conflict: "a contest to crown democracy or autocracy as the defining current geopolitical order" (p. 392).

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"Justice without force is powerless; force without justice is tyrannical."
Blaise Pascal, *Thoughts*

I first learned about the research of René Provost, a law professor at McGill University, several years ago, when he presented his newly started project at Geneva Call, a Swiss nongovernmental organization focusing on the engagement of armed groups. At the time, the approach was groundbreaking as the practitioner community had little knowledge about the administration of justice by these actors. Most of the organizations working on the issue of armed groups in the context of armed conflicts were focused on "humanitarian" concerns, such as the illegal recruitment of children, gender-based violence and rape, or the use of anti-personnel mines, unfortunately widespread practices among these types of actors. When Provost's book came out a few years later, I knew it was based on deep, innovative, and rich empirical and analytical research, including interviews with members of armed groups and with persons who lived under their control.

René Provost's *Rebel Courts* is a must-read for anyone interested in knowing more about armed groups or about international legal theory. While the book's central theme is the administration of justice, its scope extends well beyond this issue. It also discusses the fundamental relationship between the rule of law and the exercise of power in situations of armed conflict. Indeed, the book correctly underscores that these concepts are shaken to their core by the increasing presence of non-state armed groups in a state-centric international system, in which the principle of state sovereignty remains the primary metric by which to assess both the legality and legitimacy of many types of behavior. The context in which the book is written also plays a role. The contemporary policy orientation of most states with regard to armed groups is one of "counter-terrorism." To argue, as does Provost, that such actors, most often labeled as "terrorist organizations," could establish courts legally and administer justice in a legitimate way, is a courageous and refreshing approach to the question, which makes Provost's arguments even more timely and important.

Despite the sophisticated level of analysis, *Rebel Courts* is simply and clearly built around four chapters devoted, respectively, to: (1) armed groups and the *rule of law*; (2) questions surrounding the *legality* of their courts; (3) the *jurisdiction of and due process afforded by* rebel courts; and (4) the *recognition* of rebel justice by other jurisdictions. The book also contains an introduction, which explains the book's methodology and the theory of legal pluralism, as well as a (too) succinct conclusion of three pages.

To illustrate each of the four issues, Provost uses case studies based on the practice of the FARC-EP (Colombia), the Taliban (Afghanistan), the Islamic State (Syria and Iraq), the Tamil Tigers (Sri Lanka), and the armed Kurdish groups (PKK, PYD, and KRG), active notably in Turkey, Iraq, and Syria. The first part of each chapter is generally devoted to the description and analysis of how the selected armed groups administer justice in their sphere of control. These anthropological incursions into the everyday governance practices of these armed groups are fascinating and rarely found in legal scholarship. We learn, for example, that "[t]he establishment of a working administration of justice was a priority for the Islamic State, often before controlling a territory, as a way to demonstrate that the group could bring order" (p. 107) or that the Tamil Tigers (LTTE), an armed group involved in an armed conflict with

* I thank Jack Goldsmith, Duncan Hollis, Michael Karanicolas, David Kaye, and Viva Jeronimo for helpful discussion and comments.

Sri Lanka from 1983 to 2009, established a quite elaborate justice system, which even included a Supreme Court (p. 233).

The second part of each chapter uses rich empirical descriptions to explore weighty theoretical questions: If armed insurgents claim they can administer justice, what does this say about our conception of the rule of law? Does international law explicitly or implicitly allow or prohibit armed groups to establish courts, and what conditions must be met for the exercise of jurisdiction to be lawful, including elements of a fair trial? And finally, if an insurgent court is lawfully created and has exercised its jurisdiction in compliance with international law, what recognition is to be accorded to its judgments, for example with regard to the prohibition of double jeopardy (*ne bis in idem*) or the complementarity principle of the International Criminal Court?

Each of the chapters is cleverly construed in a way that one could almost read them separately, if one wished to have an insight in a particular group or issue without reading the entire book. That said, only a complete reading allows readers to understand the complex articulation between the issue of armed groups, justice, legality, and power in conflicts situations and to fully grasp the elegance and subtlety of Provost's argument, which can be summarized as follows: if non-state armed groups in a conflict zone can legally establish courts under international humanitarian law (IHL) and international human rights law (IHRL), and if they respect basic principles of a fair trial, then armed groups' administration of justice and judicial decisions should be recognized.

It is impossible within this short review to discuss all the detailed legal developments addressed in *Rebel Courts*. I will thus focus my comments on a few of the most important aspects of the book, namely the methodology, the relationship between legitimacy and sovereignty, and the legality of rebel courts under IHL and IHRL.

