BRILL NIJHOFF

JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 13 (2022) 362–377

Journal of International Humanitarian Legal Studies
brill.com/ihls

From Outlaws to Judges: Armed Groups and The Administration of Justice

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Abstract

René Provost's latest book, *Rebel Courts: The Administration of Justice by Armed Insurgents*, collects an impressive amount of practice of organized armed groups concerning the administration of justice in armed conflicts, and offers a detailed analysis of the legal issues surrounding the creation and functioning of insurgent courts. Drawing from field work and adopting a legal pluralistic methodology, Provost offers a comprehensive overview of how the rebel administration of justice functions in practice and of how international law regulates its different aspects, including the legality of rebel courts, due process guarantees, as well as international, transnational, and national recognition of the judicial practices of armed groups. In this review essay, I highlight the importance and novelty of Provost's approach, exploring the book's connections with other legal and non-legal literature on armed groups, and contextualize some of Provost's arguments concerning rebel law and rebel courts.

Keywords

Armed groups – rebel courts – justice – rebel governance – legal pluralism – international humanitarian law – international human rights law – rebel law

René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford University Press 2021), 9780190912222, GBP 105.00

1 Rebel Courts: a Common Feature of Armed Conflicts

In non-international armed conflicts, armed groups often provide to civilians services which are normally the prerogative of the state, a phenomenon referred to as 'rebel governance' in political science literature.[1] According to a study based on a dataset of over one hundred non-international armed conflicts, around a third of the concerned armed groups had legislative bodies, courts, laws, and police forces.[2] A police force and a judicial mechanism for the settlement of disputes are early features of rebel governance[3] because they allow armed groups to develop the capacity, and to create the conditions, for the provision of public goods other than security to the population.[4] By administering justice, armed groups maintain law and order, acquire information about the local community and are thus able to control it, but are also legitimized as the rightful authority in the eyes of the population and can shape society in accordance with their ideology.[5]

The insights into the administration of justice coming from rebel governance literature are among the starting points of René Provost's analysis in *Rebel Courts*.[6] Like Katharine Fortin and Heike Krieger,[7] Provost is one of the few international lawyers who engage with rebel governance studies. This allows him to put the spotlight on what normally falls in the shadow of purely legal

1 For various definitions of rebel governance see e.g. Ana Arjona, Nelson Kasfir and Zachariah Mampilly, 'Introduction' in Ana Arjona, Nelson Kasfir and Zachariah Mampilly (eds), Rebel Governance in Civil War (Cambridge University Press 2015) 3; 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 (Cambridge University Press 2015) 24; Reyko Huang, The Wartime Origins of Democratization. Civil War, Rebel Governance, and Political Regimes (Cambridge University Press 2016) 51.

2 Huang (n 1) 55, 71.

3 Zachariah Cherian Mampilly, *Rebel Rulers. Insurgent Governance and Civilian Life during War* (Cornell University Press 2011) 63.

4 ibid 17.

5 ibid 63; Ana Arjona, *Rebelocracy. Social Order in the Colombian Civil War* (Cambridge University Press 2016) 56.

6 René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford University Press 2021) 4–11.

7 Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 26–68; Heike Krieger, 'International Law and Governance by Armed Groups: Caught in the Legitimacy Trap?' (2018) 12 Journal of Intervention and Statebuilding 563; Katharine Fortin, 'The Procedural Right to a Remedy When the State Has Left the Building? A Reflection on Armed Groups, Courts and Domestic Law' [2022] Journal of Human Rights Practice 1.

analyses: the conditions and circumstances in which armed groups govern in general and administer justice in particular.[8] With a tinge of playfulness Provost explains that, as it emerges from rebel governance literature, the attitude of civilians towards rebel justice can be called 'the "Wi-Fi theory of justice governance": just like people connect to any available Wi-Fi network in cafés and shopping malls without being too concerned with the identity of the internet service provider, ordinary people do not care much whose justice is applied insomuch as it is generally predictable and fair.'[9] Indeed, while it might be easy to dismiss rebel justice as not justice at all (or even as the epitome of the lack of justice), this approach is questionable in light of the amount of people living under the control of armed groups and the attitude of civilians towards rebel governance institutions, and particularly rebel courts, which they often prefer to state courts.[10]

Provost's understanding of the circumstances and ways in which rebel courts operate in practice is bolstered by having conducted fieldwork in Iraq, Sri Lanka and Colombia, in addition to interviews with members of diasporas in North America, Europe and Asia.[11] On this basis, in the first part of each of the chapters of *Rebel Courts* he incorporated case studies concerning the administration of justice by the *Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo* (FARC), the Islamic State, the Taliban, the Liberation Tigers of Tamil Eelam (LTTE), and various Kurdish groups.

