásquez-Rodríguez v Honduras*, para. 155.

8 See for example Article 2(3) of ICCPR, HRC GC31, para. 15, *Nydia Erika Bautista v Colombia*, Human Rights Committee Communication 563/1993, UN Doc CCPR/C/55/D/563/1993 (1993), para. 8.2. In the Inter American system the focus has mainly been on judicial remedies because the right to a remedy have often been addressed via Article 25 of the American Convention on Human Rights relating to 'judicial protection'. See General Comment No. 4 on the African Charter on Human and People's Rights: The Right to Redress for Victims of Torture and Other, Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 2015, para. 23.

international human rights is with both national law and its enforcement mechanisms, that is, courts, tribunals and administrative bodies (Fraser 2020: chap 3). They also explain why, as a matter of methodology, this article later proceeds by focusing first on domestic law and secondly on domestic courts and tribunals.

3. Armed groups and remedies

Although those unfamiliar with contemporary research on armed groups might think it unrealistic to consider that armed groups might be able to honour the procedural right to a remedy for victims, the section below will illustrate that in fact it is a highly feasible idea that needs more attention. Confirmation of this fact can be found not only in the facts of the *Al Hassan* case before the International Criminal Court but also in the explosion of literature on rebel governance that has documented the provision of public services by armed groups when they control territory (Mampilly 2015; Arjona 2016; Arjona et al. 2015). Much of this literature shows that many armed groups have an instrumental and symbolic need to seek political legitimacy among the civilian population, with some even organizing popular elections (Huang 2016: 78; Gallagher Cunningham and Loyle 2021). Sometimes armed groups structure their political institutions in manners that either facilitate civilian participation or share power with civilian actors (Mampilly and Stewart 2021). Research shows that armed groups are often willing and able to set up procedures which are intended to achieve transparency, and address discontents within the civilian population (Arjona 2016: 52).

A recent study by Loyle has highlighted several instances where armed groups have established 'truth commissions' or 'commissions of inquiry' to investigate violations by their members (vilian communities (Loyle 2021: 111–2). There are instances where armed groups have paid reparation to civilian communities (Loyle 2021: 112). There are also cases where armed groups have prosecuted their own members (Loyle and Malmin Binningsbø 2018: 444) or prosecuted individuals accused of committing violence against other private individuals (Revkin 2016; ILAC 2017: 90). In her study of Colombia, Arjona found that in some areas the civilian population turned to the FARC to 'solve all problems' (Arjona 2016: 183). In Afghanistan, when it was still fighting in opposition to the government, the Taliban was reported to have set up a 'hot-line' to that civilians could call in an emergency, confirming or denying Taliban participation in a particular incident or requesting assistance (Kilkullen 2010: 66 and Arjona 2016: 52). The Taliban also set up a Commission for the Prevention of Civilian Casualties and Complaints which it described as a department that 'thoroughly investigates every civilian casualty incident and prevents its recurrence' (UNAMA 2019). Indeed, in the *Al Hassan* case, it was alleged that the defendant's mobile phone number was posted outside the police station in Timbuktu as the number people could call if they needed the police (*Al Hassan CoC*, para. 771). It has also been found that the inhabitants of Timbuktu regularly had recourse to the Islamic police in Timbuktu when they were faced with disputes over issues like debt (*Al Hassan CoC*, para. 96).

In line with the facts of the *Al Hassan* case, rebel governance literature notes that armed groups often take on roles relating to the resolution of disputes and the administration of justice in the territory which they control (Arjona 2016; Mampilly 2015; Huang 2016). It is common for armed groups controlling territory to set up dispute resolution institutions and administer justice, in all kinds of formal and informal ways. A recent study of all major civil wars between 1950–2006 found that between 25–35% of rebel groups establish legislative

bodies, courts or laws, police stations, schools and health clinics (Huang 2016: 71). Another recent study indicates that 11.5% of all rebel groups between 1946–2011 have employed judicial processes (Loyle 2021: 114). There is no doubt that armed groups are serving their own agenda by setting up these institutions. It has been found that courts are an important means for groups to 'consolidate' and 'strengthen' their rule and affect coercion (Arjona 2016: 73; Loyle 2021: 116; Huang 2016: 74). Yet, they are also responding to social needs. A community's need for dispute resolution and justice provision continues when armed groups control territory for protracted periods of time (Loyle 2021: 116; Jackson and Weigand 2020: 3). In Syria it was said that armed groups were in competition with each other to be providing justice mechanisms for the civilian population (Fortin 2017: 45). In the armed conflicts in Sri Lanka and Afghanistan, the LTTE and Taliban were said to have strategically strengthened their dispute resolution mechanisms in order to distinguish themselves from the failings of the State on these issues. As a result, civilians living under the control of the government sometimes chose to access the dispute resolution mechanisms of the armed group instead of those of the State or indicated that they preferred them (Jackson and Weigand 2020: 2; Revkin 2016: 11; Mampilly 2015: 119). Indeed, it is interesting to note that in the *Al Hassan* case the defence is arguing that the 'State had left the building' in Northern Mali not due to the arrival of Ansar Dine, but years earlier. According to the Defence, before Ansar Dine arrived, the civilian population had no security, no law, no order and no fundamental services (*Al Hassan* CoC Hearing 2019).

The ability of armed groups to adjudicate disputes within the community has been said by Arjona to be the 'backbone of rebelocracy' (Arjona 2016: 183). She notes that 'dispute institutions are an essential building block of society' because they provide order, reduce conflict and diminish uncertainty on all kinds of issues for the civilian population (Arjona 2016: 69). Just as the Islamic police in Timbuktu dealt with both civil and criminal matters, research on rebel governance indicates that armed groups often address disputes that are both civil and criminal in character. Civil disputes may include land and property claims, inheritance issues, debt claims and divorce issues (see also *Al Hassan CoC*: para. 93–95; Jackson and Weigand 2020; Sivakumaran 2009: 492 and 494). Some of these civil disputes are solved informally and some are solved formally with recourse to law or custom. Criminal prosecutions relate to the prosecution of common crimes (e.g. murder, theft, rape), infractions of behavioural codes articulated as crimes (e.g. homosexuality dress codes, smoking, possession of alcohol, sorcery) and crimes that are more closely related to the armed conflict (e.g. participation in the fighting or collaboration) (Revkin 2016: 17–8; Loyle 2021: 113). As a result, the persons who are prosecuted by armed groups vary from being captured soldiers from the other side, ordinary civilians, fighting members of the armed group, and public individuals, such as judges and civil servants (Loyle 2021: 111). Dispute resolution systems set up by armed groups are sometimes very rudimentary, consisting of procedures that have been referred to disparagingly as 'jungle justice' or 'kangaroo courts' (Somer 2007; Reno 2015: 280; Klamberg 2018; ILAC 2017: 93) and have been said to 'rarely hold up to international standards' on fair trial (Loyle 2021: 111). That being said, they can also be relatively sophisticated, even compared to the State systems, consisting of multi-level court structures and systems of appeal and supported by law colleges (Jackson and Weigand 2020: 4; Mampilly 2015: 117; Sivakumaran 2009: 494). The judges adjudicating such criminal prosecutions in armed group territory may be members of armed groups (civilian or military) or local civilian representatives, religious leaders or local communities elders (Jackson and Weigand 2020; Provost 2018: 238–9, 246). Emerging

