Rebel Courts: The Administration of Justice by Armed Insurgents. By René Provost. Oxford: Oxford University Press, 2021. 352 + xii pages.

Editorial note

We are very pleased to announce that the book under review has won the 2023 American Society of International Law's Certificate of Merit for a Preeminent Contribution to Creative Scholarship. In 2022, it received the International Society of Public Law's Book Prize.

According to the International Committee of the Red Cross (ICRC), no less than sixty-four million civilians were living under the exclusive control of armed groups in 2022.[1] In these areas, armed groups are called upon to resolve disputes, impose penal sanctions, and implement other social controls, including within their own ranks. To do so, they frequently establish courts or other judicial mechanisms.[2] Yet, for a long time, the legal framework applicable to the administration of justice by armed groups remained understudied. René Provost's new book, *Rebel Courts*, fills this gap.

What is unique about this work is that Provost combines legal analysis with field research and empirical data. Moreover, the book centres around four case studies of armed groups: (1) the Fuerzas Armadas Revolucionarias de Colombia; (2) the Islamic State (Daesh) and the Taliban; (3) the Liberation Tigers of Tamil Eelam; and (4) the Autonomous Administration of North and East Syria and other Kurdish factions. Each chapter begins with a detailed description of the judicial system operated by one of these groups, highlighting the plurality of approaches towards the administration of justice and the different levels of institutional sophistication that they have achieved. While the four case studies do not always seem to have a connection to the specific legal problems discussed in the respective chapters, they nevertheless provide a fascinating insight into what "rebel courts" look like in practice.

In Chapter 1, Provost begins his analysis with an inquiry into whether the administration of justice by armed groups could ever be grounded in what is commonly understood as the "rule of law." Most lawyers will think of the rule of law as a concept that is somehow inherently linked to the institution of the state and its monopoly on the use of force. Indeed, we intuitively perceive the capacity to administer justice as an expression of sovereignty[3], which is, ideally, accompanied by some form of democratic legitimacy. Providing an in-depth historical account of the concept of the "rule of law," Provost demonstrates that this line of thinking is misguided and that the link between the rule of law and state authorities is a comparatively young development. Adopting a pluralist approach to the administration of justice, Provost thus concludes that trials and judicial procedures by armed

[1]Matthew Bamber-Zryd, "ICRC Engagement with Armed Groups in 2022" (2023), online: *Armed Groups and International Law* <blogs.icrc.org/law-and-policy/2023/01/12/icrc-engagement-armed-groups-2022/>.

[2]See e.g. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life*, UN Doc A/HRC/38/44 (2018) at para 73.

[3]Mégret, for example, has argued that "the right to a fair trial is not simply a right to be tried fairly by whatever organ one happens to be tried by, but arguably a right to be tried by an independent and impartial tribunal understood as a tribunal that is an emanation of the state." Frédéric Mégret, 'Are There "Inherently Sovereign Functions" in International Law?' (2021) 115 AJIL 452 at 485.

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groups as an element of rebel governance can be carried out, in principle, in ways that comply with our contemporary understanding of the rule of law.

In Chapter 2, Provost then moves on to examining the criteria and legal constraints imposed by international law upon both state and non-state actors during armed conflict for the carrying out of trials and the imposition of penal sentences. He focuses on Common Article 3 to the 1949 *Geneva Conventions*, which prohibits "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."[4] Provost concludes that the requirement of a "regularly constituted court" should be understood as the "need for deliberate consideration by an established authority to constitute a court of general jurisdiction that will apply 'law' broadly defined."[5] In this regard — correctly in my view[6] — Provost rejects the position taken by other authors that the term "regularly constituted" can be equated with the requirements of independence and impartiality.[7] Moreover, he makes a convincing case that the notion of "law" in this context is broad enough to cover the armed groups' own "legislation."

What I found particularly interesting is Provost's conclusion that it is necessary for armed groups to use penal sanctions to comply with their obligations under international humanitarian law (IHL). Relying on the ICRC's customary IHL study, Provost argues that the application to armed groups of the customary law obligation to "ensure respect" for IHL "implies a disciplinary regime to sanction violations, which in turn demands a process that meets the requirements of fundamental justice."[8] This proposition has far-reaching implications as it would mean that international law not only allows for armed groups to undermine the judicial monopoly of the state but actively requires them to do so under certain circumstances.

I believe there are reasons to challenge Provost's conclusion in this regard. First, very few examples of state practice surveyed by the ICRC actually invoke a duty by armed groups to "ensure respect" for IHL, as compared to merely calling for compliance by the group. This lack of evidence in relation to the application of the "ensure respect" limb to armed groups was criticized shortly after the study had been published.[9] I therefore found it surprising that Provost seems to take the ICRC's

[4]*Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31; *Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85; *Geneva Convention III relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135; *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287.

[5]René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford: Oxford University Press, 2021) at 202.

[6]See Hannes Jöbstl, "'Rebel Courts' Book Symposium: Do Rebel Courts Need to Be 'Established by Law'? The Conundrum of 'Regular Constitution'" (2022), online: *Armed Groups and International Law* <www.armedgroups-internationallaw.org/2022/06/07/rebel-courts-book-symposium-do-rebel-courts-need-to-be-established-by-law-the-conundrum-of-regular-constitution/>.

[7]See e.g. Anne-Marie La Rosa & Caroline Wuerzner, "Armed Groups, Sanctions and the Implementation of International Humanitarian Law" (2008) 90 Intl Rev Red Cross 327 at 340; Knut Dörmann, *Elements of War Crimes* (Cambridge: Cambridge University Press, 2003) at 413.