Provost's work is the first book-length international law study concerning courts of armed groups,[12] which so far had only been addressed as one aspect of longer studies or in shorter pieces.[13]

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8 Provost (n 6) 10.

9 ibid footnote 41.

10 Fortin, 'The Procedural Right to a Remedy When the State Has Left the Building?' (n 7) 14.

11 Provost (n 6) 22.

12 Frank Ledwidge, *Rebel Law: Insurgents, Courts and Justice in Modern Conflict* (Hurst & Company 2017) rather concerns the role of courts and law in insurgency and counterinsurgency.

13 Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Bloomsbury Publishing PLC 2016) 205–271; Jonathan Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict' (2007) 89 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 253; Andrew Clapham, 'Detention by Armed Groups under International Law' (2017) 93 International Law Studies 1, 17–20; Alessandra Spadaro, 'Punish and Be Punished? The Paradox of Command Responsibility in Armed Groups' (2020) 18 Journal of International Criminal Justice 1, 20–25; Hannes Jöbstl, 'Bridging the Accountability Gap. Armed Non-State Actors and the Investigation

In this review essay, I engage with several interrelated aspects of Provost's analysis to showcase the contributions of the book to existing literature on armed groups. I start with an overview of a widespread approach of international lawyers towards armed groups (Section 2) and I explain how Provost's own approach differs from it (Sections 3 and 4). I then move to a substantive engagement with some of the book's main arguments concerning rebel law and the establishment of rebel courts (Sections 5 and 6). In closing, I offer a final appraisal of the book and the way it is organized (Section 7).

2 A Widespread Attitude Towards Armed Groups

Scholars often argue that some armed groups cannot be made to respect international humanitarian law (IHL) and thus are not worth engaging with to promote compliance with the law.[14] When it comes specifically to the administration of justice, Louise Doswald-Beck and Mark Klamberg were both doubtful that armed group courts tasked with the prosecution of enemy personnel could be independent and impartial.[15] Jonathan Somer, instead, questioned whether the '"basement" or "portable" courts' of armed groups without territorial control could ever be considered to be 'regularly constituted' as required by Common Article 3 of the 1949 Geneva Conventions.[16]

Indeed, international lawyers often focus on what armed groups are not or would not be able to do, practically or legally. This type of reasoning is evident in works concerning detention by armed groups and particularly the possibility for armed groups to adopt a legal basis to detain individuals. Daragh Murray, for example, reasoned that if IHL does not grant armed groups a legal basis to detain, all of their detentions will be arbitrary because they are not authorized under domestic or international law.[17] According to Manuel Ventura, detentions by armed groups are always arbitrary because no legal basis exists for

and Prosecution of War Crimes' (2020) 18 Journal of International Criminal Justice 567, 570–579.

14 Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 Journal of International Humanitarian Legal Studies 5, 14.

15 Louise Doswald-Beck, 'Judicial Guarantees under Common Article 3' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford University Press 2015) 491; Klamberg (n 13) 253.