literature providing finer grained insights into how armed groups fairly regularly conduct investigations, carry out trials and prosecutions and set up dispute resolution systems when they control territory confirms the importance of addressing the procedural right to a remedy.

4. The procedural right to a remedy and armed groups: normative value

Having set out the scope of the procedural right to a remedy and indicated how it is factually relevant to victims living in the territory of armed groups, it is now important to consider whether and how this right might be asserted vis-a-vis armed groups. It has been argued that the first step in any discussion relating to the application of human rights norms to armed groups should be an identification of the 'normative value' of any particular provision (Fortin 2017: 27–8). The need for this analytical step is to address a continuing view among some scholars that international humanitarian law is capable of responding to the full human experience of armed conflict. Yet a sober mapping of the norms contained in both bodies of law reveals there to be some norms in human rights that simply do not appear in international humanitarian law because they fall outside its purpose to regulate the armed conflict. It is notable that these norms correspond with core aspects of people's experiences and needs in times of armed conflict. Commonly cited examples include the right to freedom of expression, the right to association, the right to work, the right to food, and the right to freedom of movement (Fortin 2016a: 68; Henckaerts and Wiesener 2020: 152). The existence of the latter right in human rights law has become particularly relevant during the COVID-19 crisis that is raging at the time of writing, as evidence is emerging that armed groups are enforcing sweeping curfews in territory under their control (Human Rights Watch 2020). It is demonstrated in the paragraphs below that the right to a remedy is another norm that belongs on this list, because there is no explicitly equivalent provision in international humanitarian law binding upon armed groups. While State Parties are under an obligation to investigate and prosecute crimes under international humanitarian law, it is harder to argue that these provisions also apply to non-State actors in non-international armed conflicts (Jöbstl 2020: 16–9; ICRC 2019. For a recent contrary view, see Niyo 2019). This is because the treaty law provisions upon which these obligations have been founded (i.e. the obligation to prosecute grave breaches and common Article 1) are widely interpreted to be binding only upon States and to apply only in international armed conflicts. Indeed although the recent commentary to common Article 1 indicates that armed groups have to ensure respect for common Article 3 by their members and individuals or groups acting on their behalf, it seems telling that the ICRC's recent report providing guidelines on investigating violations of international humanitarian law hardly mentions armed groups at all, except to mention that the guidelines 'may prove useful for other actors' as well (ICRC 2019: 3).

The obligation binding upon armed group members in international humanitarian law that would comes close to addressing the same issues as those usually dealt with under the right to a remedy is the obligation upon commanders (often called 'command responsibility'/'superior responsibility') to suppress and punish individuals who have committed violations of international humanitarian law. The doctrine of command responsibility has evolved out of a combination of international humanitarian law and international criminal law (ICRC 2005: Rule 153). The doctrine, as expressed in international humanitarian law

(treaty and custom), puts an obligation upon commanders (which may be civilian or military) to prevent and, where necessary, to suppress and to report to competent authorities breaches of international humanitarian law. Although the principle first emerged in international armed conflict, it has long been held to apply equally in non-international armed conflict and be binding upon both State armed forces and members of armed non-State actors (Spadaro 2020: 2). It is notable that the doctrine of command responsibility that is rooted in the case law of the international criminal courts and tribunals is broader than that articulated in international humanitarian law, because it refers to the duty of commanders to prevent and suppress a wider group of crimes than just war crimes. Article 28 of the Rome Statute indicates that military commanders or other superiors will be criminally responsible for 'the crimes within the jurisdiction of the court' that are committed by forces under his or her effective command. This means that under international criminal law, armed group commanders are bound to take all necessary and reasonable measures within their power to prevent and repress not just violations of international humanitarian law, but also crimes against humanity or genocide. The notion of what is considered 'necessary and reasonable' in a given context has been interpreted rather loosely in the recent Appeals Chamber judgment in the *Bemba* case before the International Criminal Court. Here it was held that armed group commanders have the discretion to conduct a 'cost/benefit analysis' that allows them to choose measures that are 'least disruptive' to their 'ongoing or planned operations', as long as it can be reasonably expected that the measures will prevent and repress crimes (Bemba 2018: para. 170).

While the doctrine of command responsibility provides a crucial duty upon commanders to take measures to address the commission of crimes by their subordinates, it cannot be seen as a particularly far-reaching provision in efforts to secure remedies for victims. When comparing the doctrine of superior responsibility with the right to a remedy, three key observations can be made. First, while the doctrine of superior command may be considered to be an integral part of the right to a remedy, it is not articulated in a manner that captures the right to a remedy's supposed victim-orientated focus. The professed purpose of the doctrine is not to address or provide reparation for the plight of the victims of the underlying crimes. Instead, its purpose is to ensure that standards of international humanitarian law are respected and to prevent the commission of crimes by individuals operating within a chain of command (Mettraux 2009: 18). Secondly, the doctrine of superior responsibility is a duty binding upon individual members of armed groups and not the armed group in and of itself. There is no equivalent obligation on the group itself to repress and punish breaches of international humanitarian law. Although it can be argued that the existence of the superior command doctrine may imply the existence of those obligations on the armed group, their existence is not well acknowledged (Jöbstl 2020: 22). Thirdly, the doctrine of superior responsibility only applies to the prevention and repression of international crimes. This means that in practice it does not translate into a general obligation on the armed group (or its members) to address (through, for example, investigations and prosecutions) isolated violations of human rights law by armed groups or common crimes that do not constitute violations of international humanitarian law. The material elements of crimes against humanity and genocide require the underlying actus reus to be 'widespread or systematic' or 'part of a manifest pattern of similar conduct' or be conduct such could affect the destruction of a national, ethnical, racial or religious group in whole or in part (ICC 2011).

