

## ARTICLE

# Of Interactionality and Legal Universes: A Bottom-Up Approach to the Rule of Law in Armed Group Territory

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Reviewing literature on rule of law, this article puts forward a 'bottom-up' approach of the rule of law that encourages an analysis of three aspects (i) the ability of the legal framework to confer the capacity of self-determination upon individuals (ii) the extent to which the legal framework is reciprocal/ interactional, in that it creates expectations between governing and governed and (iii) the contribution made by ordinary individuals in the form of participation with or contribution to communities of practice and law in everyday life. The paper then applies this framework to the law and rules in application in territory under the control of armed groups, considering individuals' relationship with rules in these spaces and examining their different ways in which they may affect civilians' lives.

**Keywords:** armed groups; rule of law; bottom-up approaches; interactionality; communities of practice; everyday life

## 1. Introduction

It is increasingly noted in literature on non-international armed conflicts that armed groups fighting in opposition to the government often promulgate law and set up legal institutions in the territory under their control. The purpose of this article is to investigate civilians' relationship with domestic law in these territories. It is motivated by an observation that the growing body of legal literature investigating the legal significance of armed groups passing laws and rules in the territories under their control too often takes a top-down perspective. A recurring question examined in these studies is whether 'armed group law' can be seen to be 'law' for the purposes of human rights and international humanitarian law norms that rely on recourse to domestic law for their implementation, such as the prohibition of arbitrary detention and the right to a fair trial.<sup>1</sup> While these kinds of positivist questions are essential to efforts to clarify which international norms are binding upon armed groups and when and how they may be complied with, they take little account of the individuals at the bottom of the legal framework. They do not enquire what law made or used by armed groups means to the lived experience of individuals living in

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<sup>1</sup> Jonathan Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict' (2007) 876 *International Review of the Red Cross* 655; Sandesh Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 *Journal of International Criminal Justice* 489; Mark Klamberg, 'The Legality of Rebel Courts during Non-International Armed Conflicts' (2018) 16 *Journal of International Criminal Justice* 235; Alessandro Amoroso, 'Should the ICC Assess Complementarity with Respect to Non-state Armed Groups? Hidden Questions in the Second Al-Werfalli Arrest Warrant' (2018) 16 *Journal of International Criminal Justice* 1063; Pouria Askary and Katayoun Hosseinejad, 'Non-State Courts: Illegal or Conditional – the Case of Da'esh Courts' (2019) 10 *Journal of International Humanitarian Studies* 240; Hannes Jöbstl, 'Bridging the Accountability Gap: Armed Non State Actors and the Investigation of War Crimes' (2020) 18(3) *Journal of International Criminal Justice*, 567; Alessandra Spadaro, 'Punish and Be Punished? The Paradox of Command Responsibility in Armed Groups' (2020) 18 *Journal of International Criminal Justice* 1.

these territories. They also take little account of whether and how civilians living under the control of armed groups interact with these rules, for example, by examining whether they have the effect of informing the way they live their lives and governing their relationship with the armed group and other individuals around them.

This article seeks to redress this imbalance by investigating the relationship of civilians with the laws and rules that are made, promulgated or enforced by armed groups in territory under their control. Following Gorobet's assertion that 'the rule of law... should be perceived as coalescing two perspectives: one is the perspectives of the subjects (bottom-up) and the other is the perspective of legal order as such (top-down)', the first part of the article explains why it is important to try and understand how civilians living in territory under the control of armed groups relate to the law. Weaving together different strands of literature from scholarship on the rule of law, it proceeds to sketch out some features of what a bottom-up perspective to the rule of law might look like.<sup>2</sup> It draws upon writings by Lon Fuller on interactional law and writings on Jeremy Waldron on procedural rule of law. It adds perspectives by Jutta Brunnée and Stephen J. Toope on communities of practice and brings in several different threads of scholarship on the relationship of law to everyday life. The second half of the article uses these ideas as an evaluative lens to enquire whether and to what extent laws and rules in spaces controlled by armed groups may bring value to civilians and the different ways in which civilian communities interact with laws and rules in these spaces. It does this by drawing on literature from the growing scholarly field referred to as 'rebel governance.' Studying the provision of public goods and the establishment of norms and rules regulating daily life in territory controlled by armed groups fighting in opposition to the government, this interdisciplinary literature offers theoretical as well as empirical insights.<sup>3</sup> The article also draws on wide range of empirical studies and reports on armed groups and legal institutions relating to Afghanistan, Colombia, India, Iraq, Ivory Coast, Nepal and Syria.

By addressing these questions, the article seeks to add value in four distinct ways. First, it aims to add a bottom-up perspective to the aforementioned body of legal scholarship on armed groups and law. Second, it brings together literature from rebel governance with literature on 'armed groups and law' in order to encourage more interdisciplinary dialogue between these two fields of scholarship. Third, it aims to contribute to existing attempts to define what it means to look at the rule of law 'from below.' The value of this contribution is not restricted to studies of armed groups. It may also provide a useful lens for broader evaluations of the relationship of individuals with law in different contexts. Fourth, the article contributes to thinking about what the existence or non-existence of rules and laws might mean to civilians living in territories under the control of armed groups. As a result of its enquiry into how civilians living under the control of armed groups experience rules that impact upon their lives, the article argues that it is important to get a glimpse of the lived legal universe in which civilians live. This requires a broadening our observational lens so that we look not only at the law and legal institutions of armed groups in a positive sense but also seek an understanding of how rules passed by armed groups impact upon civilians' lives, how civilians interact with and use rules and laws passed by armed groups and how different forms of legal consciousness develop in these spaces.

## 2. Armed groups and law-making

In order to provide the necessary context against which the focus of this article can be understood, this first section provides a brief summary of some of what is known about armed groups and law-making. Recent estimates indicates that some 60–80 million people are living in territory under the exclusive State-like governance of armed groups.<sup>4</sup> In many cases where armed groups control territory for a protracted period of time, they end up providing different kinds of public services to the civilian population. Filling the void left by the absent *de jure* government, they take on governance activities by *inter alia* ensuring security and

<sup>2</sup> Kostiantyn Gorobets, 'The International Rule of Law and the Idea of Normative Authority' (2020) 12 Hague Journal on the Rule of Law 227, 237.

<sup>3</sup> Nelson Kasfir, 'Rebel Governance – Constructing a field of inquiry: Definitions, Scope, Patterns, Order, Causes' in Ana Arjona, Nelson Kasfir and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (CUP, Cambridge 2015) 21–46.

<sup>4</sup> ICRC 'ICRC Engagement with Non-State Armed Groups' (2021) 2. <[https://www.icrc.org/sites/default/files/wysiwyg/Activities/Humanitarian-diplomacy/icrc\\_engagement\\_with\\_non-state\\_armed\\_groups\\_position\\_paper.pdf](https://www.icrc.org/sites/default/files/wysiwyg/Activities/Humanitarian-diplomacy/icrc_engagement_with_non-state_armed_groups_position_paper.pdf)>

mediating domestic disputes.<sup>5</sup> When they take on these activities, armed groups often have recourse to laws and norms which they use to control people's behaviour and help mediate conflicts.<sup>6</sup> These laws and rules take many forms, depending on the organisation of the group.<sup>7</sup> Some armed groups use or re-adopt the State law (or parts of it) in the territory under their control.<sup>8</sup> Others keep the basis of the State law but make certain modifications, that reflect their political project or preferences.<sup>9</sup> Other armed groups adopt their own laws, that are deliberately different from the government's laws and may be based upon religious or cultural norms with which the armed group identifies.<sup>10</sup> In some areas of Syria, armed opposition groups have used a regional code – the United Arab Code – as a way of relying on a legitimate source of law on the ground in communities, while rejecting Syrian law.<sup>11</sup> A recent study of data gathered from the major civil wars between 1950–2006 found that as many as 37% of armed groups created law or order institutions in this period.<sup>12</sup>

Now that it is increasingly recognised that non-international armed conflicts are the dominant kind of armed conflict in today's world, there have been increasing efforts to understand the legal significance of armed group law-making efforts and their legal institutions in legal scholarship. In particular, as consensus builds that armed groups are bound by many international rules that usually require domestic law for their fulfilment (e.g. arbitrary detention and fair trial norms), it has been necessary for scholars, courts and international organisations, like the ICRC, to take a position on when, whether and how armed group laws can rely on their own laws and rules to fulfil these international law standards.<sup>13</sup> There have also been recent efforts to determine whether armed group law should be treated as 'law' for theoretical thinking about the rule of law, with suggestions made about how traditional rule of law standards might be interpreted differently when applied to armed groups.<sup>14</sup> Yet within the growing body of legal literature addressing armed group laws, there has been very little analysis of how civilian communities experience armed group laws and rules 'from below.' It is important to study this bottom-up perspective because without empirical insights on this issue, there remains a lot of uncertainty about civilian populations' attitudes to armed group laws. It is also unclear whether armed groups' laws are something that the international community should welcome or reject. While I show in this article that answers to these questions are often deeply contextual, I also show that it is not unusual for civilian communities to gain value when an armed group promulgates a set of rules in the territory in which they live.