How to Talk to and About Armed Groups: A Methodology for Lawyers

The methodologies employed in selecting the individuals to interview, in conducting the interviews, and in selecting the armed groups to highlight are absolutely crucial when it comes to evaluating the validity of the claims made in a book such as *Rebel Courts.* These methodological concerns are often less familiar to lawyers, who are more used to analyzing case law and legal scholarship accessible in law libraries, than they are to social scientists.

Armed groups are not an ordinary subject of academic investigation. First, the investigator herself encounters various risks in simply interacting with individuals associated with armed groups, who are frequently located in active conflict zones, and who may fall under domestic legislation prohibiting any contacts with them, or who would be reluctant to speak about their activities for security reasons. As Provost aptly observes:

> Information on the practice of armed groups is very difficult to obtain. This reflects the nature of insurgency, often relying on concealment and movement as a parry against the overwhelming military superiority of the state. Any information about the actions of insurgents, even governance activities that do not relate directly to the conduct of armed hostilities, could prove a source of vulnerability for them. (P. 20.)

There are also the dangers linked to the potential vulnerabilities of the particular persons interviewed, including members of the communities affected and armed groups themselves. Their vulnerabilities stem from the reality of armed conflict and from power imbalances inherent to the hierarchical command-obedience relationships between members of armed groups as well as between armed groups and communities. For example, victims who are living under the control of a party to the armed conflict may be exposed simply by testifying about the possible violations of IHL or human rights they witnessed or suffered.

Scholars must also consider the motivations of those they interview. It is well known that many armed groups seek political recognition of and legitimacy for their armed struggle.[1] They often

[1] *See further* Annyssa Bellal, *Welcome on Board: Improving Respect for International Humanitarian*

also wish to delegitimate their enemies, and often accuse them of being the ones not respecting the law. As a consequence, members of armed groups might characterize their own actions in an overly benign manner, thus distorting to a certain extent the realities on the ground. Empirically oriented scholars working on these topics are often bluntly asked "how can we trust what terrorists say?" Writing about armed groups' practices based on interviews with them thus needs to be done with caution. Facts must be cross-checked and the number of people interviewed should be considered. Provost is well aware of these methodological challenges. To write *Rebel Courts*, he mentions having targeted for his interviews:

> concentric circles of individuals linked to rebel courts: rebel judges, court clerks and administrators; lawyers or legal advisers; rebel commanders; individuals who had been prosecuted or had been parties to a civil case; clerics, community elders, and members of civil society organizations; and finally government officials, including state judges. (P. 22.)

Another potential methodological pitfall is investigator bias; researchers who could be either sympathetic or hostile to the "cause" of the rebel group under study. As Provost carefully notes, "[v]iolence shapes perception and identities, of both those who provide information and those who collect it, and any fact-finding enterprise in a conflict zone seems unlikely to be accepted as wholly neutral by those concerned" (p. 20). This is particularly true when research covers, as in *Rebel Courts*, some horrifying practices of armed groups like the Islamic State.[2] One way to address this challenge, as René Provost has done, is to remain factual and to adopt the posture of an observant rather than one of an advocate when describing the groups' practices (see for instance pp. 103–18). One could also consider that Provost, by including extremely violent and controversial groups such as the Islamic State or the Taliban in a book about the administration of law and justice, offers, in itself, a methodological statement: be as inclusive as possible when studying armed groups. Indeed, only then can a more nuanced, exhaustive, and overall stronger scientific analysis be conducted and lead to heuristic conclusions such as the one on the Islamic State's practice:

> There is a clear danger, because of the use by the Islamic State itself of propaganda tools, to reduce the administration of justice by the group to a caricature. Burning and boiling people to death are indeed more extreme punishments than those imposed by states, and they do form an important part of the picture. While many and probably most among the local population objected to its violence, they often acknowledged that Islamic State justice was broadly consistent and predictable, in many ways less arbitrary than that of the territorial state. Ultimately, all that can be concluded is that the administration of justice by the Islamic State was flawed in significant and systemic, but not necessarily systematic, ways. (P. 118.)

Furthermore, general statements or considerations about armed groups practices might be misleading. In 2023, the ICRC estimated that there were more than 450 armed groups of humanitarian concern worldwide.[3] It follows that an exhaustive study of all armed groups active in armed conflict is not possible, and quite understandably research on armed groups will inevitably be limited. How can a researcher choose certain groups that are representative of all the others? For instance, one research study on armed non-state practice and interpretation of international humanitarian and human rights norms, selected ten different armed groups according to their types, the hypothesis being that this sample would be representative of the

Law Through the Engagement of Armed Non-State Actors, 19 Y.B. INT'L HUMANITARIAN L. 37 (2017).

