

Table of Contents

List of Abbreviations	15
Chapter 1: An Introduction	17
I. Aim and Structure of the Book	17
II. Focus of Research and Basic Assumptions	20
Chapter 2: Non-State Armed Groups and Judicial Governance	23
I. Non-State Armed Groups: Understanding the Term	23
1. Non-state vs. state	24
2. Armed vs. non-armed	25
3. Group vs. individual	27
4. Typology of other Non-State Actors	28
a. National liberation movements	28
b. De facto entities	29
c. Insurgents	32
d. Militias	33
e. Terrorist groups	34
f. Organized criminal groups	36
5. Conclusion	36
II. Governance by NSAGs: Understanding a Phenomenon	37
1. Rebel governance: conceptual clarifications	37
2. Rebel governance and the aim of legitimacy	43
3. Conclusion	49
III. Judicial Governance by NSAGs: From Theory to Practice	50
1. Insurgent judiciary in theory	51
2. Insurgent judiciary in practice: prominent examples	54
a. FMLN judiciary in El Salvador	55
aa. Background of the conflict	55
bb. The FMLN's judicial system	58
b. FARC judiciary in Colombia	60
aa. Background of the conflict	60
bb. The FARC's judicial (governance) system	64
	9

Table of Contents

c. LTTE judiciary in Sri Lanka	67
aa. Background of the conflict	67
bb. The LTTE's judicial system	70
d. Kurdish judiciary in Northeast Syria	73
aa. Background of the conflict	73
bb. The PYD/YPG's judicial system	77
e. Interim conclusion	82
3. Conclusion	83
 Chapter 3: Non-International Armed Conflicts and International Humanitarian Law	 85
I. Defining Non-International Armed Conflicts: The Arena of NSAGs	85
1. Definition according to Common Article 3 to all four Geneva Conventions of 1949	86
2. Definition according to Additional Protocol II of 1977	90
a. Responsible command	91
b. Territorial control	92
c. Sustained and concerted military operations	93
d. Capacity to implement the Protocol	94
e. Not internal disturbances and tensions	94
3. Definition according to the Tadić-formula of the ICTY	95
4. Definition according to the Rome Statute of the ICC	101
a. Textual interpretation of Art. 8 (2)(d) and (f) ICC Statute	102
b. Historical interpretation of Art. 8 (2)(d) and (f) ICC Statute	103
c. Customary status of Art. 8 (2)(c) and (e) ICC Statute	105
5. Conclusion	106
II. Applicable IHL to NIACs: Regulation by Analogy	108
1. Legal regulation prior to 1949	108
a. Ad hoc regulation through the concepts of rebellion, insurgency and belligerency	109
b. Development of a systematic IHL applicable to NIACs prior to 1949	113
2. Contemporary IHL applicable to NIACs	120
a. Common Article 3 to all four Geneva Conventions of 1949	121
b. Additional Protocol II	123

c. Additional treaty law applicable to NIACs	126
d. Customary IHL applicable in NIACs	128
3. Conclusion	133
Chapter 4: The Legality of Courts of NSAGs	135
I. Scope of IHL Provisions Relating to the Administration of Justice by NSAGs	136
II. Common Article 3 (1)(d) to all four Geneva Conventions and Courts of NSAGs	138
1. Common Article 3 (1)(d) to all four Geneva Conventions: analysis of its pertinent terms	139
a. ‘regularly constituted’	139
b. ‘judicial guarantees which are recognized as indispensable’	144
c. A fit for purpose definition of ‘regularly constituted court’	145
2. Enabling NSAGs to convene courts ‘established by law’: a departure from state centrality in international law	146
a. ‘Established by (state) law’: traditional state-centrality in international law	147
b. ‘Established by (non-) state law’?	148
3. Conclusion	154
III. Article 6 (2) Additional Protocol II and Courts of NSAGs	155
1. Art. 6 (2) Additional Protocol II: analysis of its pertinent terms	155
a. ‘Independence and impartiality’	156
b. Judicial guarantees of Art. 6 (2)(a)-(f) Additional Protocol II	158
2. The capacity of NSAGs to conduct ‘independent and impartial’ proceedings and to adhere to fundamental judicial guarantees	160
a. Courts of NSAGs during armed conflict: a capacity problem	161
b. Towards substantive equality: seeking a differentiated solution	162
3. Conclusion	165

Table of Contents

IV. Legality or Lawfulness? – The Normative Reach of Common Article 3 (1)(d) and Art. 6 (2) Additional Protocol II	166
1. The debate and its origin: regulation vs. authorization	167
a. The nature of norms	169
b. The nature of Common Article 3 and Art. 6 (2) Additional Protocol II	170
2. Resolving a misconception: relative legality	174
V. Factual Parameters for the Legality of Courts of NSAGs	177
VI. Conclusion	180
 Chapter 5: The Rule of Ne Bis In Idem and Courts of NSAGs	 183
I. Ne Bis In Idem: An Overview of its Different Dimensions	184
1. Ne bis in idem in human rights law	185
2. Ne bis in idem as a national (criminal law) guarantee	189
3. Ne bis in idem in European criminal law	192
a. Art. 4 Protocol 7 additional to ECHR	193
b. Art. 50 EUCFR	195
c. Art. 54 CISA	196
4. Ne bis in idem in IHL	199
5. Conclusion	200
II. Ne Bis In Idem before the ICC	201
1. The admissibility assessment before the ICC	201
a. Structure of Art. 17 ICC Statute	202
b. The pertinent steps of an admissibility-test according to Art. 17 ICC Statute	203
aa. Inactivity	204
bb. ‘Unwilling or unable genuinely to investigate and prosecute’	206
cc. ‘Sufficient gravity’	209
2. The admissibility-regime and its relation to the ne bis in idem principle	210
3. Conclusion	213
III. Art. 20 (3) ICC Statute and Courts of NSAGs: Opening the Gateway	214
1. Courts of NSAGs as ‘another court’?: testing the term’s elasticity	216
a. Textual interpretation	216

b. Contextual interpretation	218
c. Teleological interpretation	220
d. Historical interpretation	223
e. Equality of belligerents	225
f. Thinking command responsibility pursuant to Art. 28 ICC Statute further	228
g. Return to ne bis in idem as a human right	232
h. Interim conclusion	234
2. Final conviction or acquittal	237
3. 'shall be tried by the Court with respect to the same conduct'	238
4. Conclusion	241
IV. Parameters for Recognizing Judgments of Courts of NSAGs within Art. 20 (3) ICC Statute	242
1. The ICC and the administration of justice by non-state entities: an extract	243
2. Parameters for including courts of NSAGs into the scope of Art. 20 (3) ICC Statute	249
a. Normative requirements	250
b. Factual parameters	251
c. Examination process: a proposal	252
3. Conclusion	253
Chapter 6: Summary and Conclusions	257
References	263