<sup>5</sup> Zachariah Mampilly, *Rebel Rules: Insurgent Governance and Civilian Life during War* (Cornell University Press, Ithaca and London 2011) 4.

<sup>6</sup> Ana Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (Cambridge University Press, Cambridge 2017) 48–9.

<sup>7</sup> For insights into the varied patchworks of legal systems that sometimes co-exist in opposition held Syria, see Syria Rule of Law 2017 ILAC 76–8.

<sup>8</sup> René Provost, 'FARC Justice: Rebel Rule of Law' (2018) 8(2) UC Irvine Law Review 228, 241.

<sup>9</sup> See for example in North East Syria it is reported that the Rojava authorities are using the Anti-Terrorism Act in Syrian law to try local ISIS suspects, but with certain modifications to remove the death penalty. See here: Translation: North and East Syria's Anti-Terrorism Act used to try local ISIS suspects – Rojava Information Center.

<sup>10</sup> See for example, Sivakumaran (n2) 492 detailing law used by FLMN in El Salvador, CPN-M in Nepal and LTTE in Sri Lanka. See Cyanne E. Loyle, 'Rebel Justice During Armed Conflict' 2020 *Journal of Conflict Resolution* 1, 20 providing details on CPN-M in Nepal. Ashley Jackson and Florian Weigand, 'Rebel Rule of Law: Taliban Courts in the West and North West of Afghanistan, Humanitarian and Human Rights Law: Foundation and Framework of Obligations and Rules on Accountability' (Routledge, Abingdon 2017); Tilman Rodenhäuser, *Organising Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (OUP, Oxford 2018); Andrew Clapham, 'The Limits of Human Rights In Times of Armed Conflict and Other Situations of Armed Violence in. B. Fassbender and K. Traisbach (eds) *The Limits of Human Rights* (OUP, Oxford 2020) 305–317; Amrei Muller, 'Can Armed Non-State Actors Exercise Jurisdiction and Thus Become Human Rights Duty-Bearers?' (2020) 20 *Human Rights Law Review* 269. See also references at note 2 above. For an ICRC position, see ICRC, Commentary to the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Force in the Field (2016) [750].

<sup>11</sup> Syria Rule of Law 2017, ILAC 78. The use of this code was a source of dispute later in the conflict, see Regine Schwab, 'Insurgent courts in civil wars: the three pathways of (trans)formation in today's Syria (2012–2017) (2018) 29(4) *Small Wars and Insurgencies* 801, 813.

<sup>12</sup> Reyko Huang, *The Wartime Origins of Democratization: Civil War, Rebel Governance and Political Regimes* (CUP, Cambridge 2016) 78.

<sup>13</sup> Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart, Oxford 2016), Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (OUP, Oxford 2017). Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations and Rules on Accountability* (Routledge, Abingdon 2017); Tilman Rodenhäuser, *Organising Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (OUP, Oxford 2018); Andrew Clapham, 'The Limits of Human Rights In Times of Armed Conflict and Other Situations of Armed Violence in. B. Fassbender and K. Traisbach (eds) *The Limits of Human Rights* (OUP, Oxford 2020) 305–317; Amrei Muller, 'Can Armed Non-State Actors Exercise Jurisdiction and Thus Become Human Rights Duty-Bearers?' (2020) 20 *Human Rights Law Review* 269. See also references at note 2 above. For an ICRC position, see ICRC, Commentary to the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Force in the Field (2016) [750].

<sup>14</sup> Provost (n9) 267–8.

### 3. Bottom up perspectives to the rule of law

The first part of this article creates an evaluative lens that can be used for the later analysis of how civilian communities experience armed group laws and rules ‘from below.’ It does this by examining literature on the rule of law in order to trace how different theories of the rule of law have conceived the place of the individual and the lived reality of rules in everyday life. Typically literature on the rule of law distinguishes between the international rule of law and domestic rule of law.<sup>15</sup> Like other studies, this article finds that this distinction does not make so much sense when dealing with the norms found in international humanitarian law and international human rights law, due to the multiple contact points between the national and international frameworks.<sup>16</sup> This is especially true of human rights law which relies heavily on domestic laws and institutions for its implementation, with one of its purposes arguably being to safeguard the rule of law at domestic level. Unlike in other areas of international law, where States’ multilateral commitments create a web of obligations the horizontality of which make it difficult to compare to a domestic legal framework, the international frameworks of human rights law and international humanitarian law applying to non-international armed conflicts broadly mirror the mixed verticality/horizontality of the domestic system. The fact that both human rights law and international humanitarian law both have the broad purpose to protect the individual means that the ‘general structures and story lines’ of the domestic and international frameworks are have more similarities than in many other areas of international law, and they have the same key characters in their dramatis personae i.e. state organs are the powerful actors and individuals are the vulnerable actors.<sup>17</sup> These similarities make it both logical and possible to refer to theories of the rule of law that have been developed in studies of both domestic and international law.

#### 3.1. Bottom-up approaches in traditional rule of law theories?

Most traditional theories on the rule of law, such as the formal and substantive conceptions of the rule of law, provide a ‘top-down’ view of the rule of law. By this it is meant that these theories pay more attention to the fabric and content of the law and its purposes, than to the relationship of the individual with the law. Authors who take formal and substantive conceptions to the rule of law encourage a qualitative appraisal of the law itself, focusing on its content and/or the manner in which law is passed and promulgated, its clarity and temporal application.<sup>18</sup> One of the most well-known descriptions of the formal conception of the rule of law is the list of principles provided by Lon Fuller. Fuller’s list contains the following principles: generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence.<sup>19</sup> Joseph Raz proposes another equally well-known list that includes a similar catalogue of requirements relevant to the fabric of law: that laws should be prospective, not retrospective; that they should be relatively stable; that particular laws should be guided by open, general and clear rules; that there should be an independent judiciary; and that there should be access to the courts; and that the discretion of law enforcement entities should not be allowed to pervert the law.<sup>20</sup> Indeed very many scholars on the rule of law focus their analysis on the normative fabric of the law, without paying attention to the individuals’ point of view.

However, even though traditional theories on the rule of law maintain a top-down focus, they widely acknowledge that one of the key purposes of the rule of law is to provide benefit to individuals. The ideal of the rule of law is widely understood to be a construct designed to constrain the ability of any entity to wield unchecked or arbitrary (political) power over individuals. This purpose is perhaps seen most clearly in substantive approaches to the rule of law that argue that it is not enough for a law to be constituted properly, its content must also be ‘good.’<sup>21</sup> Dworkin, one of the most well-known proponents of this school of thought, finds that one of the key purposes of the rule of law is to ‘capture and enforce moral rights’ for

<sup>15</sup> James Crawford, ‘International Law and the Rule of Law’ (2003) 24 *Adel L Rev* 3–12; Simon Chesterton, ‘An International Rule of Law?’ 56 *Am. Comp. L.* 331–361; Ian Hurd, ‘The International Rule of Law: Law and the Limit of Politics’ (2014) 1(28) 39–51; Robert McCorquodale, ‘Defining the International Rule of Law: Defying Gravity’ (2016) 65, 277–304; Gorobets, ‘Idea of Normative Authority’ (n3) 233–4.

<sup>16</sup> Machiko Kanetake, ‘The Interfaces between the National and International Rule of Law’ in M. Kanetake and A. Nollkaemper (eds) *The Rule of Law at National and International Levels: Contestations and Deference* (Hart, Oxford 2016) 11, 17.