[2] See some examples of these practices, that were in flagrant violations of international law, at p. 114.

[3] Matthew Bamber-Zyrd, *ICRC Engagement with Armed Groups in 2023*, HUMANITARIAN L. & POL'Y (Oct. 10, 2023), *at* https://blogs.icrc.org/law-and-policy/2023/10/10/icrc-engagement-with-armed-groups-in-2023.

wider category of groups and practices.[4] That said, choosing armed groups through certain features can be debatable, because no single typology of "armed group" is broadly accepted in scholarly writings, and international law offer no definition of who qualifies as an armed non-state actor. In fact, it is not unusual for armed gangs or private military companies to be considered as "armed groups."[5] These types of actors would not, however, often be included in research projects such as Provost's.

IHL is likewise of limited use in this context, as it has adopted a less-than-nuanced approach to armed groups. As long as an armed group reaches a minimum degree of organization that enables it to respect IHL provisions, its structure is irrelevant.[6] Territorial control' as triggering the application of IHL is also mentioned in Article 1 of Additional Protocol II of the 1949 Geneva Conventions[7] and by many scholars as a distinguishing feature of some armed groups. But Provost reminds us that the notion of territorial control is far from self-evident and for him, "the concept of territory cannot be reduced to bare space, land, or terrain, but that it is socially constructed by a combination of power and geography" (p. 78).

In reading *Rebel Courts* or any other book on armed groups, one should thus be aware that the analysis is in fact only about a selected number of armed groups, sometimes chosen according to some characteristics, like being able to exercise governance functions. Unfortunately, the author does not provide much more information about his particular choice of armed groups for the case studies, other than underlying that "[t]he selected armed groups span a spectrum of formalism in their approach to the administration of justice, from highly institutional courts (LTTE) to instrumentalised community justice (FARC)" (p. 22). This choice does not seem to be based on the typology of the groups, but rather on the fact that these were known to administer justice in a significant way (see p. 21).

Such an approach (comparing what is similar) can be justified, especially in a study based on a specific practice, like the administration of justice. Another scientific method also consists in including armed groups that are different in their structure and practice, but which are nevertheless bound by the same rules. Comparing "what is different" might indeed help understand the reasons why certain practices do not comply with international law.[8] Geographical concerns were also mentioned, though at the end, for various reasons, the SPLM/A (South Sudan) and the Polisario Front (Western Sahara) could not be included in the analysis, thus leaving armed groups from the African continent unfortunately not represented in the study (p. 22).

Last but not least, the time factor is critical when researching armed groups' practices. While governments and laws change over time,

[4] Annyssa Bellal, Pascal Bongard & Ezequiel Heffes, *From Words to Deeds, A Study of Armed Non-state Actors' Practice and Interpretation of International Humanitarian Law and Human Rights, Research and Policy Conclusions*, UK Res. & Innovation, 12–17 (Sept. 2022), *at* https://words2deeds.org/wp-content/uploads/2022/09/Words2Deeds_comparative-study.pdf.

[5] *See, e.g.*, Peter G. Thompson, Armed Groups: The 21st Century Threat 75–95 (2014).

[6] See in that sense the 2016 ICRC Commentary of Common Article 3 to the Four Geneva Conventions of 1949, paras. 422–34, *at* https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016?activeTab=undefined#_Toc465169867.

[7] Which provides that: "1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), Art. 1, June 8, 1977, 1125 UNTS 609, *at* https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-1?activeTab=default.

[8] See, for example, in social science research methods, A.B. Markman & D. Gentner, *Commonalities and Differences in Similarity Comparisons*, 24 Memory & Cognition 235 (1996).

states, as such, are considered to be permanent legal entities and their practice will be deemed more stable than those of armed groups that have very limited legal personality in international law. As a consequence, variations of armed groups' structures, strategies and behavior will make it more difficult to reach firm legal conclusions. For example, the FARC-EP's structure varied during the sixty-year long conflict in Colombia. As explained by Ezequiel Heffes: "While active, the FARC-EP modified its organizational structure through three stages. First it was constituted as a peasant self-defence movement; then it became a 'mobile guerrilla formation'; and finally, the FARC-EP developed itself as an 'army.'"[9] As a consequence, any finding on a particular topic either has to consider the variations in time of the armed groups studied, or accept it will only be valid for a specific period in the life of the group. In any case, the conclusions will remain relative.

