

The Exercise of Criminal Jurisdiction by Armed Non-state Actors in NIAC: Benefits or Simply Risks?

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Alessandro Mario Amoroso

Outline

- I. Framing the issue
- II. Why is the issue relevant to legal advisors of the armed forces?
- III. Can armed groups exercise criminal jurisdiction?
 - III.a Absence of prohibition
 - III.b Potential legal effects of exercise of justice by armed groups

I. Framing the issue

Exercise of Criminal Jurisdiction by Armed Non-state Actors in NIAC

- Who: armed groups ≠ other (state and non-state) actors in NIAC
- What: exercise of jurisdiction properly ≠ quasi-judicial oversight; enforcement of discipline etc.

II. Why is the issue relevant

1. Dissemination

- Generally: GCs CA 47/48/127/144
- In NIAC: AP II Art. 19 (for signatories)
- Rule 142 CIHL → States and parties to the conflict must provide instruction in international humanitarian law **to their armed forces** [IAC/NIAC]

II. Why is the issue relevant

2. NIAC in home territory:
Should persons convicted by a
rebel court be tried again by
the state judiciary?



II. Why is the issue relevant

3. NIAC abroad:

Should state courts recognise the legal effects of a judgment passed by a rebel court?



III. Can armed groups exercise jurisdiction?

- Domestic law: irrelevant
- International law: International humanitarian law
 - Common Article 3(1)(d) GCs: universal ratification
 - Art. 6 AP II (Penal prosecutions): no universal ratification and higher threshold of application

III. Can armed groups exercise jurisdiction?

Common Article 3(1)(d) GCs → absence of prohibition

“[T]he following acts are and shall remain **prohibited** at any time and in any place whatsoever with respect to [persons taking no active part in the hostilities]:

[...]

(d) 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.**

III.a Absence of prohibition

What is a regularly constituted court in NIAC?

Option 1: established on the basis of applicable **domestic law**

- “constituted under regular, constitutional laws of the state” (Bhuta)
- “in accordance with the laws and procedures already in force in a country” (ICRC Customary IHL study)

Problem: ANSA cannot exercise authority in accordance with a state constitutional or ordinary law

→ Option 1 relinquishes the principle of equality

III.a Absence of prohibition

What is a regularly constituted court in NIAC?

Option 2: IHL as a (conditional) legal basis

→ Art. 6 AP II: Penal prosecutions

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.

III.a Absence of prohibition

What is a regularly constituted court in NIAC?

Option 2: IHL as a (conditional) legal basis → Art 6(2) AP II

- **Rationale**: “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** [...] which was accepted without opposition” (ICRC Commentary APs, mn 4600)
- **Problem**: Limited applicability of AP II (ratification and threshold)

III.a Absence of prohibition

What is a regularly constituted court in NIAC?

Option 2: IHL as a (conditional) legal basis

→ Article 8(2)(c)(iv) ICC Statute: It is a war crime

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

→ Article 8(2)(c)(iv) Elements of Crimes: 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*”.

III.a Absence of prohibition

What is a regularly constituted court in NIAC?

Option 2: IHL as a (conditional) legal basis

→ ICC EoC

- Rationale: “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”. “[O]ne may conclude that independence and impartiality are the main features of a ‘regularly constituted court’”. (EoC Commentary)
- Problem: limited relevance to ICC jurisdiction

III.a Absence of prohibition

What is a regularly constituted court in NIAC?

Solution: A court affording the **essential guarantees of independence and impartiality**

III.a Absence of prohibition

What is a regularly constituted court in NIAC?

→ **ICRC 2016 Commentary to CA 3**

“Common Article 3 requires ‘**a regularly constituted court**’. If this would refer exclusively to State courts constituted according to domestic law, non-State armed 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.**”

III.b Legal effects of armed groups' justice (?)

Does IHL also authorize armed groups to establish courts in NIAC?

Difference between absence of prohibition and authorization.

- What is not prohibited under IHL might still be prohibited by other branches of law.
- Authorisation: recognition of legal effects (IHL potentially prevails)

Interplay IHL - domestic law

III.b Legal effects of armed groups' justice (?)

Stockholm District Court, *Pros. v. Sakhanh* → Unclear

The accused cannot be prosecuted for crimes against the law of nations

- If the court is regularly constituted
- And if the justice is exercised to
 1. maintain discipline in the actor's own armed units
 2. maintain law and order in controlled territory, provided a) that the courts are staffed by **personnel appointed before the conflict** in accordance with applicable rules, and b) that the court applies the **law as in force before the conflict** – or at least does not apply legislation that is significantly more severe than that in place before the conflict.

Does this mean that the Swedish court recognised the **legality of rebel courts**?

III.b Legal effects of armed groups' justice (?)

Does IHL authorize armed groups to establish courts in NIAC?

No general obligation to recognise legal effects to ANSA's justice.

Way forward?

1) ***Ne bis in idem***: respect of the accused right not to be put in jeopardy twice, provided the first trial respected the fair trial guarantees of independence and impartiality. → weak argument

III.b Legal effects of armed groups' justice (?)

Does IHL authorize ANSA to establish courts in NIAC?

2) Command responsibility

“Commanders and other superiors are **criminally responsible for war crimes committed by their subordinates** if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and **did not take all necessary and reasonable measures** in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.”

Thank you for your attention