16 Somer (n 13) 687–688.

17 Daragh Murray, 'Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward' (2017) 30 Leiden Journal of International Law 435, 448.

them under either IHL or domestic law.[18] Along the same vein, Laura M. Olson argued that '[i]t is highly unlikely that a state's domestic law would authorize a "rebel" group to deprive the state's citizens, including members of its armed forces, of their liberty. How are non-state actors to provide by law the reasons for internment?'.[19] None of these authors considered that armed groups could adopt a legal basis independently of international and domestic law, presumably denying all law-making capacity to armed groups. Frédéric Mégret did take into account, but seemingly discarded, the idea that non state armed groups (NSAGs) might rely on their laws to detain individuals lawfully. He asked: 'The idea here is that detentions must be pursuant to law, but what is the law of a NSAG? It is certainly unlikely that such a group will be willing to apply the law of the State that it is fighting against. Can it prescribe norms in a way that is recognizably "legal" (predictable, general, etc.) or is there a sort of manifest contradiction between NSAGs and the very idea of legality?'[20]

Such an attitude towards armed groups is not reserved to academics, but was notably displayed by the Stockholm District Court in the *Sakhanh* case, which resurfaces time and again from the pages of *Rebel Courts* as a reminder 'of how real, current, and important the question of the administration of justice by non-state armed groups in conflict zones is.'[21] In that case, the Stockholm District Court found that in non-international armed conflicts (NIAC) armed groups can establish courts only to maintain discipline within their ranks and for the maintenance of law and order, provided that the courts are staffed with former state judges and that they apply law that pre-existed the outbreak of the conflict or is not considerably stricter.[22] The District Court effectively excluded armed groups from the realm of law-making and imposed

18 Manuel J Ventura, 'Automatic Criminal Liability for Unlawful Confinement (Imprisonment) as a War Crime? A Potential Consequence of Denying Non-State Armed Groups the Power to Detain in NIACs' in Ezequiel Heffes and Marcos D Kotlik (eds), *International Humanitarian Law and Non-State Actors. Debates, Law and Practice* (Springer 2020) 163.

19 Laura M Olson, 'Practical Challenges Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict' (2009) 40 Case Western Reserve Journal of International Law 437, 452.

20 Frédéric Mégret, 'Detention by Non-State Armed Groups in NIACs: IHL, International Human Rights Law and the Question of the Right Authority' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors. Debates, Law and Practice* (Springer 2020) 182.

21 Provost (n 6) 453.

22 *Prosecutor v Omar Haisam Sakhanh, Judgment, Stockholm District Court* (2017) Case no. 3787-16, available in English in 16(2) Journal of International Criminal Justice (2018), 403–424 [31]; the judgment was upheld on appeal as explained by Klamberg (n 13) 259–261.

standards that are unlikely to be met in practice by insurgents, given that they often prefer adopting their own legal standards rather than applying the law of the state against which they are fighting.[23]

The result of this legal thinking, shared by many scholars and the Swedish judges, is a state-centric view not only of international law generally, but also of IHL of NIAC specifically – even though the latter should be interpreted in a way so as to make compliance by armed groups possible. Marco Sassòli, from the pages of this very Journal over ten years ago, called for the involvement of armed groups in the development, interpretation and operationalization of the rules of IHL that apply in NIAC, with a view to making it more realistic for them to comply with and therefore more often respected.[24] *Rebel Courts* responds to Sassòli's call, and in it Provost debunks the myths about what armed groups cannot do, as a matter of fact and as a matter of law. He does so, on the one hand, through a careful analysis of the practice of several armed groups – collected through extensive documental and field research – as well as, on the other hand, by adopting a legal pluralistic methodology to make sense of the administration of justice by non-state armed groups from the perspective of international law. These aspects will be analyzed in the following two sections.

3 Taking Armed Groups (And Their Courts) Seriously[25]

Provost's research into the practice of armed groups and their courts has the merit of going beyond an admittedly unsatisfactory application of legal standards to 'an imagined version of rebel justice derived from a limited number of documents produced by a few non-state armed groups themselves or described in stories in the media.'[26] Of course, not all IHL scholars studying armed groups have the capacity, interest, or necessary funding to conduct fieldwork.[27] Indeed, field research is also not strictly necessary to conduct 'meaningful and penetrating legal analysis'.[28] Provost's approach, however, did allow him to see

23 Provost (n 6) 264.

24 Sassòli (n 14).

25 This is a nod to ibid 20 who, in the first issue of this Journal, called for 'a serious analysis of existing IHL of non-international armed conflicts from the perspective of armed groups'.

26 Provost (n 6) 18.

27 ibid xii Provost explains that he was awarded a generous prize from the Pierre Elliott Trudeau Foundation that allowed him to carry out this project.