It is for this reason that it can be useful for practitioners to point to an armed group's obligation to provide effective remedies under human rights law, when seeking to address violations within armed group territory. The procedural right to a remedy provides a useful basis to insist that armed groups should conduct investigations into acts that amount to violations of international human rights law, international crimes (including violations of international humanitarian law) and common crimes. Because the right to a remedy attaches to acts even if they do not have the characteristics of an international crime, it is a key tool to make sure that accountability can be achieved for non-systematic acts by armed groups that are not simultaneously violations of international humanitarian law. As discussed above, such actions do not fall under the doctrine of superior responsibility. Rather, the right to a remedy provides a concrete basis on which individuals and human rights monitoring bodies can seek details of the factual and legal basis on which an armed group has acted, in instances where achieving international criminal liability is not at issue. It provides a legal basis to insist that armed groups render up information regarding suspected violations, so that the territory in which they operate does not become an information blackhole or human rights vacuum. It is the basis on which armed groups can be asked to reveal the steps they have taken to investigate allegations relevant to a particular victim's fate and the steps that have been taken to bring perpetrators to justice. It may also be the basis on which an armed group can be requested to prosecute individuals, although (as will be discussed more below) this concept is particularly controversial when applied to armed groups. As a matter of theory (though not always practice) armed groups struggle more than States with abiding by fair trial guarantees (Loyle 2021: 111) and it remains unclear how armed groups can set up courts in a way that ensures that they are 'established by law' or 'regularly constituted' (for a detailed review of these terms, see Jöbstl 2020: 5–6). Although it will of course not always be safe or feasible for civilians to approach some armed groups with requests for a 'remedy', it has been shown above that in a significant number of situations the idea of civilians requesting armed groups to conduct investigations is in fact not unrealistic.

In fact, it is also not unusual for international entities to demand that armed groups conduct investigations or provide information regarding their prosecutions. There is quite some precedent for international bodies such as UN field offices engaging successfully with armed groups on matters of international law (Fortin 2016a). The various Geneva Call Deeds of Commitment include a commitment by armed groups to conclude investigations if they are alerted to cases of non-compliance with the human rights norms or humanitarian law norms therein (Geneva Call, Heffes 2020). Over the last few years, there has been an increased practice by United Nations Special Procedures addressing armed groups and de facto entities directly by means of the communication system. These communications—marked with the reference 'OTH', presumably a shortening for 'other actor'—have sought information on, among other things, the legal grounds for a person's arrest, information on legal proceedings against them and details and results of investigations. In a joint communication dated December 2019, the Mandates of the Working Group on Enforced or Involuntary Disappearances, the Working Group on Arbitrary Detention and two special rapporteurs wrote to the *de facto* authorities in Yemen seeking information regarding the fate of two disappeared journalists and reminding them of their obligations under human rights law and international humanitarian law. In the annex to the communication setting out the relevant law, the special procedures included the following specific statement on the right to a remedy: 'Insofar as human rights obligations are directly applicable to it, the non-

State armed group is under a duty to provide effective remedies to victims in situations of alleged violations of customary human rights law and alleged serious violations of customary humanitarian law, including through investigations of alleged violations' (UN Human Rights Council 2019b).

In a similar vein, the Special Rapporteur on Extrajudicial, summary or arbitrary executions has recently emphasized how important the obligation to investigate is in the human rights framework in her work on non-State actors. She has indicated that armed non-State actors should 'as a priority, investigate killings (or acts of torture or sexual violence) committed by their members' (UN Human Rights Council 2018b). In recent years, the Group of Eminent International and Regional Experts on Yemen has addressed the *de facto* actors directly with lists of issues that ask them to detail what steps they have taken to 'investigate' allegations of ill-treatment and torture and 'investigate and prosecute' sexual and gender-based violence (UN Yemen List of Issues 2018, 2019). The same *de facto* authority (Ansar Allah) has replied to this enquiry mentioning their commitment to human rights norms, confirming that they will investigate any allegations of violations and stating that those who commit crimes against women are prosecuted under Yemeni law (UN Yemen Response 2019). The same Group of Experts has called upon all parties to the armed conflict (including the *de facto* authorities) to conduct investigations into all violations and crimes (UN Human Rights Council 2019a and 2018a). In a similar vein, the International Commission of Inquiry set up to investigate violations of human rights law in Libya called on the Transitional National Council (TNC) to 'conduct exhaustive, impartial and public investigations into all alleged violations of international human rights law and international humanitarian law, and in particular to investigate, with a view to prosecuting, cases of extrajudicial, summary or arbitrary executions and torture, with full respect for judicial guarantees' (UN Human Rights Council 2012b: para. 259(b)). It is noteworthy that the TNC also committed themselves to investigating any complaints regarding treatment in detention 'promptly, thoroughly, and in an impartial manner by an independent body' (TNC 2011). There are also a few examples of States welcoming investigations carried out by armed groups (Jöbstl 2020: 17).

The United Nations Assistance Mission for Afghanistan also very often recommended that the Taliban 'investigate' incidents that may amount to violations of international law, take accountability measures and publicly report its findings (e.g. UNAMA 2018, 2019, 2020) before the group took control of the country in August 2021. In a similar fashion, the Syrian Commission of Inquiry has also sometimes called upon non-State armed groups to investigate all allegations of violations and crimes committed by their fighters, take urgent measures to discipline or dismiss individuals responsible for such acts and make their findings public (UN Human Rights Council 2020). When viewing reports from the Syria Commission of Inquiry and the Group of Experts on Yemen and comparing them with earlier reports from the same or similar bodies, it can be seen that these later reports, referring to the obligation to investigate, represent somewhat exceptional and emerging practice. Many early reports from other and even the same Commissions of Inquiry have limited their recommendation that violations are investigated to the State parties (see for example UN Human Rights Council 2016). This may be because the Commissioners did not see an obvious obligation to investigate and prosecute for armed groups under international humanitarian law and were uncertain whether it was acceptable to say that armed groups have an obligation to investigate and prosecute crimes under human rights law.