<sup>17</sup> Gorobets, ‘Idea of Normative Authority’ (n3) 233.

<sup>18</sup> Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467, 467.

<sup>19</sup> Lon Fuller, *The Morality of Law* (Yale University Press 1964) 47–91.

<sup>20</sup> Joseph Raz, ‘The Rule of Law and Its Virtues’ as re-printed in *The Authority of Law: Essays on Law and Morality* (OUP, Oxford 1979) 218.

<sup>21</sup> For comments on the difference between the formal and substantive conceptions of the rule of law see Raz, *ibid*, 211 and 227. See also Craig, ‘Formal and Substantive Conceptions’ (n19) 468.

the individual.<sup>22</sup> Yet proponents of the formal rule of law also note that one of the functions of the rule of law is to stabilize social relationships that may otherwise 'disintegrate or develop in erratic or unpredictable ways.'<sup>23</sup> It prevents recourse to violence between individuals or between the State and individuals. There is also a strong consensus among traditional rule of law theorists that law allows individuals to plan their life.<sup>24</sup> The existence of rules, that are known in society, safeguard individuals' ability to manoeuvre safely in and around those constraints.<sup>25</sup> While people tend to think of the existence of law as something that *constrains* action, many rule of law theorists see a rudimentary truth in Locke's statement, 'where there is no law, there is no freedom.'<sup>26</sup> This basic principle is contained in Hayek's formulation of the rule of law, where he wrote: 'this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of that knowledge.'<sup>27</sup>

### **3.2. Injecting the perspective of the individual into rule of law scholarship**

While it is seen above that the individual is certainly visible in core writings on the rule of law, the perspective of the individual is often not given much weight or attention. In fact, it was partly in response to this observation that Waldron developed a third conception of the rule of law, which he calls a 'procedural rule of law'. This theory was, at least partly, intended to capture the role of the individual more directly. One of the ideas at the heart of Waldron's writing on the 'procedural rule of law' is the idea that:

[a]pplying a norm to a human individual is not like deciding what to do with a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with.<sup>28</sup>

In line with this notion, Waldron has argued that it is not enough to just pay attention to 'the rules' when studying the law.<sup>29</sup> It is also necessary to pay attention to the point of view or perspective of the individuals in the legal framework who act as conduits or recipients of rules. It is for this reason that Waldron urges attention to be paid to the procedural institutions by which law is applied because even faultlessly formed rules are no good, if they are not administered properly. As part of this exercise, Waldron argues that it is important to pay attention to the role played by individuals inside the legal system, whether it be by presenting evidence or legal argument, exercising their right to representation or be present, their right to confront witnesses or their right to appeal.<sup>30</sup> This reflects the fact that the existence of rules becomes most pertinent vis-à-vis the individual at the moment when they are enforced or challenged ('Law comes to life *in institutions*').<sup>31</sup> Perhaps we can discern a broader conclusion in Waldron's writing that the rule of law as a concept only finds proper meaning when it is understood as existing at the meeting point between law-giver, individual (or law-recipient) and norm.

In sketching out what this article identifies as an example of a 'bottom-up' perspective to the rule of law, Waldron argues that a legal system, in its foundation, should be understood as providing a system of governing that treats individuals with respect, not only because of its purportedly non-arbitrary nature and the manner in which it contrasts law with power, and not only because of its ability to confer freedom, but also because of the respect it gives an individual as a human person. Waldron argues that this aspect is illustrated in the way in which legal systems rely largely on self-application and voluntary

<sup>22</sup> Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1985) 11, 12.

<sup>23</sup> Raz, *i* (n21) 220.

<sup>24</sup> *Ibid* 218. Craig, 'Formal and Substantive Conceptions' (n19) 469.

<sup>25</sup> See Fuller, *The Morality of Law* (n20) 162 'To judge [people's] actions by unpublished or retrospective laws... is to convey to [them] your indifference to [their] powers of self-determination', As cited by Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James E. Fleming (ed) *Getting to the Rule of Law* (Nomos L, 2011) 3–31, 4.

<sup>26</sup> John Locke, *Two Treatises of Government*, Of Civil Government, Chapter VI Of Paternal Power.

<sup>27</sup> See also '[t]he significance for the individual of the knowledge that certain rules will be universally applied is that... [sh]e knows of man-made cause-and-effect relations which he can make use of for whatever purposes he wishes' Friedrich Hayek, *The Constitution of Liberty* (1960) 153.

<sup>28</sup> Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 3, 23–4.

<sup>29</sup> *Ibid* 61.

<sup>30</sup> Waldron, 'Importance of Procedure' (n26) 19.

<sup>31</sup> *Ibid* 14.



self-control i.e. an individual's capacity and general propensity to abide by the law.<sup>32</sup> He argues that it is also evident in the fact that individuals are given a voice in the legal framework. Legal systems usually provide formal channels where people can employ legal arguments to explain their position vis-à-vis the law.<sup>33</sup> In articulating these ideas, Waldron has argued that law has a 'dignitarian' dimension.<sup>34</sup> Analysing his procedural rule of law writings, Taekema has noted that Waldron's work can be seen to have been heavily influenced by Fuller, who was writing several decades earlier.<sup>35</sup> Fuller also understood that the rule of law to be closely tied to a '[hu]man's dignity as a responsible agent.'<sup>36</sup> Like Waldron, Fuller also understood the system of law to be a mark of respect to an individual's ability to plan their lives and exercise self-determination. Indeed, Waldron's views relating to self-application have similarities with what Fuller called 'an interactional view of law.'<sup>37</sup> In his theories on interactionality, Fuller challenged views of law that see it as a 'one-way projection of authority' and encouraged a view of law as a two-way channel.<sup>38</sup>

### **3.3. Interactionality between individual and law-giver**

According to Fuller's theories on interactionality, identifying the important role of the individual in a legal framework is not only a matter of giving due regard to human dignity but also a prerequisite to the proper functioning of a legal system.<sup>39</sup> In his view, a 'relatively stable reciprocity of expectations between lawgiver and subject' is part of the very idea of a functioning legal order.<sup>40</sup> Laws and rules create expectations on the part of the citizen that are consolidated when there is congruence between official action and those declared rules.<sup>41</sup> Equally the whole system of law is premised on the expectation of the law giver that its subjects are of the capacity and disposition to usually abide to the rules.<sup>42</sup> In this sense, according to Fuller, the effective functioning of a legal system depends on a 'cooperative effort – between law-giver and subject.'<sup>43</sup> The idea that law entails a measure of reciprocity between law giver and citizen is similar to what Waldron has called self-application and voluntary self-control. Waldron's ideas regarding the procedural role of the individual inside the system of law is also intimately connected to Fuller's exploration of communication, which he finds exists at a vertical level between the governed and the governing and at a horizontal level between citizens. According to Fuller one of the very purposes of law is to '[o]pen up, maintain, and preserve the integrity of the channels of communication by which men [and women] convey to one another what they perceive, feel and desire.'<sup>44</sup>

Building on Fuller's interactional theories, Waldron has gone even further to identify the significance of the more active role that individuals play in shaping and defending their rights within the legal framework. Agreeing with Fuller that 'a fallacy of modern positivism' is its 'exclusive emphasis on the command-and-control aspect of law, or the norm-and-guidance aspect of law,' Waldron has argued that much more attention

<sup>32</sup> Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(1) Cambridge Law Journal 200, 206 citing Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* William N. Eskridge and Philip Frickey (eds) (Foundation Press 1994) 120–1.

<sup>33</sup> See also Waldron, 'Importance of Procedure' (n 26) 16.

<sup>34</sup> The link between human dignity and the rule of law is also noted by Raz 'The Rule of Law and Its Virtues' (n21) 221 who states: 'observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating persons capable of planning and plotting their future... The law can violate people's dignity in many ways. Observing the rule of law by no means guarantees that such violations do not occur. But it is clear that deliberate disregard for the rule of law violates human dignity. *It is the business of law to guide human action by affecting people's actions* [emphasis added].'