28 ibid 18.

for himself what armed groups already do, well and not so well, when it comes to the administration of justice, in addition to inquiring what it is that they should and could do, as far as international law is concerned.

Making compliance with the law possible for armed groups, including by interpreting the relevant rules so that armed groups can comply with them, is not meant to legitimize the insurgents' struggle or their status. Specifically in the context of the administration of justice, an inquiry into what armed groups do and into their capacity to respect the law, which is a prerequisite for a realistic interpretation of the relevant legal standards, is not meant to argue that rebel courts are 'better' than state courts.[29] Rather, in the interest of those who are affected by the rebel administration of justice, international law standards (on the regular constitution of courts, their requirements of independence, impartiality and fair trial, etc.) need to be interpreted in order 'to nudge this practice towards as close an approximation of justice as can be achieved in such challenging circumstances.'[30] In my view, Provost succeeded in this endeavor.

If in the collective imaginary the names of armed groups like the FARC, the Taliban, or the Islamic State might be associated with atrocities and blatant violations of international law, Provost avoids reducing them to a caricature. He studies their judicial practices seriously and meticulously to show that civilians often trusted them with the resolution of disputes, and how in some respects their actions aligned with the concepts of rule of law and justice.[31] For instance, Provost describes the Taliban's systematic rotation of judges, aimed at preventing them from forming ties with the local population[32] and coupled with an oversight mechanism to collect information on the performance of judges and to allow civilians to report cases of corruption or misbehavior,[33] which he takes as signs of the impartiality of Taliban courts.[34]

At the same time, Provost makes it clear that courts of armed groups do often fall short of complying with international law standards. The courts of the *Mouvement du libération du Congo*, whose judges reported to the group's leader, Jean-Pierre Bemba, at the end of each hearing to receive instructions, and the Timbuktu Islamic Court, which merely reproduced the decisions taken by the leaders of Ansar Dine/al-Qaeda in the Islamic Maghreb, are glaring

29 ibid 453.
30 ibid 454.
31 ibid 56, 100, 117–118.
32 ibid 129. Due to the book having been published in late 2021, this concerns the period prior to the Taliban's takeover of Afghanistan in August 2021.
33 ibid 135.
34 ibid 215.

examples of rebel courts that are not independent and do not comply with the requirements of international law.[35] Similarly, Provost points out that the FARC's practice of tying the accused to a tree would suggest a presumption of guilt rather than innocence as required under international humanitarian and human rights law.[36] Provost's analysis remains fair, balanced, and realistic throughout the myriads of examples of rebel courts he presents.

4 Rebel Courts Through the Lenses of Legal Pluralism

In addition to showing what armed groups (can) do in practice, in *Rebel Courts* Provost demystifies some assumptions regarding what they cannot do as a matter of law. As discussed earlier, armed groups are often denied – implicitly or explicitly – the ability to make law. In the context of detention cited above, this would mean that they can only rely on domestic or international law as a legal basis to deprive individuals of liberty or else carry out arbitrary and unlawful detentions. In relation to the administration of justice, a similar reasoning would entail excluding that armed groups can prosecute individuals under their own law rather than under the law of the state, or even set up a 'regularly constituted court' as prescribed by Common Article 3. Governments confronted with armed groups and their courts systematically adopt this perspective, denying norms adopted by rebel groups the qualification of law and, as a consequence, the qualification of courts to the institutions that apply them.[37] This stance was emblematically captured in an interview with the Chief Justice of Sri Lanka who, when asked to comment upon the courts of the LTTE – a group which had established a multi-tiered judicial system, adopted their own law codes, and even set up a law college,[38] – replied:

> The LTTE can have a conciliation mechanism if they want, like if two neighbours are at dispute then settling such a dispute in an amicable manner is all right. But they have no judicial authority. Judicial power is part of the sovereignty of the people and it cannot be exercised by any

35 ibid 312, referring to Judgment pursuant to Article 74 of the Statute, Bemba Gombo (ICC-01/ 05-01/08), Trial Chamber III, 21 March 2016, paras 299–300 and *Procureur c Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Version publique expurgée, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (2019) *ICC-01/12-01/18* (*ICC Pre-Trial Chamber I*), para 420.