In his book, Provost does classify FARC justice into different periods on time, from 1964 to 2003, noting however that, "the FARC was involved, for a period of time extending over several decades, in the management of a wide array of social issues . . . [and] [o]ne facet . . . was the administration of justice" (p. 30). The Islamic State had a more limited span of existence (approximately 2014–2019) and it seems that its practice during that whole time was evaluated. René Provost mentions the different periods of life of the Taliban (1996–2001 as a group controlling 90 percent of Afghan territory and then 2001–2021 as an insurgency) though the practice studied seem to belong in its majority to the decade after 2010 (see pp. 118–40). The LTTE was formed in 1976, though became a party to the armed conflict against the Sri Lankan government in 1983. It existed until 2009, when its leader was killed. Over the years, the LTTE became a highly structured armed group, with an elaborate governance system. As acknowledged by Provost, one of the obstacles of reaching a comprehensive understanding of the LTTE justice system, and which illustrates the volatility of any research on armed groups, was that "individuals who played a role in the administration of justice by the LTTE were killed, disappeared, interned or exiled following the bloody end of the conflict" (p. 228). For this group, Provost explains he had to rely mainly on evidence and research that was carried out between 2002–2008, but the book does account for the evolution of the LTTE court system since the 90s (see pp. 227–48). Finally, *Rebel Justice* also includes a study of the practices of various Kurdish armed groups, that are still active today, i.e., the PKK (Turkey/Iraq), which came into existence in 1981, the PYD/YPJ in Syria, that became party to the armed conflict in 2013 and the KRG, arguably not an armed group *stricto sensu*, as it is considered to be a federal region of the Iraqi state recognized officially as such in 2005, but which was *de facto* autonomous since 1992 (see pp. 357–85). Provost assessed the practice of these groups with an emphasis on the principle of legality, comparing the groups' own "legal documents" with international or domestic law. As such, the analysis was less dependent on a possible evolution of the groups over time, as it was based on existing legal texts, which are still in force today for the most part.

The Legitimacy, Justice, and Sovereignty Conundrum

As Provost clearly states, "the suggestion that non-state armed groups may properly be said to administer justice contradicts in a fundamental manner the sovereignty of the state over its population and territory. Given that the rule of law is a concept at the heart of state sovereignty, it is clear that there is some significant overlap between a contestation of rebel justice anchored in the doctrine of the rule of law and one rooted in state sovereignty" (p. 86). In other words, from the classic Westphalian perspective, the state, as a sovereign entity, is understood as being the sole

[9] Ezequiel Heffes, *From Words to Deeds: A Research Study of Armed Non-state Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms, Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (Revolutionary Armed Forces of Colombia-People's Army, FARC-EP)*, 9 (Mar. 2021), *at* https://words2deeds.org/wp-content/uploads/2021/07/Case-Study-Revolutionary-Armed-Forces-of-Colombia-%E2%80%93-Peoples-Army.pdf.

repository of legitimate authority and as a consequence, the only guardian and provider of justice and the rule of law. This conception of sovereignty has been predominant in Europe over several centuries (p. 87). Provost shows however that state governance (including the administration of justice) flowing from its sovereignty, has not been exported everywhere. In Colombia, for instance, many sources of local power and authority coexist alongside the state (p. 88). The practice of the Kurdish armed groups in Northeast Syria also contradicts the hypothesis that chaos will result in the absence of a state monopoly on power or justice (p. 90). In that sense, the existence of "non-state" (armed groups) justice is also conceivable, at least from a conceptual perspective.

Provost takes the argument a large step further. He argues that armed groups may in some circumstances have *a "moral necessity"* to administer justice, which is an essential social good, when the state is unable or too corrupt to deliver it (p. 91). The persons living under the control of these groups might even see the vacuum filled by the armed group as positive and, to a certain extent, legitimate. This occurred in the early days of the Islamic State in Iraq, as their courts "were to some extent tolerated, if not accepted, by residents weary of lawlessness in the caliphate, . . . [and] [a]ny law and order was seen as an improvement, even [the Islamic State's] brutal interpretation of [*Shari'a*]" (p. 108).