<sup>35</sup> Indeed Waldron points out that although Fuller is best known for his writing on the formal elements of the rule of law, in fact he was 'one of our deepest thinkers on matters procedural.' Jeremy Waldron, 'Thoughtfulness and the Rule of Law,' British Academy Law Lecture, February 2011, 11. For the connection between the procedural rule of law and Fuller, see Sanne Taekema 'The Procedural Rule of Law – Examining Waldron's Arguments on Dignity and Agency' in B. Sharon Byrd, Joachim Hruschka and Jan Joerden (eds), *Annual Review of Law and Ethics* (Duncker & Humboldt, Berlin, 2013), 133, 140–1. The account by Taekema was a key source of inspiration to read further into this connection between Fuller and Waldron.

<sup>36</sup> Lon Fuller, *Morality* (n20) 162.

<sup>37</sup> *Ibid* 219 and 221.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid* 209 and 162.

<sup>40</sup> *Ibid*.

<sup>41</sup> Lon Fuller, 'Human Interaction and the Law' 1969 in *The American Journal of Jurisprudence* 14(1) 1–36, 24.

<sup>42</sup> Fuller, *Morality* (n20) 219.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid* 186.

needs to be given to the culture of argument that any legal system ‘frames, sponsors and institutionalizes.’<sup>45</sup> He points out that it is a fundamental characteristic of legal systems that they provide spaces for the voices of those who are defending their rights. Law as a normative architecture entails an inner acknowledgement of the fact that individuals will have an opinion on the way in which law applies to them.<sup>46</sup> The idea that citizens can have a view on the norms that apply to them is also one found in the writings of Fuller who argues that citizens do not only need to know the law so that they can obey it and live their lives with relative freedom, but also so that they can subject the law to public criticism.<sup>47</sup> In Taekema’s words, the procedural rule of law developed by Waldron and based on the interactionality of Fuller recognises ‘the role of ordinary people as contributors to the shape and content of the law itself.’<sup>48</sup>

### **3.4. Legal universes, communities of practice and everyday life**

Together, Fuller and Waldron’s writings can be seen as providing important insights into what a bottom-up perspective to the rule of law should look like. In doing so, they also develop the idea that law creates a legal universe in which individuals live, participating and contributing in a multiplicity of ways and with varying degrees of formality.<sup>49</sup> This latter notion has similarities with the idea of ‘communities of practice’ that has been developed by Brunnée and Toope in their exploration of legitimacy and legality in international law.<sup>50</sup> Analysing international legal norms, Brunnée and Toope have relied on Fuller’s writings on interactionality to argue that it is important to consider whether communities of practice develop around a norm. They define a community of practice as a setting in which ‘the knowledge and norms that shape actors’ understanding of the world are generated and practices evolve.’<sup>51</sup> Building on theories advanced by social learning theorists Lave, Wenger and Adler and explicitly linking them to the interactional theory of law put forward by Fuller, Brunnée and Toope have argued that the existence of a ‘practice of legality is even more important than enshrining norms in positive law.’<sup>52</sup> People need to know what the law says and have a ‘shared understanding of legality.’<sup>53</sup> The idea that perceptions of legality on the ground may be more important than technical appraisals of whether law is ‘law’ holds similarities with legal pluralist approaches which deny the State ‘special status’ in the creation of ‘governing norms’ and argues that ‘law’ arises out of ‘all collective behavior entailing systematic understandings of our commitments to future worlds’ i.e. the normative.<sup>54</sup>

Similar ideas are also found in scholarship on law and everyday life.<sup>55</sup> As a body of scholarship that identifies itself as taking a ‘bottom up’ perspective, scholarship on law and everyday life provides some further helpful insights into what it means to look at the rule of law ‘from below.’<sup>56</sup> According to these scholars, adopting a bottom-up view means uncoupling law from formal legal institutions and seeking to understand how law finds its effect in ordinary social interactions within neighbourhoods, families, schools, community relations.<sup>57</sup> Prioritising the word and concept ‘legality’ over the word ‘law’ in a similar manner to Brunnée and Toope, scholars have sought to understand how legality manifests itself and is lived and embodied outside formal legal spaces, in the commonplace materiality of the schemas of everyday life.<sup>58</sup> Similar ideas are also found in Hertogh’s writing on the ‘Living Rule of Law’ where he has relied upon *inter*

<sup>45</sup> See also Waldron, ‘Importance of Procedure’ (n26), 22. This reference to ‘command and control’ holds echoes of Fuller’s reference to ‘one-way projection of authority’, Lon Fuller, *Morality* (n20) 216 and 221.

<sup>46</sup> Waldron, ‘How Law Protects Dignity’ (n33) 210.

<sup>47</sup> Fuller, *Morality* (n20) 51.

<sup>48</sup> Taekema (n36) 141.

<sup>49</sup> The term ‘normative universe’ is used by Robert M Cover, ‘The Supreme Court 1982 Term, Foreword: Nomos and Narrative’ (1983–1984) 97 Harv. L Rev 4. Gorobets argues that domestic and international jurisprudence develop as two ‘pocket universes’, Gorobets ‘Idea of Normative Authority’ (n3) 233.

<sup>50</sup> Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP, Cambridge 2012).

<sup>51</sup> *Ibid* 63–4.

<sup>52</sup> *Ibid* 72.

<sup>53</sup> *Ibid* 63 and 69.

<sup>54</sup> Robert M Cover, ‘The Folktales of Justice: Tales of Jurisdiction’ (1985) 14 Cap U L Rev 179, 181. See also Sally Merry, ‘Legal Pluralism and Legal Culture’ in Brian Z. Tamanaha, Caroline Sage and Michael Woolcock (eds) *Legal Pluralism and Development* (CUP, Cambridge 2012).

<sup>55</sup> Patricia Ewick and Susan S. Silbey, *The common place of law – stories from everyday life* (University of Chicago Press 1998).

<sup>56</sup> *Ibid* 19.

<sup>57</sup> *Ibid* 20.

<sup>58</sup> *Ibid* 16. See also Austin Sarat and Thomas R. Kearns (eds) *Law in Everyday Life* (University of Michigan Press 1995).

*alia* Erlich's theories of 'living law.'<sup>59</sup> As one of the few scholars who has explicitly sought to articulate a 'bottom-up' perspective to the rule of law, Hertogh has argued similarly that such a perspective requires turning away from a study of law in action (i.e. how legal principles are implemented in legal and social practice) in favour of a study of everyday legal practices (where the content of the law is not seen as an external fixed benchmark).<sup>60</sup> He asserts that it is necessary to place equal focus on people's understanding of the rule of law and acknowledge that these understandings may be quite different to the law on the books. Indeed, Hertogh points out, and also demonstrates through his empirical research on a refugee camp on the Thailand-Myanmar border, that the adoption of a bottom up approach may sometimes bring forth a 'completely different image' of the rule of law because it allows greater acknowledgment that spaces are often governed by plural legal orders, values and cultural norms that may compete or clash with official versions of the law.<sup>61</sup>

#### **4. A new field of enquiry into how civilians experience armed group law**

This review of literature on the rule of law 'from below' provides several useful tools for understanding how it might be possible to add a new dimension of enquiry to existing literature on armed groups and domestic law which so far has largely considered whether armed group law 'is law' from a positivist perspective. Certainly it confirms the importance of going beyond the positivist questions about whether armed group law and rules is 'law' and asking instead how rules and laws made by armed groups are experienced by civilians living in territory under their control. Three further themes come to the fore from the foregoing literature review. First, the scholarship encourages consideration to be given to the notion that the existence of law or rules in society – duly promulgated and clear – *can be* an important means of securing some kind of security for civilians because they allow them to live their daily lives in a manner that takes due account of the (legal) consequences of their actions and decisions. This idea was seen to emerge from the more traditional theories of the rule of law that finds its purpose to be to constrain arbitrary action. It also emerges out of the ideas formulated by Fuller and developed by Waldron that posit that rules can only be effective if they are understood as conductors of bidirectional energy, instead of being conceptualised as unilateral edicts. If law-givers act in a manner that creates 'expectations' of compliance in the minds of the ordinary citizen, the ordinary citizen will they be motivated to abide by rules.