36 Provost (n 6) 318–320.

37 ibid 11.

38 Described in detail ibid 229–244.

> other person than those who are vested with it. If someone else is administering justice then he is doing it on his own accord.[39]

From this perspective, the existence of multiple legal orders in conflict zones where armed groups exercise authority is 'factually exceptional and normatively problematic'.[40] In contrast, legal pluralism – which Provost subscribes to – takes as a given the existence of multiple and interacting legal orders and rejects essentialist definition of law in order to accommodate both state and non-state normativity.[41]

One might be tempted to conclude that, for legal pluralists, any norm regulating social interactions amounts to law, and hence that 'we are swimming, or drowning, in legal pluralism.'[42] However, this is overly simplistic. Through a brief historic overview, Provost shows that the exclusive positivist association between law and the state is relatively recent.[43] Adopting a legal pluralistic view means simply acknowledging that law 'has never been a state monopoly: there are many non-state centres and processes that create, interpret, and apply law.'[44] Legal pluralism then allows interpreting the concepts of law and rule of law in the context in which they are applied – in this case, in the context of rebel governance and rebel administration of justice.[45]

Even if we accept legal pluralism as a valid methodological choice from an academic perspective, the question could arise of whether international and domestic courts adjudicating *Sakhanh*-like cases will also need to have recourse to legal pluralism to make sense of rebel law and rebel courts. Far from being a theoretical possibility, one such case is pending before the International Criminal Court (ICC). Al Hassan is facing charges including the war crime of the 'passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable'.[46]

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39 Laila Nasry, 'LTTE Has No Judicial Authority. Interview with Chief Justice Sarath N de Silva' Sunday Times (Sri Lanka) http://www.sundaytimes.lk/021208/news/courts.html.

40 Provost (n 6) 12.

41 ibid.

42 Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney Law Review 375, 393.

43 Provost (n 6) 60–66.

44 ibid 62.

45 ibid 66, 76–86.

46 Article 8(2)(c)(iv) of the Rome Statute; Common Article 3 paragraph 1(1)(d); *Procureur c. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Version publique expurgée, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (n 35).

In the past, the ICC did not exclude *a priori* the possibility that armed groups could set up courts. For instance, in the *Bemba* case, it rejected Amnesty International's argument that the phrase 'competent authorities' in Article 28 of the Rome Statute concerning the repression of crimes under the doctrine of command responsibility would only include state or international authorities.[47] In *Al-Werfalli*, the ICC Pre-Trial Chamber took note of the absence of prosecutions by the Libyan National Army, an armed group active in Libya, to declare the case admissible for the purposes of Article 17 of the Rome Statute.[48] It cannot be excluded that the Court will display a similar sensitivity towards courts of armed groups when dealing with charges under Article 8(2)(c)(iv) of the Rome Statute even without having recourse to legal pluralism. The insights from *Rebel Courts* might nonetheless inform the judges' understanding of this provision.

Some authors who do not adopt – at least explicitly – a legal pluralistic view of the law have interpreted the concepts of rebel law and rule of law in a way that is not dissimilar from Provost's. Sandesh Sivakumaran, for instance, argued that 'to read references to law as including the "law" of the armed group is simply to interpret the wording of a specific provision in light of the particular setting in which it is applied. This is by no means revolutionary.'[49] Similarly, according to Marco Sassòli, the concepts of law and rule of law can encompass rebel law and rebel rule of law, provided that certain requirements are met.[50]

If not strictly necessary, the interpretative exercise allowed by a legal pluralistic take, as opposed to a positivistic one, on the concepts of law, rule of law, and justice nevertheless does facilitate the distinction 'between, on the one hand, non-state justice practices that are reasonable approximations of

47 Prosecutor v Jean-Pierre Bemba Gombo, Amicus Curiae Observations on Superior Responsibility Submitted pursuant to Rule 103 of the Rules of Procedure and Evidence (2009) ICC-01-/05-01/08 (ICC Pre-Trial Chamber ii), para 20; Prosecutor v. Jean-Pierre Bemba Gombo, Judgment pursuant to Article 74 of the Statute (n 35) para 703 referring to the accused's power to convene courts martial.