Provost's final argument on this issue builds on the concept of *effectivité* in public international law, which links the exercise of power to authority. Applied to armed groups, it means that the legitimacy of rebel courts could be grounded in their exercise of power and control over a given territory or population. It is true that state sovereignty cannot always be assimilated with justice and authority. Suffice to think of all the examples of autocratic or totalitarian states that have issued judgments in total violation of international law. Consider, for example the transfers of some Islamic State foreign fighters, at the request of their countries of nationality, from the *non-state* Kurdish armed groups' detention centers, to be judged and subsequently sentenced to death, arguably in violation of human rights law, by *state* courts in Iraq, which underscores the complex and varied relationships between states, non-state actors, legitimacy, and legality.[10]

By applying the principle of *effectivité*, courts have sometimes considered power-sharing scenarios, in which different actors have administered different geographical zones at the same time with some degree of legitimacy. While this may be justified, especially to ensure that persons who live in the control of armed groups are not placed in a "legal vacuum," or because it helps recognize that some form of legal administration can exist outside of state sovereignty, one should not be too quick to assimilate authority and effective power. As René Provost admits, it is clear that "the principle of *effectivité* embodies a tension between law and power, between fact and norm" and should not be 'pushed to the extreme" (p. 94). Indeed, without law and justice constraining the exercise of power, an exclusive focus on effective power as a source of authority runs the risk of tolerating tyrannical or criminal forms of governance.

Legality of Rebel Courts Under IHL and Human Rights Law

Having discussed the potential *legitimacy* of armed groups' administration of justice, Provost turns to their *legality* under international law. Armed groups' justice is *ipso facto* illegal under domestic law, as states have the monopoly on the use of force. The only relevant legal framework for this discussion is thus international law. According to Provost, there are four ways to address the question. International law could: (1) contain a clear prohibition; (2) be silent on the matter; (3) provide armed groups with the right to have courts; or (4) impose an obligation on armed groups to administer justice when they exercise control over a territory or population (p. 150).

Provost rightly concludes that international treaty law does not prohibit armed groups from administering justice. On the contrary, it may provide for an implied right to do so, notably

[10] *IntelBrief: French Foreign Fighters Sentenced to Death in Iraq*, Soufan Ctr. (June 2019), *at* https://thesoufancenter.org/intelbrief-french-foreign-fighters-sentenced-to-death-in-iraq.

though Common Article 3(d) of the 1949 Geneva Conventions, applicable in the context of non-international armed conflicts, and which is also binding on armed groups. The article provides that "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."[11] Armed groups also have an obligation to respect and ensure respect of IHL under Common Article 1 of the 1949 Geneva Conventions, which is also applicable in the context of non-international armed conflicts. Arguably, armed groups thus have the duty to prosecute war crimes. Finally, by virtue of the doctrine of command responsibility, armed groups could have the obligation to establish courts, at least to be able to judge their own members for violations of IHL (p. 164).

Perhaps more problematic are arguments regarding the necessity of considering the capacity of armed groups in the legality assessment. Acknowledging that armed groups cannot be considered as equal belligerents with regard to the administration of justice (p. 146), Provost considers that "[w]hen we acknowledge that non-state actors . . . may come to wield public authority, the regime regulating the exercise of that authority must be adapted to reflect the reality and capacities of these non-state actors" (p. 216). The argument of differentiated responsibilities or "sliding scale of obligations" for armed groups in relation to their capacity to implement international norms has also been offered by other authors.[12] In the absence of a monitoring body with general competences to oversee armed groups obligations, other than international criminal law, that only applies in exceptional circumstances, one could wonder which authority could strike the balance and evaluate the correct threshold of capacity to respect the law? In that context, Provost's plea to "balance the meaningful and effective protection of the interests protected by . . . legal standards with the constraints imposed on non-state armed groups by the conflict" is relatively convincing (*id.*). More specifically, the author ends his book by encouraging "lawyers to attend the role of law in understanding and regulating such practice, to address insurgent justice in all that it stands for, as a system of rules, a register of meanings, a claim of identities and a manifesto of aspirations" (p. 456). While this is undeniably an essential "call to arms" as Provost calls it himself, I would argue that in order to be able to take rebel justice more seriously, lawyers should do more than that. What seems to be missing is indeed the establishment, at the international level, of monitoring bodies able to exercise their jurisdiction over non-state armed groups. This would ensure the effective protection of the right to justice of the persons who live, sometimes for decades, under the control of these actors.

In conclusion, despite these slight disagreements, *Rebel Courts* is a remarkable piece of academic literature and undeniably a core addition to international legal scholarship. The strength of the book lies in the detailed analysis of some key armed groups' practices and a groundbreaking legal conclusion, which encourage states and practitioners alike to consider, in some circumstances, the validity and even legitimacy of armed groups justice. Not an easy recommendation to make given the (sometimes justified) bad reputation, surrounding armed groups in contemporary international relations, to say the least.

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[11] 1949 Geneva Conventions, Common Art. 3(d), *at* https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-3.

[12] Notably by Marco Sassòli, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare 587 (2019).