A second theme that emerges is the idea that there is value in paying attention to the roles that individuals play within the legal framework itself. We have seen that in addition to understanding the content and form of rules, it is important to consider the extent to which civilians are able to play a role in the legal institutions that are set up to apply rules (i.e. courts and tribunals). Paying attention to this procedural aspect often found in institutions provides insights on whether individuals are treated with dignity within a system of rules, or whether they are merely treated like passive recipients of one-directional projections of authority. Connectedly, the literature on law and everyday life above confirms the importance of seeking to understand the varied roles that law and rules play in certain geographical spaces. It confirms that while it is important to make a top-down enquiry about whether armed group law is 'law' and how legal institutions work, it can be *just as important* to consider how civilian communities living within that legal system view and experience the rules that affect their rights, lives, relationships and property. It confirms that it is important to consider how laws and rules passed or adopted by armed groups shape and define the everyday lived experiences of civilians on the ground. It also confirms the importance of paying attention to how lived experiences of law corresponds with armed group law (i.e. the law on the books) and State law (i.e. the law that was previously on the books). While a proper analysis of these points would require these kinds of criteria to be fed into the design of empirical field research in the context of a larger study, the second half of this article subjects them to a preliminary analysis by comparing them with literature on rebel governance and studies on the administration of justice by armed groups.

<sup>59</sup> Marc Hertogh, 'Your rule of law is not mine: rethinking empirical approaches to EU rule of law promotion' (2016) 14 Asia Europe Journal 43, 48.

<sup>60</sup> Ibid 49.

<sup>61</sup> Ibid 54.



## 5. Civilian communities' experiences with law in armed group territory

### 5.1. Armed groups laws can deliver feelings of both safety and fear

When consulting literature and studies on rebel governance to evaluate whether civilians can gain value from armed group law, it is first important to note that the analysis contained within this body of scholarship is highly granular. It often takes pains to emphasise that it is too simplistic to say that the administration of justice by armed groups elicits *either* simple opposition or approval in civilian populations. That fact notwithstanding, there are many studies that indicate that individuals living in territory controlled by armed groups attach value to the existence of rules legal dispute resolution mechanisms in their societies. In her detailed study of the Islamic State in 2016, Mara Revkin concluded that the existence of the Islamic State's legal system was valued by many people on the ground, at least at a certain moment in time in the conflict. Interestingly, and with echoes of the debate between 'formal' and 'substantive' theorists of the rule of law referred to above, the people she interviewed made the distinction between the content of the rules and the rules themselves, commenting that although they may 'hate' the group and its ideology, they valued the efficiency, effectiveness and transparency of the system. Several respondents compared the Islamic State system to the systems of the State or other groups finding it the 'lesser evil.'<sup>62</sup> Revkin notes that people's views on this point may have been informed by the fact that both Syria and Iraq were near the bottom of the corruption index in 2015, meaning that alternative justice systems were sometimes seen as a relief, at least in the early years of IS control.<sup>63</sup>

Similar conclusions regarding the value that civilians place on rules and dispute resolution mechanisms are seen in many different studies on rebel governance. In Ana Arjona's detailed work on social order in the non-international armed conflict in Colombia, she sets out a theory of how armed groups with long term horizons establish a kind of social contract with the civilian population, that is of benefit to both sides. She argues that by making their expectations of the civilian population known, armed groups can better control them. The fact that civilians know the rules within their society allows what Arjona calls 'voluntary obedience' (a term that has echoes with Waldron's writing on 'self-application').<sup>64</sup> She argues that civilians' knowledge of the rules and the consequences that will accompany their breach provide them with some tools to attempt to live in a sphere of lawfulness, that keeps them safe from punishment.<sup>65</sup> It allows them to make life decisions in a manner that permits them to weigh up the consequences of their actions, including negative ones. In elaborating this theory, Arjona argues that the existence of institutions that can resolve disputes are 'essential building block[s] of society' because '[c]onflict is inherent to human interaction.'<sup>66</sup> She indicates that dispute resolution institutions provided by armed groups are often essential to civilian communities because they prevent conflict by 'decreasing uncertainty, reducing the number of available choices, and creating precedent.'<sup>67</sup> Armed groups promulgate rules and set up courts to enforce them not only to impose control on the civilian population but also seek to win their support.

Indeed, numerous empirical studies confirm civilians' need for institutions to resolve disputes on the basis of law in times of armed conflict.<sup>68</sup> Studies on Afghanistan indicate that civilians place a high value on the ability to access courts for land disputes, even when run by the Taliban. Different studies on Afghanistan have linked a lack of access to justice to insecurity for civilians. In the absence of a functioning justice system, local disputes can more easily 'fester and deepen' becoming a major cause of conflict.<sup>69</sup> For many years now, the Taliban have played a role in resolving inter-community disputes in the territory under their control.<sup>70</sup> While some of the Taliban's decisions are feared by the community as brutal, others are often

<sup>62</sup> Mara Revkin, *The Legal Foundations of the Islamic State*, Brookings Institute, Analysis Paper, No. 23 (July 2016) 11.

<sup>63</sup> *Ibid* 11. See also ILAC (n8) 82–3. Raid Haid, *Local Community Resistance to Extremist and Groups in Syria*, Middle East and North Africa Programme (Chatham House, June 2017) 9–10 for details of how ISIS sought to portray itself as more efficient and less corrupt.

<sup>64</sup> Arjona (n7) 49.

<sup>65</sup> *Ibid* 48.

<sup>66</sup> *Ibid* 69.

<sup>67</sup> *Ibid*.

<sup>68</sup> For the relevance of private micro level violence and disputes in non-international armed conflicts, see Stathis Kalyvas, *The Logic of Violence in Civil War* (CUP, Cambridge 2006).

<sup>69</sup> Jackson & Weigand (n11) 3. See also Elizabeth Lee Walker, *Culturally-Attuned Governance and Justice in Helmand Province, Afghanistan* (April 2010) 77.

<sup>70</sup> Walker, *ibid*.

said to be valued for their authority and finality.<sup>71</sup> Comparable conclusions have also been found in studies on armed group justice in Syria.<sup>72</sup> Here, it has been noted that the establishment of courts in non-government controlled spaces were largely driven by three factors: (i) the fact a lack of courts lead to a ‘justice vacuum’ and ‘administrative chaos’ in the area (ii) popular pressure for a system to be created to settle disputes and (iii) the need for trusted mechanisms for the resolution of disputes between armed actors.<sup>73</sup> In Nepal, scholars writing on the Maoists have noted that some of the people’s courts established by the group were seen as being effective in settling village level disputes and were more accessible than government courts, which were often several days’ walk away.<sup>74</sup> Similar observations about individuals preferring LTTE courts in some instances have been made by Mampilly in his study of Sri Lanka and Suykens in his study on Naxalite and Naga India.<sup>75</sup>

However, many of these studies also note that sometimes the legal institutions established by armed groups are also used to exert control over the population.<sup>76</sup> In Nepal, the same courts that were described as effective were also criticized as representing a ‘coercive system’ that dispensed ‘arbitrary justice.’<sup>77</sup> Equally the Syrian study finding that armed group courts responded to a social need also noted that armed groups quickly began to use the newly established justice institutions as a way of exerting their control over the territory and population.<sup>78</sup> Likewise in Arjona’s study of Colombia, she highlights the ‘instrumental value’ of dispute institutions, referring to a range of studies showing how courts have often been used to consolidate power, not only by armed groups but also by colonial powers. She argues that courts are always a key instrument by which governing authorities (State or non State) can increase social control, enforce rules and increase their legitimacy.<sup>79</sup> One of her interviewees, a FARC mid-level commander, confirmed: ‘The FARC creates rules for living together. But this is not with the goal of creating ideological consciousness, but rather to increase their social control.’<sup>80</sup> While this statement confirms that the FARC did not seek to create an ideological consciousness with their justice institutions, other armed groups have clearly used laws and rules to this end. The obvious example is the Islamic State which used its legal system not only to control its citizens, but also to expand its Islamic ideology.<sup>81</sup> In addition to creating a series of criminal offences and torts based on Islamic law, it made Islamic education mandatory and punished apostasy. Likewise, by discriminating against non-Muslims in law, the group nurtured the creation of a social hierarchy in which Muslims could achieve more social advancement than non-Muslims, being subject to less persecution, social controls and taxes.<sup>82</sup>

These conclusions and observations mirror broader findings in studies on rebel governance that governance projects by armed groups – including those involving the passing and enforcement of rules and laws – almost always instil a contradictory mixture of fear and acceptance in the civilian population.<sup>83</sup> Frerks and Terpstra have commented that armed groups need to call upon both coercion and legitimacy strategies to make a civilian population comply with their rules in a ‘quasi voluntary’ fashion. This term ‘quasi-voluntary’ used by Frerks and Terpstra has some similarities with Waldron’s theories on ‘self-application’ and Arjona’s writings on ‘voluntary obedience.’<sup>84</sup> It can be understood to refer to compliance which is ‘motivated by a

<sup>71</sup> Walker, *ibid* 87.