5. The right to a remedy and armed groups: controversies

The above practice shows that there is a normative and practical value to holding armed groups to adhere to the right to a remedy because it provides a legal foundation to contribute to victims' rights by insisting that an armed group investigate allegations of abuses. However, although it has been shown above that it is relatively feasible for many armed groups to provide information and conduct investigations it remains uncertain what more can be expected of armed groups in order to comply with an obligation to provide a procedural remedy, particularly in the light of the fact that, as was shown above, the traditional implementation tools of this right are (1) domestic law and (2) its enforcement mechanisms, for example, courts and tribunals. When reviewing the developing practice on these issues, human rights practitioners may be uncertain whether it is worthwhile and appropriate to ask armed groups to reveal the legal basis on which they have detained people or prosecuted people, when the law that the armed groups are applying is not the law of the State. They may also be uncertain whether and when it is ever appropriate to ask armed groups to prosecute particular violations (UN Yemen List of Issues 2018, 2019). The idea of armed groups prosecuting individuals in their territory clearly raises questions about whether a court established according to the law of an armed group ever considered to have been 'established by law', as required by human rights law (and international humanitarian law) and whether it could afford defendants judicial guarantees (Somer 2007; Sivakumaran 2009; Klamberg 2018; Spadaro 2020; Amoroso 2020; Jöbstl 2020; Askary and Hosseinnejad 2019). When applied to armed groups, these terms need careful legal and conceptual analysis, not least because the *Al Hassan* case warns that armed group members carrying out flawed prosecutions may face international criminal responsibility for war crimes. The rest of this article is devoted to addressing these questions, while also identifying and discussing some of the unseen undercurrents in the legal discourse that shape different positions in the scholarship.

5.1 Domestic law

It was noted above that domestic law is a key tool for the implementation of the right to remedy when applied to States. This reflects the reality that the domestic legal realm is the primary sphere in which human rights are respected, protected and fulfilled. It is for this reason that human rights treaty monitoring bodies often prioritize scrutinizing a State's legislative framework when they assess its compliance with human rights norms. If a State's laws are substantively compliant with human rights law, the discussion can shift from what the law should say, to how it should be implemented. The importance of domestic law in the human rights framework generally, and in relation to the right to a procedural remedy specifically, makes it important to question whether and to what extent domestic law is a legitimate basis on which rights can be protected, investigations can be conducted, persons can be tried or courts can be set up, in territory controlled by armed groups. The existence of different kinds of law being in force in territory under the control of armed groups runs contrary to the image many people have of these territories as lawless zones. Yet it has long been said, and in many ways this observation is at the heart of the body of scholarship called rebel governance, that territory controlled by armed groups is often quite organized (Kalyvas 2009; Kolomba Beck 2012; Verhoeven 2009; Mampilly 2015). Just as armed groups controlling territory very often have courts or structures which are approximate to courts, so as was pointed out above, they also very often have 'law', that applies both to

their own members and to the population under their control. It takes many forms. Sometimes the law enforced by armed groups is identical to the State's law, in that the armed group continues utilizing State legislation on some issues. In the Gaza strip, the Hamas authorities continued to enforce British enacted criminal statutes (Qafisheh 2012).

Sometimes armed groups adopt the State law, but with certain modifications that reflect their political project or preferences. In Syria, the Kurdish authorities announced an intention to apply Syrian law to prosecute local IS fighters, but with certain changes to make it more human rights compliant, that is, by abolishing the death penalty (Geerdink 2020). At an earlier stage in the armed conflict, several Syrian armed opposition groups indicated that they were using the State law as it was in 2011, before the point at which they took up arms against Assad (ILAC 2017). Other armed groups in Syria reportedly adopted and utilized the Unified Arab Code, a code that was in the process of being drafted with the endorsement of the United Arab League (ILAC 2017: 77). In Afghanistan, the Taliban has mainly relied upon sharia law to address to the vast range of disputes its courts deal with, with some consultation with the Majallat al-Akham al-Adiyya, the Ottoman Empire's codification of Hanafi jurisprudence for guidance on civil disputes (Jackson and Weigand 2020: 5). The Islamic State in Iraq and Syria promulgated their own criminal law, as did the Maoists in Nepal (Revkin 2016; Loyle 2021: 111: Sivakumaran 2009: 492, 494). The LTTE in Sri Lanka adapted parts of the British-influenced Sri Lankan Penal Code with cultural norms emerging out of Tamil culture, known as *thesavalamai* (Mampilly 2015: 117). The Office of the Prosecutor in the *Al Hassan* case alleges that Ansar Dine/AQIM in Mali brought in new rules and edicts based on religious principles that were not previously known to the local population, although this is contested by the Defence (e.g. *Al Hassan CoC*: para. 182–3 and *Al Hassan* CoC Hearing 2019: 28). While it would be helpful if much more was known about armed groups' laws (e.g. how are they passed, whether they are made known to the civilian population, whether they are written down) (Fortin 2021b: 37), the notion that armed groups *have* these legal codes is a relevant first fact to be taken into account when considering the ability of armed groups to implement the right to a remedy.

Although it might be easy for practitioners to feel that they should dismiss law enforced by armed groups as 'not law' on the basis it lacks the democratic legitimacy of State law, it is questionable whether this is a sensible approach considering how many millions of people are living under these kinds of legal orders. The recent study of data gathered from the major civil wars between 1950–2006 already cited above found that as many as 37% of armed groups had created 'law' or 'order' institutions (Huang 2016: 78). Likewise, as was already mentioned, studies have also indicated that individuals living on the ground sometimes choose to utilize the dispute resolution systems (and therefore rules) administered by armed groups, demonstrating a preference over those administered by States (Mampilly 2015: 119; Revkin 2016: 11). There are different reasons for this choice, but it usually relates to the fact that some of the State rules and institutions that are given automatic legitimacy within the international system are inadequate, non-functioning, corrupt or even viewed as having been 'externally imposed' (Jackson and Weigand 2020; Revkin 2016). In some instances, the legal systems administered by armed groups are viewed by the civilian population as less corrupt, more allied to local values and better able to deliver a remedy (Jackson and Weigand 2020; Revkin 2016; Mampilly 2015: 118–9).