48 Second Arrest Warrant in the case of The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli, Situation in Libya (2018) ICC-01/11-01/17 (ICC Pre-Trial Chamber I) para 27.

49 Sivakumaran (n 13) 508.

50 Marco Sassòli, 'L'administration d'un territoire par un groupe armé, peut-elle être régie par le droit ?' in Michel Hottelier, Maya Hertig Randall and Alexandre Flückiger (eds), *Etudes en l'honneur du Professeur Thierry Tanquerel. Entre droit constitutionnel et droit administratif: questions autour du droit de l'action publique* (Schultess 2019) 275. Additionally, in his short review blurb included on the back cover of *Rebel Courts*, Sassòli writes: 'Even if they do not adhere to legal pluralism, readers will greatly benefit from this book, to understand a central feature of non-international armed conflicts, but also to reflect on the fundamentals of law, the rule of law and justice.'

the legal requirements of fundamental justice and due process in the context of armed conflict and, on the other hand, arbitrary uses of authority masquerading as justice.'[51] Future studies on armed groups and their legal orders will definitely benefit from engaging with Provost's methodological choices.

5 Rebel Law for Rebel Courts

On the basis of these methodological premises, I expected Provost to engage in some depth with the concept of rebel law. While a section titled 'The Concept of Law' is included in Chapter 2,[52] Provost makes it clear that he is going to be '[l]eaving aside philosophical investigations of the ontological nature of law'.[53] In my view, some extents of philosophical discussions about what law is would have added both depth and clarity to the analysis, particularly in light of his choice of legal pluralism as a method, which might not convince all readers. In that section, however, Provost does highlight two matters on which I would like to share some further reflections.

First, he mentions that rebel courts must reach decisions on the basis of norms that were known or knowable to the individuals to whom they are applied.[54] This is a fundamental characteristic of rebel law, which helps explain why rebel law is indeed law. From a legal pluralistic standpoint,

> Legal norms, in whatever site of law, are imagined by human beings, given expression by human beings, lived by human beings, followed by human beings, modified by human beings, rejected by human beings – in a word, constituted by human beings not primarily as passive legal subjects, but above all as active legal agents. The obligational force of legal rules derives not from the normative status with which they are vested when ultimately wielded by officials, but from the normative status human beings afford them in their everyday lives.[55]

If we adopt this idea of normativity, rules imposed by armed groups on their own members or on the civilian population living in an area under their

51 Provost (n 6) 12.
52 ibid 188–192.
53 ibid 188.
54 ibid.
55 Roderick A Macdonald and David Sandomierski, 'Against Nomopolies' (2006) 57 North Ireland Legal Quarterly 610, 614–615.

control clearly do have normative value and substantially legal effects for the individuals who are addressed by them, behave according to them, or are punished on their basis. Provost discusses in some detail the Taliban's *layeha* code of conduct,[56] the codes and statutes adopted by the LTTE,[57] the fact that some groups apply (their own interpretation of) *sharia,* or other legal documents, such as the Unified Arab Code.[58] Importantly, not all of these rules are addressed to the same constituencies. In addition to not choosing the same instruments to regulate the behavior of individuals, with some groups even continuing applying the law of the state,[59] armed groups also speak – through their laws – to different audiences, including their own members, members of the adverse party, and civilians. In this sense, while a code of conduct might form the basis for prosecuting violations of the internal rules of the group by their own members, amounting to law for this category of individuals to whom it is certainly known or knowable, the same document might not address the conduct of civilians at all nor have any normative character towards them, and thus it may not form the basis for their punishment. Therefore, the answer to the question of what (rebel) law is varies depending on the circumstances.