<sup>72</sup> Huang, (n13) 124 and ILAC (n8) 79.

<sup>73</sup> ILAC (n8) 79.

<sup>74</sup> Huang (n13) 126 and Sivakumaran (n2) 493.

<sup>75</sup> Mampilly, (n6) 118–9; Bert Suykens, ‘Comparing Rebel Rule through Revolution and Naturalization: Ideologies of Governance in Naxalite and Naga India’ in Arjona, Kasfir and Mampilly (n4) 138–157, 149; See also Daragh Murray, ‘Engaging Armed Groups Through the Development of Human Rights Obligations: Incorporating Practice, Motivation and Ideology to Promote Compliance with International Law’ in Terry D. Gill and others (eds) (2016) *Yearbook of International Humanitarian Law* 119, 134.

<sup>76</sup> Loyle (n11) 9 who writes: ‘judicial processes are able to be used as either a tool of co-optation of the general population (taking a “positive approach to their problems” in Guevara’s words) or coercion (“punishing” those who do not support the rebel cause).’

<sup>77</sup> Huang (n13) 124; Loyle (n11) 20; Sivakumaran (n2) 493.

<sup>78</sup> *Ibid*.

<sup>79</sup> Arjona (n65) 72–3. See also Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making* (CUP Cambridge 2005) 222–3.

<sup>80</sup> Arjona (n7) 186.

<sup>81</sup> Revkin (n63) 19.

<sup>82</sup> *Ibid* 16.

<sup>83</sup> Kalvyas (n69) 101. Niels Terpstra and Georg Frerks, ‘Rebel Governance and Legitimacy: Understanding the Impact of Rebel Legitimation on Civilian Compliance with the LTTE Rule’ (2017) 19(3) *Civil Wars* 279, 284. The term legitimacy has been referred to as the acceptance by populations of a regime as correct and appropriate.

<sup>84</sup> *Ibid*.

willingness to comply but backed up by coercion, in order to ensure others will obey the ruler.<sup>85</sup> A similar observation has been made by Kalyvas who indicates that any commitment felt by the civilian population to an armed group will result from varying combinations of persuasion and coercion. Kalyvas shares an anecdote told by Finnegan in his study of Mozambique, which recounts a conversation with a Mozambican peasant:

Wouldn't the bandits be recognized and turned over to the police [if they came in town]? The [man] to whom I put this question said, 'Not necessarily. The police are not popular here.' Were the bandits popular, then? 'Not necessarily.'<sup>86</sup>

Drawing upon this anecdote alongside many others, Kalyvas highlights the ambivalence that civilians often feel towards armed groups. He argues that the behaviour of most people living in territories under the control of armed group is motivated by a desire to survive. He argues that only a very tiny proportion of the population is actively involved, either as fighters or active supporters of an armed group.<sup>87</sup> Commenting on some of the complex and contradictory dynamics found within the civilian-armed group relationship, van Baalen points out it is often too simplistic to treat governance by armed groups as the inverse of coercion, because the two are often intricately interwoven, with governance projects serving to 'both protect and repress.'<sup>88</sup>

It is interesting to note that some of these observations chime with findings in theoretical writings on law and State-building and law and power. In State territory, it is said that it is law's enforceability *through force* (interpreted broadly) that distinguishes 'law' from ordinary rules.<sup>89</sup> Weberian theory identifies law as a key instrument in the State's toolbox to justify a claim to the monopoly of the legitimate use of force. Similarly, it is often noted that there is a close relationship between 'law-making' and 'power making'.<sup>90</sup> Indeed, especially in today's world of what has been called legal 'fetishism,' it has been argued that 'to transform itself into sovereign authority, power demands an architecture of legalities or their simulacra.'<sup>91</sup> Likewise, as Foucault has argued, crime is productive.<sup>92</sup> These varied theories remind us that law-making initiatives by States can also involve some of the same contradictory dynamics seen above, with law serving simultaneously to protect, control, dominate and legitimate violence. These theories also provide explanations of why armed groups often have something important to gain by creating legal frameworks. The fact that armed groups create or appropriate a framework of rules allows them to respond to violations of those rules – e.g. crime – in a manner that then has the effect of reconstituting these frameworks in the minds of the civilian population.<sup>93</sup> It also allows them to set themselves up as a competitor to the *de jure* government in the eyes of the local population.<sup>94</sup>

## **5.2. Civilians' interactionality with law in armed group territory**

Having seen that laws passed by armed groups can deliver a complex and contradictory mixture of protection and repression to individuals living in armed group territory, the article now turns to consider what is known about individuals' relationship with the fabric of the law itself in these territories. In many ways, the fact that rules promulgated by armed groups achieve what Arjona has called voluntary obedience – and what Terpstra

<sup>85</sup> Sukanya Podder, 'Understanding the Legitimacy of Armed Groups: A Relational Perspective' (2017) *Small Wars & Insurgencies* 28(4–5), 686–708, 688.

<sup>86</sup> Kalyvas (n69) 102.

<sup>87</sup> *Ibid.*

<sup>88</sup> Sebastian van Baalen, *Reconceptualising Rebel Rule: The Responsiveness of Rebel Governance in Man, Cote d'Ivoire, the Programme on Governance and Local Development at Gothenburg*, Working Paper No. 34 2020, 6; See also Loyle (n11), 9.

<sup>89</sup> Austin Sarat and Thomas R. Kearns (eds), *Law's Violence* (University of Michigan Press, 1992) 7 citing Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' *Cardozo Law Review*, 11 (1990). In making this statement, Derrida clarifies that 'force' can be 'direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive or hermeneutic, coercive or regulative, and so forth' 927.

<sup>90</sup> John L. Comaroff and Jean Comoroff, 'Reflections on the Anthropology of Law, Governance and Sovereignty' in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Julia Eckert (eds) *Rules of Law and Laws of Ruling: On the Governance of Law* (Routledge 2009) 39 and Walter Benjamin, 'Critique of Violence', in P. Demetz (ed) and E. Jephcott (trans.), *Reflections: Essays, Aphorisms, Autobiographical Writings* (New York, Schocken Books 1978) 277–300, 295.

<sup>91</sup> Comoroff & Comoroff (n90) 39.

<sup>92</sup> *Ibid.* 55. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage 1955) 307–8.

<sup>93</sup> A similar dynamic has been noted in Afghanistan, Yemen and Mali. Revkin (n63) 6.

<sup>94</sup> Suykens (n75) 149.

and Frerks have called 'quasi-voluntary compliance'- can be seen to be evidence of rules and laws passed by armed groups having interactional character. It was mentioned above that when rules in rebel territory are made explicit and civilians know what is expected of them, they can alter their own behaviour to ensure their own safety.<sup>95</sup> As Arjona has argued, 'people dislike living with high uncertainty; they value order over disorder, even when it is imposed upon them.'<sup>96</sup> By adjusting their behaviour to armed group norms, individuals are demonstrating an acknowledgment of the rules and demonstrating some sort of expectation that the armed group will uphold their side of the bargain, by adhering to their rules themselves. The degree to which this kind of reciprocity emerges in armed group territory will clearly depend on the attitude and behaviour of the group to the rules, the relationship of the armed group to the civilian population and many other factors. Of the civilians she interviewed in her study of Colombia, Arjona concluded that about 90% of the civilians knew what rules they had to follow and stated that they had clear expectations of how combatants would behave if they did not follow them.<sup>97</sup>

While it is interesting to note these findings, it is also important to observe that just as legal literature on armed groups and law is currently lacking certain perspectives, non-legal literature on armed groups and legal institutions in the growing scholarly field referred to as 'rebel governance' is also currently missing certain perspectives. Indeed, it is noted that many of the scholars who have studied armed groups and legal institutions in an empirical manner are non-lawyers. This may explain why authors tend to provide fascinating empirical insights into the dispute resolution mechanisms that are run by armed groups, without looking in detail at the rules and laws employed by them.<sup>98</sup> Scholars from non-legal disciplines are generally more interested in the symbolic significance of courts, the factors that lead them to be created (e.g. control of territory, civilian support etc), the armed group's motivations for setting them up and their function in society, rather than in the substance of their rulings *per se* or the content or procedural fabric of the rules on which they are based.<sup>99</sup> As a result of this focus, the non-legal literature on rebel courts does not tell us much about the content of the laws or how they are passed and made known in societies. By focusing mainly justice and dispute resolution institutions, it also provides insights mainly into the ways in which individuals deal with conflicts or ruptures within their legal universe. By that it is meant that it provides insights into the circumstances that cause individuals to have recourse to a dispute resolution mechanism or court (e.g. disputes, crime etc) when they have a problem or dispute.