It is also relevant to note that as a matter of international humanitarian law, armed groups are not prohibited from passing their own laws (unlike to a certain extent occupying powers situations of occupation). Indeed, it was pointed out by one State delegate during

Diplomatic Conference 1974–1977 during discussion of Additional Protocol II that 'it was only logical' that if an armed group was organized enough to abide by the terms of the protocol, it would also be able to 'organise a recognizable body of law' (ICRC Vol III and Sivakumaran 2009 500). It also seems relevant to note that in many countries there is a plurality of legal systems, meaning that alternative systems of law provided by armed groups are not such an extraordinary or exceptional occurrence. A 2012 report on informal justice systems noted that in some countries 80 per cent of disputes are resolved through informal justice systems (UN Women 2012). Indeed, sometimes armed group courts operate alongside both State courts and customary courts meaning that individuals have a choice between a variety of non-State justice mechanisms (Jackson and Weigand 2020: 7; ILAC 2017: 92). Contemplating these facts, it is worth pausing to consider why existing literature on armed groups and legal orders is not more connected to wider fields of literature on customary courts and legal pluralism, especially in areas of limited statehood (e.g. Tamanaha 2012; Fortin 2021b: 39). One has the feeling that significant insights into the issues and controversies at the heart of discussions on armed groups and courts would be gained by asking the question: what (if anything) is special about a legal order created and enforced by an armed group that merits it being treated differently from any other customary legal systems in instances where State systems are incapacitated or absent? This question is returned to later in the article.

It is also important to ask who wins and loses if law imposed by armed groups is ignored by the human rights monitoring system rather than subjected to scrutiny for its compliance with human rights norms (Gordon 1984: 72)? Asking this question takes us to the centre of some of the knotty policy dilemmas that arise when considering the application of human rights law to armed groups in general. For it becomes apparent that the answer is potentially different depending on whether a thick understanding of the law is taken or a thin view (McEvoy 2007: 414). The adjectives 'thick' and 'thin' have been applied to transitional justice scholarship and praxis to distinguish between, on the one hand 'complex, multi-layered, and actor-oriented styles of scholarship' and on the other 'narrowly descriptive, unidimensional, instrumentalist or positivistic analysis' (McEvoy 2007: 414). When a thicker human rights discourse is adopted, there is more scope for pragmatism, in the form of engagement on the content and quality of a given armed group's law, to be preferred over legalism. Engaging with an armed group's law provides an opening to improve it. It also gives due recognition to the inability of positivist approaches to connect with the real-life complexity of everyday life in territories where the 'State has left the building' and an armed group controls territory, which is characterized by not only top-down coercion and violence but also by plurality, informalism, hybridity and what has been called elsewhere the 'life-goes-on-driver' (Fortin 2016a: 167). When a thin discourse is adopted, an evaluative framework is created which dictates that such pragmatism will lead to the legitimation (and therefore prolongation) of non-democratic systems whose existence makes it more difficult to bolster and strengthen the State system. When a legalistic perspective is adopted that sees the State as the only possibly duty bearer of human rights norms, then the State system is the only system that can represent a long-term solution for citizens on the ground.

Reflecting on these questions draws attention to the further dilemma that two completely different sets of constituents may benefit from engaging with the laws of armed groups: the civilian population and the armed group itself. From a short-term perspective, it seems hard to refute that victims will benefit from the greater oversight that comes from willingness on the part of the international community to engage with the 'content' of

domestic law in these spaces, than no oversight at all. Yet, it is often argued that the armed group will also benefit from the perceived international legitimacy that stems from that engagement (for discussion see Krieger 2018, Fortin 2021b: 35–6). It is this paradox that is at the heart of much of the debate relating to armed groups and human rights law. It is the reason that scholars asserting that armed groups are or should be bound by human rights law find themselves—somewhat perplexingly—taking a view that could be criticized as both overly utopian and overly apologetic at the same time (Koskenniemi 1989). It is possible that this paradox emerges out of the insufficiently acknowledged fact that the human rights system, which is traditionally conceived of, promoted and taught in classrooms as standing to benefit the individual or collective rights bearers at the bottom of the legal framework, in fact, in its State-centred form, also stands to benefit the duty-bearer at the top of the legal framework (Rajagobal 2009: 189). Human rights discourse—at least when applied to States—has increasingly become part of what has been called the 'etatization' of the world (Rajagobal 2009: 189). Despite its victim-orientated rhetoric, the human rights discourse is 'built on the doctrine of sovereignty' making it the 'handmaiden of particular constellations and exercises of power' (Rajagobal 2009: 246). The 'etatization' created by the State-based human rights discourse leaves little room for alternative constellations of power, as it makes it more difficult to imagine how alternative duty-bearers would not also benefit from the feedback loop of legitimacy that has become such an inherent part of the State-based human rights system.

It may be this link between the doctrine of sovereignty and human rights discourse which is one of the main causes of scholars 'seeing like a state' when looking at the administration of justice by armed groups (for this expression see McEvoy 2007: 422 and Scott 1998). Key tendencies in this regard include an insistence that human rights norms can only be interpreted 'one way' (i.e. the same way that they are interpreted for States) and an insistence that entities can only be held by the human rights discourse if they are excessively State-like (Muller 2020). With these views, the myth is perpetuated that there is only one model of legal personality under international law, and that is the State model. Ironically, the existence of this myth within the discourse feeds and confirms States' fears that the discourse is itself constitutive. It means that a suggestion that a particular entity has human rights obligations is interpreted as confirmation that that entity has set off down a 'yellow brick road' that leads dangerously and inevitably to Statehood. These fallacies run deep in the legal system of international law and the discourse that surrounds it. They are captured by the very term non-State actor, a term which, as has often been said, is of no assistance at all in identifying the characteristics of the entities it seeks to describe (Alston 2005). As a term, it confirms that non-State actors are only legally relevant when they are understood through a lens that identifies them by *what they are not* rather than *what they are*. There are serious shortfalls with such an approach, not least because it utilizes an analytical lens that contains built-in and substantively significant blind spots.

Treating legal personality as a quality that exists along a trajectory leading to Statehood is not only unhelpful, it is factually incorrect because it incorrectly suggests that all armed groups seek to be States. It also stands in bewildering contradiction with the law on legal personality. The International Court of Justice (ICJ) in its *Reparations* advisory opinion back in 1949 could not have said it more clearly when it found that the UN is an international person, and qualified its statement with the line:

> This is not the same thing as saying it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State... It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. (ICJ 1949: 9)

The fact that these words have been ignored by so many over the seven decades since they were written who still insist that legal personality is a sacred concept reserved for States is testament to the intricate relationship between international law and politics. It also shows how dynamics of power are stubbornly stuck in the discourse and are then reconstituted by it.