Second, and relatedly, the normative power of armed groups to prescribe (and proscribe) behavior, ensure compliance with the law, and punish breaches thereof is not unchecked. Provost considers that rebel law is constrained by the requirements of IHL and international human rights law, mentioning for instance that the rules of the Islamic State discriminating on the basis of religion were law but also violated international law.[60]

Provost however does not examine the limits that IHL and international human rights law impose on armed groups in relation to the penalties that their courts can impose. For instance, while execution is repeatedly mentioned with reference to the *Sakhanh* case,[61] Provost does not elaborate on whether – aside from compliance with the requirements of Common Article 3, paragraph 1(1)(d) – international law otherwise prevents armed groups from applying the death penalty. To my knowledge this issue has not received much attention by scholars, with the notable exceptions of Andrew Clapham, according to whom the use of the death penalty by armed groups would amount to a violation of

56 Provost (n 6) 135–136, 139. A translated version of the code is publicly available: 'The Islamic Emirate of Afghanistan. The Layha [Code of Conduct] For Mujahids' (2011) 93 International Review of the Red Cross 103.

57 Provost (n 6) 237–238, 241–244.

58 ibid 261.

59 ibid 260.

60 ibid 192.

61 ibid 2, 186, 272, 415.

human rights law,[62] and Daragh Murray, who suggests that 'an absolute prohibition on the issuance of death sentences by armed groups may be appropriate' and that, at a minimum, armed groups should not impose the death sentence in states where it has been abolished.[63] Provost's take on this issue – and more generally on the legality of penalties imposed by court of armed groups – would have been a welcome addition to this otherwise scarce academic debate.

6 The Establishment of Rebel Courts

If *Rebel Courts*' main richness lies in the analysis of and engagement with a vast array of armed groups' practice, the book also gives an important contribution to the legal debate concerning the establishment of courts by armed groups.

Other authors have addressed the issue of what courts of armed groups are for. For instance, according to Jonathan Somer the two situations in which armed groups would prosecute people in relation to the armed conflict are the perpetration of international crimes and the participation in hostilities against the armed group.[64] Sandesh Sivakumaran contemplated the creation of courts in the context of the administration of territory by armed groups for the maintenance of law and order as well as for the repression of violations of international humanitarian law.[65] Similar considerations were made by Mark Klamberg.[66] Provost does not provide a typology of rebel courts based on the type of crimes that they are tasked with adjudicating, although he does discuss some crimes that fall within or outside the 'subject-matter jurisdiction' of armed groups.[67] His analysis, however, offers novel insights on the establishment of rebel courts under international law.

As a starting point, Provost asks whether armed groups are prohibited from establishing courts, or rather whether they have a right or even a duty to administer justice.[68] He contends that the requirement of a 'regularly constituted court' under Common Article 3 should not be interpreted to refer only to courts set up under the law of a state, which would entail the outright illegality

62 Clapham (n 13) 31.
63 Murray (n 13) 220.
64 Somer (n 13) 682–683.
65 Sivakumaran (n 13) 509–510.
66 Klamberg (n 13) 251–254.
67 Provost (n 6) 257–274.
68 ibid 150–151.

of rebel courts.[69] Instead, he argues that armed groups are at least allowed to establish courts under international law, noticing the shift from the 'regularly constituted court' requirement in Common Article 3 to 'a court offering the essential guarantees of independence and impartiality' required under Article 6 of Additional Protocol II.[70] The most interesting and innovative part of Provost's analysis rests in his inquiry into whether armed groups have a duty to administer justice under international law, at least in some circumstances.[71]

Provost considers first whether armed groups have a general duty to prosecute war crimes, concluding in the negative.[72] He then inquires whether the duty to respect and ensure respect for IHL would imply that armed groups have a duty to administer justice. According to him, the duty to respect IHL 'would lead to some form of rebel administration of justice, at least as it relates to the internal discipline of the non-state group.'[73] I found this conclusion surprising, if not rushed, given that the enforcement of discipline within the armed group can take various forms and does not necessarily require the imposition of criminal punishment following a judicial procedure.[74]

Concerning the duty to ensure respect for IHL, Provost concludes that if armed groups have a duty to prevent and punish violations of IHL by any actor, this translates 'in all likelihood' into a duty to administer justice in some forms, at least when armed groups have authority over a population and territory.[75] The armed group's duty to administer justice stemming from IHL, therefore, has a fairly narrow scope.