As a result, in both legal scholarship and rebel governance literature, we see that there is still relatively little analysis of the substantive content of armed group law and rules (and how it compares substantively to the law that previously applied in that territory) and the procedures and manner under which armed group law that is later applied by these institutions is (i) 'made' and (ii) promulgated. In existing analysis of judicial institutions set up by armed groups, there is also little distinction made between civil claims and criminal cases.<sup>100</sup> In both legal and non-legal scholarship, relatively little is known about the lived legal universe that armed groups create and in which individuals live their everyday lives, in particular when there is no 'rupture' of that legal universe caused by arrest, trial or the emergence of a dispute.<sup>101</sup> Such an enquiry would ask how, whether and to what extent armed group law has seeped into the lived experience and 'commonplace materiality' of people's everyday life (e.g. determining who and when individuals can marry, what procedures must be followed for babies to be registered when they are born, what property can be owned, inherited or rented, how debts can be collected, who is allowed to go to school, when and how pensions are paid). Such a focus would capture the everyday life experiences that take place in the traditionally private realm, providing vital insights into the extent to which different notions of legality exist in territory controlled by armed groups. It would also show whether and when it might be said that communities of practice have developed around certain armed group rules. It may also shed

<sup>95</sup> Arjona (n7) 48.

<sup>96</sup> Arjona (n7) 50.

<sup>97</sup> Ana Arjona, 'Wartime Institutions: A Research Agenda' (2014) 58(8) *Journal of Conflict Resolution* 1360, 1371.

<sup>98</sup> See for example Loyle (n11). See also Cyanne E. Loyle and Helga Malmin Binningsbó, 'Justice during Armed Conflict: A New Dataset on Government and Rebel Strategies' 2018 (62)(2) *Journal of Conflict Resolution*, 442, 451, Schwab (n12) 802.

<sup>99</sup> *Ibid.*

<sup>100</sup> For exceptions see Revkin (n63) and Jackson & Weigand (n11). It is noteworthy that Loyle (n11) also has a specific section on coercive judicial processes.

<sup>101</sup> See Austin, Sarat and Thomas R. Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life' in Sarat & Kearns (n58). At 51 it is stated, 'The hegemonic character of law in everyday life cannot be seen in those instances in which law actively intervenes in people's lives to change behavior, or where some discrete legal mechanism is available for use. Law is hegemonic in everyday life where it works unobtrusively, inseparably from social practices themselves.' See also Ewick & Silbey, (n55), 16.

light on how civilians living in armed group territory are sometimes forced to navigate *between* multiple legal frameworks or notions of legality, that may be at different moments competing, contradictory or complementary e.g. by, for example, choosing to access services provided by the State when in armed group territory or vice versa.<sup>102</sup>

### **5.3. Communities of practice in armed group territory?**

Despite this missing information, it is nevertheless possible to make some observations on the extent to which civilians interact with legal norms in territory under the control of armed groups. As these insights mainly relate to the role of civilians as participants in the legal framework they are analysed below in this section on 'communities of practice.' When seeking to understand how civilian communities perceive rules in their communities, some helpful information can be gleaned by analysing civilians' use of courts and other law enforcement institutions. The use by civilian communities of courts provided by armed groups may be taken as evidence of civilians interacting with the norms, in a manner identified by Fuller as essential if rules are going to be understood as having any effectiveness. Such interaction is particularly evidenced by individuals having recourse to armed group courts and dispute resolution mechanisms to solve their civil disputes. As a civil claims court usually represent a non-coercive jurisdiction, the active resort by individuals to these courts and tribunals for resolution of their civil disputes can be taken to be an sign of some sort of acceptance of the legal norms imposed by armed groups.<sup>103</sup> It shows that the rules applied by these courts and tribunals are somewhat recognised within communities, as a framework capable of regulating individuals' legal relationships with other individuals and providing a legal framework by which private disputes on land and debt can be solved. Even though civilian communities' recourse to these courts may be sometimes due to a lack of alternatives, it has been shown above that there have been a few situations where civilian communities have demonstrated a preference for armed group courts over State institutions.<sup>104</sup> This demonstrates that in some circumstances legal frameworks created by armed groups are capable of creating a relatively stable reciprocity of expectations between lawgiver and subject to the extent that they can be relied upon to resolve conflicts between the armed group and individuals and those that arise in the horizontal relations between individuals.

It can also be noted that studies on armed groups and legal institutions indicate that in some cases civilian communities feel a degree of affinity with and even contribute to the content of some of the rules that apply to them. Studies conducted in Afghanistan have indicated that courts hearing civil claims provided by the Taliban are sometimes seen in a more favourable light than courts provide by the government because Taliban courts were more accessible and easier to navigate than State courts. It has been commented in this regard that aspects of the legal system and code in Afghanistan were introduced post 2001 and were partly inspired by Western legal systems. Because the local community did not feel any affinity with these new rules, State courts had an unfamiliar feel for many Afghans in rural areas without formal education, and people felt more connection with Taliban institutions on issues related to [land disputes] and they also had recourse to customary courts.<sup>105</sup> Similar examples of civilian communities demonstrating an affinity with justice institutions in armed group territory are found in Syria. In Aleppo, it is known that armed groups and civilian legal professionals worked together to form a joint judicial system known as the Unified Council in Syria. After it became clear that this cooperation would not work, civilian lawyers took over the court for a period before it was ultimately taken over by extremists.<sup>106</sup> Likewise in Daraa, the Daraa Bar Association played a role in helping writing formal rules, laws and procedures.<sup>107</sup> A bargain was struck between the armed groups controlling the region and the lawyers of Daraa that allowed the lawyers and the armed

<sup>102</sup> It was already mentioned above that there are some instances where civilian communities choose armed group courts over State courts. For instances where civilian populations continue to access State issued birth registration services in armed group territory see Katharine Fortin, 'To be or not to be? Legal Identity in Crisis in Non-International Armed Conflicts (2020) 43 Human Rights Quarterly 29.

<sup>103</sup> For an example of civilians utilising armed group courts for civil claims, see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, Oxford 2012) 553 who writes that by late 2004, the LTTE courts had heard some 23,000 cases many of which related to land disputes and financial matters.

<sup>104</sup> See n75 above and Jackson & Weigand (n11) 3 who explain that by 2020 in north and north west Afghanistan while all three options (State, Taliban and customary courts) were 'available,' people have little option but to choose the Taliban courts if they live in an area under Taliban control.

<sup>105</sup> Jackson & Weigand (n11) 2. For contrast, see Walker (n70) 83 who in her study of Helmand Province in 2010 found that some Taliban judges came from Pakistan.

<sup>106</sup> ILAC (n8) 84.