[8]Provost, *supra* note 5 at 157.

[9]Jonathan Somer, "Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-international Armed Conflict" (2007) 89:867 Intl Rev Red Cross 655 at 684 (describing the evidence for extending the customary law duty to ensure respect to armed groups as "not convincing").

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conclusion for granted, especially since he is rather critical of other customary rules identified by the ICRC's study.[10] Second, even assuming that armed groups are indeed under an obligation to "ensure respect" for IHL, the author does not explain why such respect can only be achieved through penal sanctions as opposed to disciplinary or administrative measures that do not require a judicial procedure meeting the indispensable guarantees required by Common Article 3.[11] I therefore think the question of when (if at all) the capacity to pass penal sentences translates into a duty to do so would have deserved a more in-depth treatment.

In Chapter 3, Provost then looks at specific due process guarantees that international law requires from trials held during armed conflicts, using Article 6 of *Additional Protocol II*, Article 75(4) of *Additional Protocol I* — both of the 1949 *Geneva Conventions* — as well as Article 14(1) of the *International Covenant on Civil and Political Rights* as a reference point.[12] Unsurprisingly, the application of these standards to the conduct of trials by a non-state actor during armed conflict involves certain challenges, for example, in relation to the structural independence a rebel court is expected to demonstrate *vis-à-vis* the armed group's military and political leadership. Here, Provost convincingly suggests that the most adequate comparator should be the standards that we apply to state-operated military courts, where the dividing line between judiciary and executive authorities is not always absolute.

Another interesting but also controversial discussion in this chapter relates to the question of whether there are any limits to an armed group's legislative activity in relation to criminal law and penal sanctions. Provost concludes that armed groups may criminalize acts that endanger the group's security (such as espionage or sabotage) but not the act of engaging in hostilities against the armed group as part of the government or other enemy forces.[13] In this regard, Provost does not shy away from challenging the principle of belligerent equality and its application to non-international armed conflict [NIAC]) and instead advocates for holding insurgents and government authorities to distinct legal obligations.[14]

Finally, Chapter 4 addresses the formal legal recognition of armed group courts and their decisions within the domestic judicial system of states before international courts and by other armed groups. In this chapter, Provost explains, *inter alia*, how the complementarity regime of the *Rome Statute of the International Criminal Court*[15]

[10]For example, Provost questions the study's conclusion as to the existence for states of a customary law obligation to prosecute war crimes committed by their nationals or on their territory in non-international armed conflict (NIAC). See Provost, *supra* note 4 at 155–56.

[11]The judicial guarantees in Common Article 3 to the *Geneva Conventions*, *supra* note 3, are understood to apply only to penal sanctions. See International Committee of the Red Cross (ICRC), *Commentary on the Third Geneva Convention* (Cambridge: ICRC / Cambridge University Press, 2020) at para 712.

[12]*Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, [1976] Can TS no 47 (entered into force 23 March 1976).

[13]Provost, *supra* note 4 at 264–71.

[14]*Ibid* at 144–49.

[15]*Rome Statute of the International Criminal Court*, 17 July 1998, Can TS 2002 No 13 (entered into force 1 July 2002).

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or the so-called "Namibia exception" recognized by the ICJ[16] could be interpreted to give some form of legal effect to judicial proceedings by armed groups. Drawing upon an impressive amount of case law and state practice, he concludes that the obligations imposed upon both state and non-state actors "suggest the ineluctability of engagement with, and in some cases recognition of, the rebel administration of justice."[17]

In summary, *Rebel Courts* is an incredibly comprehensive and thought-provoking read. While I do not agree with some of the conclusions made, I am nevertheless certain that this book will serve as *the* reference work for any future legal assessment of the administration of justice by armed groups. Indeed, *Rebel Courts* is an impressive piece of work and a much-needed addition to the so far under-studied topic of rebel governance.

Hannes Jöbstl
DPhil Candidate, University of Oxford
hannes.jobstl@univ.ox.ac.uk
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Domestic Application of International Law: Focusing on Direct Applicability. By Yuji Iwasawa. Leiden: Brill / Nijhoff, 2023. 279 + xxix pages.

This book, authored by International Court of Justice Judge Yuji Iwasawa, builds on decades of reflection on the topic of direct applicability of international norms within a domestic legal system. As the author explains in the preface, the issue sparked his interest as a young academic in relation to domestic courts' application of international human rights treaties. As he began researching it in more depth, he noticed that "the doctrine of self-executing treaties was in a state of confusion and in great need of clarification and reformation."[1] While most of the research was conducted several decades ago (which explains why some of the references are dated), the book strives to include recent developments, and some parts have been substantially revised or developed, especially in Chapters 2 and 5.[2]

As the title and subtitle of the book make clear, direct applicability is but one dimension of the domestic application of international law. Judge Iwasawa reminds his readers that "the question of the domestic status of international law involves three separate issues: force of law, direct applicability, and rank."[3] While the distinction between force of law (or validity), direct applicability, and rank will seem obvious to the

[16]In the *South West Africa* advisory opinion, ICJ found that the invalidity of illegal acts does not extend to acts the effects of which could be ignored only to the detriment of the inhabitants of that territory. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 at para 125.

[17]Provost, *supra* note 4 at 412.

[1]Yuji Iwasawa, *Domestic Application of International Law: Focusing on Direct Applicability* (Leiden: Brill/Nijhoff, 2023) at ix.

[2]*Ibid* at x.

[3]*Ibid* at 150; see also 54, with further references.