There are further contradictory strands in the debate that need to be addressed. If the human rights discourse is inherently legitimating it would be expected that States would always deny the idea that armed groups have human rights obligations, especially at the moment that legitimation matters most when armed conflict breaks out in their territory. Yet there is evidence that this is not always the case. Notably, when the armed conflict broke out in Syria and the Syria Commission of Inquiry started scrutinizing the government's actions under human rights law, the Syrian government immediately indicated that the Commission should also turn its gaze to the 'human rights violations' committed by the armed groups operating at that time (UN Human Rights Council 2012a : 63–4). The fact that the Syrian government embraced the idea that human rights law bound the groups which it was fighting against, is an indication that it is not a self-evident truth that the application of human rights law to armed groups is legitimating, in the sense that it leads to their acceptance as political actors. In fact this is a narrative of our own creation that can be changed, by pointing out, for example, that the imposition of obligations upon armed groups brings not only advantages (i.e. in the form of possible legitimation) but also disadvantages for that group (i.e. in the form of obligations). Indeed, it would ensure that both State and armed group are bound by the same legal obligations (Shany 2019: 324).

Yet even if this point is accepted, the Syria anecdote may be taken as evidence of another reason why some scholars and practitioners hold that armed groups should not be seen to be human rights duty-bearers. It is sometimes said that States—like in the Syria example—will welcome greater acceptance of armed groups being bound because it will allow them to use any allegations of violations by the armed group as fuel to justify their counter insurgency operations (Petrasek 2012: 135). It will also allow them to point the finger at another actor rather than assuming full responsibility for the human rights within their territories (Ssenyonyo 2007: 110). But just as the law tells us that to say an armed group has legal personality does not mean that it is a State, so the law tells us that the State *is already off the hook* with regard to territory that has fallen outside its control. It is well known that a State's obligations are reduced when it loses control of territory to a *de facto* actor (*Ilascu v Moldova*). This means that the question is not really whether the State is off the hook in these situations, but whether victims living in the territory of the armed group are left outside the reach of the human rights framework, because the international community refuses to engage with the armed group's practices, laws or judicial institutions and subjects their behaviour to less public scrutiny (Petrasek 2012: 131). It is an unfortunate paradox that 'states where human rights protection is most needed are often those least able to enforce them against NSAs' (Fraser 2020: 156 citing Ssenyonyo 2007).

It is also sometimes argued that applying the human rights discourse to armed groups dilutes and degrades it, in that it makes the terminology less specific, introduces the notion

of graduated norms and applies it to actors that are not capable or worthy of its guardianship (Rodley 1993: 298–301). It has likewise been said that to address an armed group on human rights expectations risks 'treat[ing] it like a State' (UN Commission on Human Rights 2006). It 'inevitably endow[s] them with privileges such as the privilege to engage in (democratic) law making that will legitimize their authority over time 'confer[ing] on those non-state entities a quasi-sovereign status' (Muller 2020: 270–1 citing Mégret 2020 : 183). But the validity of these arguments rests on the idea that there is only one human rights discourse that is reserved for States. It reinforces the need to question whether it is not possible to create multiple and interwoven human rights discourses or a thicker single discourse that can take account of the fact that in some instances the capacity of one actor should be linked to and compensate for the incapacity of another actor. It reiterates the importance of the finding that international norms can be applied differently to different actors, commensurate to their capacity and character (Sassòli and Shany 2011; Fortin 2017; Murray 2016).

From a bottom-up, victims-orientated vantage point, the primary purpose of the human rights discourse is to ensure that people's rights are protected and or realized. This makes it important to discern what steps need to be taken to reduce the étatization dynamic or restrict it to State actors so the discourse does not so readily affect the legitimacy of the non-State actors involved. Indeed, if ways could be found for a greater acceptance of the notion that there is space in the discourse to hold other actors to human rights law *because they control territory and the fate of people's lives lie in their power* (rather than because they control territory and are State-like), it would allow a discussion of the more important questions (1) 'what is it that can and should be demanded of armed groups in particular situations?' and (2) 'how and when can the international community engage with armed groups on these obligations?' (see Clapham 2014: 798; Bellal 2018). It seems increasingly clear that it is only if more thought can be put into how to put a brake on the idea that the application of international norms to armed groups increases their legitimacy, that progress will be made towards ensuring that the question who 'wins if law imposed by armed groups is scrutinized by the human rights system' only has one answer: the individuals living under their control.

5.2 Courts

These comments take us to the second major point of analysis that is necessary for the study of the right to a remedy, which is the question of judicial bodies. Of course this is the issue that is squarely in front of the International Criminal Court in the *Al Hassan* case. Here again, the appropriate starting point is an acknowledgment of the research already cited confirming that armed groups very often establish courts, tribunals and justice mechanisms to enforce their laws. It has been said above that the right to a remedy is often interpreted to require States to open an investigation and conduct prosecutions (see UN Yemen List of Issues 2019; UN Human Rights Council 2012b). This practice raises the question of whether armed groups would be/should be considered under an obligation to prosecute crimes. It can be observed that the idea that armed groups may be under an obligation to prosecute serious crimes raises some of the same tensions that have been explored in scholarship with regard to the commander's obligation to prosecute under command responsibility (Spadaro 2020; Jöbstl 2020; Amoroso 2020). Spadaro has argued succinctly, 'the commander would be placed in front of two paradoxical alternatives: do nothing and be punished or punish and be punished' (Spadaro 2018: 30). A similar paradox emerges if it is

understood that an armed group is under an obligation to prosecute as part of the right to a remedy, as the group is similarly between a rock and a hard place. It can either do nothing and face liability for violating the obligation to provide a remedy, or it can prosecute crimes, and face possible liability for violating fair trials norms, while its members face possible criminal prosecution under international criminal law for carrying out sentences, without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees. The systemic integrity of international law means that it cannot be correct that one norm of international law (the right to a remedy) compels an entity to act in a manner that would constitute an unlawful act under another body of law (international humanitarian law) or an unlawful act under another norm of the same body of law (human rights law).