<sup>107</sup> Ibid 86.



groups to make an equal number of judicial appointments, so that half would be trained in law and the other half would be trained Islamic scholars.<sup>108</sup>

These examples underline the further important point that it is often too simplistic to talk about service provision by armed groups *or* the State. While international humanitarian lawyers often like to conduct analysis in a manner that imagines that only the *Parties* to an armed conflict provide governance in times of armed conflicts, in fact civilians often take on active roles in service provision when the *de jure* government is absent, including those relating to dispute resolution and justice. Further examples of this phenomenon can be seen in studies of community dispute resolution in Colombia. Provost provides details of the conciliation committees run by the *Juntas de Acción Communal* (JAC).<sup>109</sup> He tells how these peasant organisations were also often the first place that people turned to, when seeking justice for community disputes. Although generally independent from the FARC, they had a strong relationship with the FARC in villages under the control of influence of the FARC. He also tells that sometimes FARC fighters were tried by an assembly of villagers.<sup>110</sup> Again, this indicates that it is inaccurate to assume that the agents of justice within a community living under the control of an armed group are always the members of the armed group and that those subject to judicial procedures are civilians. In some instances, this constellation can be reversed.

It also shows that individuals may seek justice with a completely different actor, that is not the armed group or the State. For example, in Afghanistan at different moments in the conflict people have been able to choose between customary courts, State courts and Taliban courts.<sup>111</sup> The observation that people living in armed group territory may be living in a 'governance palimpsest' where different actors and legal regimes overlap, conflict or even complement each other, in ever shifting constellations, provides another reason why a traditional top down rule of law lens can be such an inadequate tool when seeking to understand how law applies to these areas.<sup>112</sup> A lens looking at the rule of law 'from below' is better able to take account of the dynamic and multidimensional nature of the legal pluralism inhabiting these spaces. However, no matter what the identity of the justice giver (i.e. State, customary court, armed group court) it is reasonable to conclude that when civilian communities take active roles within justice institutions this may be taken as an indication that a community of practice might have built up around the norm, because by means of their participation, different sets of actors – the armed group and/or customary entity and civilian population – are acknowledging its legality.

However, it is clear that there are some serious limits to the application of a community of practice theory to rules in territory under the control of armed groups. The greatest of these limitations relates to the identity of the 'community' in question. Some armed groups co-opt certain civilians, for example those with an affinity to their ideology, to enforce norms against other civilians. For example, the Taliban has made local 'Vice and Virtue' commissions that police regulations related to dress code and other behavioural codes and are made up of *inter alia* civilian members.<sup>113</sup> Often these commissions enforce the rules against individuals who either reject the Taliban's ideology and/or have different traditions relating to dress and women's freedoms. While the participation of civilians in the enforcement of these behavioural norms could be seen to demonstrate acceptance of those norms 'from below,' it is imperative not to forget that these civilians only represent a small portion of the community of civilians connected to these rules. The need to sound an explicit warning on this point stems from the fact that there is little attention given to representativeness in the theories on the procedural rule of law by Waldron and interactivity by Fuller, possibly because this is presumed by the general tenet of generality in the formal rule of law. Studies on armed group governance systems make equally clear that an evaluation of individuals' experience with or connection to laws cannot be made in a general sense in a given swathe of territory. Studies will likely have to take account of different dynamics and relationships between armed groups and civilians in different areas of that territory and also

<sup>108</sup> Ibid 88.

<sup>109</sup> Provost (n9) 239.

<sup>110</sup> Ibid 246.

<sup>111</sup> Noah Coburn and John Dempsey, *Informal Dispute Resolution in Afghanistan*, United States Institute for Peace, 2010. See also Walker (n70) where she noted that in Helmand in 2010 the formal justice system was of little relevance to many Helmandis and the informal justice system resolved most civil disputes and minor criminal matters 73. It also notes that it was these customary courts that were considered to be the only 'adequate counterweight to Taliban justice.' See also n103 above.

<sup>112</sup> For the term 'governance palimpsest' see Hertogh (n59) 55 citing Kirsten McConnachie *Governing Refugees: Justice, Order and Legal Pluralism* (2014 Routledge, Abingdon/New York) 157. See Provost (n9) who also argues that legal pluralism is a helpful framework through which to analyze rebel law, 232.

<sup>113</sup> Human Rights Watch, 'You Have No Right to Complain: Education, Social Restrictions and Justice in Taliban-Held Afghanistan,' (2020), 37–8.

give due attention to the fact that certain kinds of rules may be more acceptable to some civilian communities in one location than others, depending on their ethnic, religious, political affiliations.<sup>114</sup> For example, several studies indicate that the Taliban justice systems relating to civil claims attract more community support than their more coercive rules dispensing criminal justice.<sup>115</sup>

## 6. Conclusions

This article has articulated a framework for assessing a rule of law from below that it is hoped may be of interest to scholars of the rule of law more generally. Drawing on writings by *inter alia* Fuller, Waldron, Brunnée and Toope, Ewick and Silbey, Sarat and Kearns and Hertogh, it has argued why and how it is important to take account of an individual's relationship with the law in any rule of law analysis, but especially in territories under the control of armed groups. It has put forward a framework of indicators that may provide insights into an individual's relationship with the law and used this framework to provide insights on the extent to which civilians living under the control of armed groups might feel a connection to the rules that mediate their relationship with the armed group and other individuals around them. This analysis has shown that in many cases both armed groups and civilian communities have something to gain from law-making or law enforcement initiatives. Armed groups create a means to control the population and simultaneously gain legitimacy. Civilian communities living under their control often benefit from the existence of rules and laws in their societies. It has been demonstrated that rules created by armed groups are sometimes able to confer civilian communities with a heightened capacity for self-determination, in that they allow them to make decisions about their daily lives that takes due account of expected consequences and risks. It has also been shown that civilians sometimes play a role in the legal frameworks applying in their territory. These insights are important because when stripped of the presumption of legitimacy that accompanies most State legal orders, it may become too easy to conclude that armed groups' laws should be viewed as another feature of the armed group's military strategy. It may also be easy to see armed group law as just another kind of manifestation of the kind of disorder that a State's law (and international law) is usually called upon to conquer and part of the broader landscape of violence in which armed groups are often thought to operate.<sup>116</sup> While the international law dimension of this topic has deliberately not been touched upon in this article, it is important to state that the idea that civilians have something to gain from the passing of laws is also relevant to ongoing discussions about the accountability of armed groups under human rights law. It confirms that much can be gained when armed group action is 'in accordance with law' and when rights are not interfered with 'arbitrarily'.<sup>117</sup>

In investigating the relationship of individuals with law in these territories, the purpose of this article has not been to make a determination of whether the law that applies in these spaces matches the standards of the rule of law generally. It leaves the question of whether armed groups constitutes 'law' or whether its content is 'good' to other studies. As Gorobets argues, the rule of law requires a 'coalescing' of a top-down and bottom-up perspectives meaning that any study that focuses on only one of these perspectives (like this one) will inevitably be incomplete.<sup>118</sup> Instead, the purpose of the article is to highlight the importance of *also* considering civilians' relationship with law in armed group territory, in order to *inter alia* better understand the risks and opportunities that accompany the use of law by armed groups. In bringing together literature streams from rebel governance and international law, the article argues that a bottom-up lens is much better able to take account of the shifting plurality of layered laws and rules that may inhabit spaces under the control of armed groups. The article also illuminates how much potential there is for future interdisciplinary research projects designed around this issue. Interdisciplinary studies could facilitate much more detailed insights into the *content* of armed group law, with attention given to how it is created, shared and made known, the difference between civil and criminal jurisdictions and how it relates to other rules and regimes. It could also bring an understanding of what has been called in this article the 'lived legal universe' of individuals living in territory under the control of armed groups or what has been called by others the

<sup>114</sup> See Walker (n70) 85–6 for a fine-grained account of how significantly civilian Taliban relations differed on matters of justice in different areas of Helmand province. See also HRW (n105) for similar variations in rules, their enforcement and civilian relations in different parts of Taliban held territory.

<sup>115</sup> For very different contemporary accounts of Taliban justice see reports by Jackson & Weigand (n11) (which focuses on civil claims) and HRW (105) (which focuses on both civil claims and criminal). See also Walker (n70) 87.

<sup>116</sup> Sarat and Kearns (n89) 4–5.

<sup>117</sup> For a further discussion of this see Murray (n75).

<sup>118</sup> Gorboets (n3) 237.

'commonplace materiality' of law. Such insights would provide information into the extent to which armed law has seeped into the marrow of everyday life, providing clearer insights into the interactionality of the norms and the communities of practice that have (or have not) built up around them in particular areas. They would also shed light on the manner in which armed groups' laws may interact with, contest with or complement State law in certain spaces.

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The author has no competing interests to declare.

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