Relatedly, Provost argues that armed groups have a duty to administer justice stemming from their obligations to respect and protect the human rights of the people living under their control.[76] The maintenance of law and order, through the suppression of common crimes, is of course essential for the protection of human rights.[77] Provost pragmatically acknowledges that not all armed groups might have the capacity to administer justice in the territory

69 ibid 152–153. Provost then analyzes the meaning of 'regularly constituted court' ibid 195–202.
70 ibid 153.
71 ibid 153–167.
72 ibid 154–156.
73 ibid 157.
74 Spadaro (n 13) 13–18; Jöbstl (n 13) 580–581.
75 Provost (n 6) 158.
76 ibid 163–164.
77 Murray (n 13) 196; Fortin, *The Accountability of Armed Groups under Human Rights Law* (n 7) 52.

they control, in which case they would have to let the state do so.[78] This argument develops and operationalizes one formulated in more general terms by Daragh Murray, according to whom, all armed groups are capable of fulfilling the obligation to respect human rights, while the obligations to protect and to fulfil require a more consolidated control and the sole authority of the armed group on a specific population and territory,[79] notwithstanding the persistence of obligations for the territorial state.[80]

Finally, Provost excludes that the doctrine of command responsibility can be taken to require armed groups to establish courts, although they may do so.[81] This is a reasonable conclusion, given that a criminal law doctrine on the basis of which *individual* responsibility is established cannot be taken to form the basis of an obligation for armed groups as *collective* entities to create courts.

To sum up, according to Provost, international law does not prohibit the administration of justice by armed groups. Rather, the latter is mandated by IHL and international human rights law in circumstances stemming from the obligations to respect and ensure respect for IHL, and from the obligations to respect, protect, and fulfil human rights. The administration of justice by armed groups is thus no accident or aberration for international law. At the same time, even if international law welcomes or mandates the insurgent administration of justice, courts of armed groups do not have *carte blanche*, being bound by a series of due process requirements stemming from both IHL and human rights law.[82]

7 Final Thoughts

Rebel Courts is an exceptional book. The breadth of practice of armed groups collected, cited, and analyzed by Provost will, without a doubt, offer important insights to generations of scholars interested in rebel governance, rebel law, and rebel administration of justice. The book will also, hopefully, inspire more international lawyers to engage in fieldwork and with legal pluralism. I am confident that it will generate animated conversations among those who prefer positivism to legal pluralism, and who consider that armed groups are

78 Provost (n 6) 164.
79 Murray (n 13) 183; see also Fortin, *The Accountability of Armed Groups under Human Rights Law* (n 7) 66.
80 Murray (n 13) 197–199.
81 Provost (n 6) 164–166.
82 ibid 290–354.

simply outlaws – they will be harsher critics than I have been in this review essay.

Nevertheless, I would not want to leave the reader with the impression that I consider *Rebel Courts* to be flawless. On the contrary, I think that the biggest limitation of this book is its organization. The book is divided in four colossal chapters, averaging over one hundred pages each, making it hard to read them in one sitting. The initial one-third of each chapter is dedicated to showcasing the case studies chosen by Provost, which as I already mentioned are a truly interesting feature of this book. Unfortunately, however, there is no real connection between the case study presented at the beginning of each chapter and the legal analysis that follows. Far from applying the law to the case study, or at least making explicit the numerous links between the case study and the law, in the remaining part of the chapter Provost draws from several other examples to illustrate concepts and operationalize legal theories. In Chapter 4, having discussed Kurdish non-state courts, Provost candidly admits that '[t]here is at the time of writing no discernable basis for the ICC to exercise jurisdiction over crimes committed in Kurdish areas.'[83] He then moves on to a detailed analysis of 'insurgent complementarity' before the ICC,[84] leaving the reader puzzled as to the choice of case study for this chapter. In addition to the disconnect between the two souls of each chapter, the chapters are not self-contained and *renvois* to different parts of the book, as well as frequent repetitions, make the reader work harder than necessary to appreciate Provost's take on this or that concept, provision, or interpretation. While this is regrettable, it does not subtract from the quality and importance of *Rebel Courts*, which will make a fine addition to the bookshelves of the readers of this Journal.

83 ibid 385.
84 ibid 385–409.