As a result, if an armed group's structure and capacity is such that it cannot conduct trials without violating common Article 3's prohibition on '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' or violating the fair trial norms in human rights law, it cannot be correct that it should ever be held to be under an obligation to carry out trials. This conclusion corresponds with the argument that an armed group's obligations should be tailored to match their capacity (Sassòli and Shany 2011; Fortin 2017; Murray 2016). As a result, if an armed group does not have judges or courts such that enable it to abide by fair trial guarantees, the obligation to provide a remedy should not be read to require them to carry out trials. In the words of Andrew Clapham, 'There are limits' (Clapham 2019: 316). When appraising instances in which an armed group's obligations to a remedy may be in tension with its other obligations, it is also important not to see every instance of armed groups carrying out trials to be an illustration of that group fulfilling the right to a remedy. The right to a remedy has nothing to do with the prosecution of the kinds of victimless crimes which were prosecuted by Ansar Dine in Mali and the Islamic State in Syria, for example, violations of dress codes, possession of alcohol, smoking, homosexuality, apostasy, blasphemy, and witchcraft (Revkin 2016: 17; *Al Hassan* CoC).

When armed groups are already conducting trials and prosecutions, many crucial questions emerge about how norms relating to the establishment of court and judicial guarantees should be applied to armed groups. Because many authors have written on these issues in some detail, the arguments are not recounted in detail here (Somer 2007; Sivakumaran 2009; Klamberg 2018; Spadaro 2020; Amoroso 2020; Jöbstl 2020; Askary and Hosseinnejad 2019). However, it is noted that when considering these questions, one comes up against many of the same issues that are identified above regarding the status of 'law' in territory under the control of armed groups. Indeed, the question is the same, only this time applied to courts: to what extent does the international regulation of an act that is unlawful under national law—that is, the administration of justice by a non-State armed actor—have the effect of legitimating that practice? Reflecting on this question, it is important to note that versions of this question have always plagued efforts to regulate the acts of armed groups with international law, whether it be under international humanitarian law or international human rights law. The commentary to common Article 3 notes that the inserted paragraph confirming that the application of the article's provisions 'shall not affect the legal status of the Parties to the conflict' was 'essential' because it was intended 'to meet the fear—always the same one—that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the de jure Governments lawful suppression

of the revolt, or that it may confer belligerent status, and consequently increased authority, upon the adverse Party' (Pictet 1952: 60).

Today, this fear—still the same one—remains very much alive. In the ICRC's recent commentary to common Article 3 it added specific words tailoring the original clause in common Article 3 to trials stating 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' (ICRC 2016). Arguably, the legitimation fear is an even stronger dynamic in the human rights law framework due to its aspirational rather than pragmatic character (Fortin 2017: 169–70). Furthermore, unlike the international humanitarian law framework which by design can designate as lawful acts that may well be unlawful under both national law and international law (i.e. *jus ad bellum*), the international human rights law framework is particularly unaccustomed to the notion that it may be called upon to adjudge acts lawful under human rights law that are 'unlawful' under a State's domestic law. The very idea that an act contrary to a State's national law may nevertheless adhere to human rights law provokes something akin to an existential crisis in this legal framework. An example of this kind of crisis can be seen in the case law from the European Court of Human Rights addressing the remedies provided by *de facto* authorities in the 'Turkish Republic of Northern Cyprus' for deprivation of property. Ultimately, the Court ruled that not to recognize these processes due to fears of legitimation would risk turning these zones into a human rights vacuum. It found that: 'it [was] in the interests of the inhabitants of the "TRNC" to be able to seek the protection of such organs'. Putting its finger on some of the issues at the heart of the paradox identified above, it added 'if the "TNRC" authorities had not established them, it could rightly be considered to run counter to the Convention' (*Cyprus v Turkey*, para. 98; *Demopoulos and Others v Turkey*, para. 95–8). Although these cases cannot easily be seen as establishing precedent for cases involving armed groups due to the involvement of Turkey, they identify some of the difficult issues relating to exhaustion of domestic remedies that will need to be thought through if human rights treaty bodies are ever to accept individual complaints from individuals living in the territory under the control of armed groups. Similarly challenging questions have recently been asked by Amoroso in his thoughtful examination of whether judicial proceedings by armed groups may render cases inadmissible before the International Criminal Court (Amoroso 2018).

Yet even if it is accepted that human rights law can be applied to the remedies of armed groups without legitimating them, a further crucial and highly topical question relates to the proper scope of international humanitarian law as a complementary framework when it comes to addressing the judicial processes of armed groups. The latest Challenges report by the ICRC indicates that all exercises of public administration by armed groups fall under the scope of international humanitarian law (ICRC 2019 and Rodenhäuser 2020). This is also a view that can be found in some (but not all) relevant passages in the *Al Hassan* confirmation of charges decision at the ICC (compare for example para. 346 with para. 415 and 485 of *Al Hassan* CoC). The approach is legally rationalized by the view that the requirement in international humanitarian law that acts must have a nexus to the armed conflict is fulfilled by the fact that the armed group is only exercising public prerogatives *due to* the armed conflict (*Al Hassan* CoC: para. 346). From a policy perspective, one can speculate that the ICRC might wish to adopt this view out of a desire to render the greatest measure of protection to the individuals living under the control of armed groups. On the basis that the ICRC (and many States) remain sceptical about whether armed groups have human

rights obligations at all (although the ICRC affirms armed groups may have responsibilities), the temptation must be strong to take the widest possible approach to the material scope of international humanitarian law. But such an approach is not without controversy, as a matter of law and policy. Other authors, including myself, have relied upon *inter alia* the drafting papers of the Additional Protocols and the case law of the ad hoc tribunals to argue that a more nuanced approach to nexus is required (Fortin 2016a: 173–9, Pothelet 2020: Schabas 2017: 93–8). In particular, it has been argued that the prosecution of common crimes by armed groups should not fall within the scope of international humanitarian law, unless there is some kind of clear nexus between the act of prosecution and the armed conflict that goes beyond the armed group's factual control of territory.

On the basis that the norms regarding fair trial in humanitarian law and human rights are largely identical, it might be questioned why matters whether international humanitarian law applies or human rights law applies. Indeed, it would seem likely that even if international humanitarian law does apply to the prosecutions carried out by armed groups, there is scope to say that international human rights will apply concurrently. It matters for several reasons. First because if *all* prosecutions or judicial proceedings by armed groups fall within international humanitarian law, then any failures by an armed group to meet the standards of international humanitarian law (and international criminal law) for those judicial processes resulting in a sentence will potentially constitute war crimes. This is a worrying proposition when one recalls how common it is for an armed group to set up judicial processes and how inevitably flawed those processes very often are compared to (many) State standards (Loyle 2021: 111). It raises the danger that if courts prosecuting war crimes combine a wide approach to the nexus requirement with a high standard of fair trial norms, then the legal framework of international humanitarian law will end up in practice criminalizing the phenomenon of armed groups carrying out trials and prosecutions. The Pre-Trial Chamber in the *Al-Hassan* case may be said to have come quite close to doing this by holding (in places in its decision) that everything that occurs in the territory of an armed group has a nexus to the armed conflict and interpreting judicial guarantees broadly to include not only those listed in Additional Protocol I and Additional Protocol II, but also those found in the ICCPR, the European Convention of Human Rights, the American Convention on Human Rights and the African Charter of Human and People's Rights (*Al Hassan CoC*, para. 383). It has to be questioned whether such an approach makes sense, especially when it is remembered that armed groups very regularly set up justice mechanisms in the territory under their control. It also has to be asked whether such an approach makes sense on the basis that alternative justice systems are not exceptional in many countries, where customary courts are common and divisions between the State and non-State actors may be less delineated.

Such an approach also fails to take due cognizance of the reality that justice structures by armed groups are often responding to a societal need created due to the 'State having left the building', sometimes even before the armed group took control (*Al Hassan* CoC Hearing 2019). It also takes little note of studies surveying the justice systems set up by armed groups that indicate that some of the individuals utilizing them are often satisfied or have chosen them over the State system or other customary systems (Jackson and Weigand 2020: 6–7; Mampilly 2015: 119, Revkin 2016: 11). Indeed, if it is accepted that armed groups have human rights responsibilities, it is argued that it should be possible in some circumstances for armed groups—in the same way as States—to *simply violate human rights law* when conducting trials that do not meet international standards, rather than for

members exercising judicial functions to be also committing crimes. It is now appropriate to return to the question that was asked earlier in the article: what (if anything) is special about a legal order created and enforced by an armed group that merits it being treated differently from any other customary justice system, operating in the same territory? Or put differently: what (if anything) is special about a court created and enforced by an armed group that merits those being involved in its procedures being *prosecuted* under international law? It does not seem fathomable that the answer can lie *solely* in the idea that the armed group has taken control of territory with force. If this is the case, a considerable asymmetry is injected into the legal framework, because it criminalizes acts by armed group members (i.e. the prosecution of common crime in courts that do not meet international standards) that would not be criminalized in State territory (see also Schabas 2017: 98). It seems more sensible to say that the answer lies in a narrower conception of nexus that is based on a much more precisely defined connection between the act of prosecution and the armed conflict (Fortin 2016a: 178–9). It is important to be clear at this juncture, that in making this comment this article does not pass judgment on whether Mr Al Hassan may have committed a crime under Article 8(2)(c)(iv) of the Rome Statute due to his role in Timbuktu, as this question would need much more detailed analysis. Nor does it advocate that the trials conducted by the Ansar Dine group did not have a nexus to the armed conflict or that the crimes the group prosecuted were not connected to the armed conflict. It simply argues that as a matter of law, the Pre-Trial Chamber's interpretation of Article 8(2)(c)(iv), in combination with a wide nexus test, has the result of casting a net of individual criminal responsibility that is too wide.

6. Conclusion

The *Al Hassan* case demonstrates how important it is for practitioners working in different fields of international law (e.g. human rights, international criminal justice, international humanitarian law) to understand the tensions that can exist at the intersections of these bodies of law as they meet in the legal framework that applies to armed groups when they control territory. It shows how several legal principles (i.e. the right to a remedy, fair trial rights, international humanitarian law, international human rights law) pull and push in different ways when armed groups control territory. It might be tempting to eliminate some of this complication by asserting that international humanitarian law is able to govern such situations on its own. But it has been shown above that this comes with two main dangers. First, international humanitarian law simply does not have the material scope to cover the full range of human experience, so the inapplicability of human rights law leaves a protection gap for victims. The reality is illustrated now at the time of writing during the COVID-19 crisis, as it is seen that armed groups are instigating curfews in territories under their control. International humanitarian law does not have rules on the freedom of movement that provide a yardstick to measure and comment on those restrictions. Equally, this article has shown that international humanitarian law is currently lacking an obligation upon armed groups to investigate crimes outside the scope of international humanitarian law and provide information regarding the fate of individuals in their custody. This means that the right to a remedy is an important norm to ensure that people's rights are protected, respected and fulfilled in the domestic sphere. Secondly, an overly expansive application of international humanitarian law risks the over-criminalization of acts that it does not make sense to criminalize and crucially would not be criminalized if applied to State territory.

The application of human rights law to armed groups has long been considered controversial by those who see it endangering the human rights system. Scholars and practitioners may worry that the arguments asserting that armed groups need to enforce rights like the right to a remedy risks legitimizing them by placing an obligation on them to build up their law enforcement capabilities, in a manner that makes them more State-like. In response, this article has argued that it must be possible to find scope for a thicker human rights discourse that includes alternative actors and is not so tightly bound up with 'étatization'. Thought needs to be given by practitioners and scholars to how the 'legitimacy' dynamic may be taken out of the argument so that the only beneficiaries of the application of human rights law to armed groups are civilians. Perhaps this can be done with the sorts of Deeds of Commitments that are organized by Geneva Call around particular issues. Or perhaps it is time to reinvigorate discussion of a more far reaching human rights document such as the Fundamental Standards of Humanity which is rooted solely in humanitarian imperatives and is less susceptible to the étatization dynamic (Turku/Åbo Declaration). If progress on the legitimacy issue could be achieved, the application of human rights law to these entities might be better able to be seen as simply responding to the fact many armed groups have governance institutions (be they administrative, judicial or legislative), rather than offering a reward to the group. The right to a remedy can then be best described as a legal counterweight to an armed group's existing practice. It forces the armed group to use the same institutions that it has already potentially used for bad ends (e.g. by effecting enforced disappearances, killings, torture), to secure the accountability of its members and provide justice for the victims of those rights violations.

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