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FARC Justice: Rebel Rule of Law

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“La guerrilla lo que tiene que hacer para vivir es ser la ley donde llega.”
- Rebel Commander, Colombia

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INTRODUCTION

In the more than half-century of civil strife in Colombia, there has been a constant ebb and flow in the sharing of power between the Government and rebel groups, the largest of which is the *Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo* (FARC).¹ The FARC is a highly structured group controlled by a designated hierarchy, said to have encompassed as much as 17,000 fighters at its peak in the early 2000s.² While the FARC has exercised total control of national territory only for quite small areas during limited periods, it has been a dominant presence in more than half of Colombian municipalities over long periods of time. In those areas of mixed control, the population has had to navigate between governance *de abajo* (from below, in the plains) emanating from state institutions, and governance *de arriba* (from above, in the hills) emanating from the FARC. The latter adopted a dual strategy of instrumentalization and neutralization, attempting to infiltrate official institutions to co-opt them to follow a line dictated by the rebels or, failing that, impeding the operations of these institutions. As a result, the FARC has been involved, in a period of time extending over several decades, in the management of a wide array of social issues, including labor relations, commerce, family life, taxation, and much more.³ One facet of this rebel governance has been the administration of justice. It appears that FARC judicial institutions grew out of internal disciplinary mechanisms, commonly established by non-state armed groups to ensure tactical effectiveness.⁴ This Article, relying on recent ethnographic research by anthropologists and sociologists in Colombia as well as my own field work, will map out the emergence and evolution of these FARC “courts” with a view to appraise the extent to which they correspond in any meaningful manner to the concept of the judicial function. This will in turn serve to interrogate, relying on the insights of legal pluralism, the concept of the rule of law that is embodied in international legal instruments in the fields of international human rights and international humanitarian law. Unpacking the idea of the rule of law applicable in situations of armed conflict, I argue that a cogent concept of the rebel rule of law can be articulated to serve as yardstick to measure and guide insurgents in their legal governance.

I. REBEL GOVERNANCE AND LEGAL PLURALISM

The very notion of civil war brings associations of the chaotic displacement of normal social structures, challenged by insurgent forces set on overcoming all resistance to its rise, whether in the form of armed opposition or in the operation

1. ANA ARJONA, REBELOCRACY: SOCIAL ORDER IN THE COLOMBIAN CIVIL WAR 89, 91, 96–97 (Margaret Levi et al. eds., Cambridge Univ. Press 2016).

2. *Id.* at 96–97.

3. *Id.* at 180–86.

4. *See infra* Section II.B.

of other state institutions. When a rebel group is said to have taken control of a territory, the evocation is more often than not the imposition of absolute authority through raw, barely controlled violence—actual or threatened. Social institutions that normally ensure stability in human relations are destroyed or displaced, leaving the civilian population in a position of acute vulnerability and powerlessness vis-à-vis the ruling non-state armed group. The image is of an all-powerful, non-state actor unilaterally imposing its will through violence upon a civilian population deprived of any real agency. This vision corresponds to—and indeed is fueled by—a characterization of non-state armed groups as criminals or terrorists, typically conveyed in government narratives about non-international armed conflicts.

This may be a common evocation of rebel control over a territory and population, one commonly pictured in Hollywood representations of civil wars, but for a very long time it has been known to be factually inaccurate. We can see in classic works on insurgency by Mao and Che Guevara the relation of dependence that is posited between a rebel group and the population on which it must necessarily rely if it is to survive and succeed.⁵ Hannah Arendt in her essay, *On Violence*, noted: “No government exclusively based on means of violence has ever existed”; drawing a link to guerrilla warfare and the limits of military domination from the Napoleonic invasion of Spain to the Vietnam war, she argued that violence can destroy power but can never be politically productive in creating power.⁶ This has been repeated and analyzed often in relation to state power, but the dominant view remains what Mampilly describes as a “Hobbesian conjecture”—only the state can wield power to bring about order in society.⁷ If the state’s power is challenged and undermined, then order is accordingly undermined, ultimately leading to chaos. In fact, sociological studies of non-international armed conflict indicate that life largely remains orderly for most people, most of the time, in most places affected by war.⁸ How can this be so, if the state’s power is partially or completely displaced by insurgency?

The emerging field of rebel governance suggests that non-state armed groups fill, to some extent, the vacuum of power created by the state’s retreat.⁹ Armed groups do so not merely or even mostly by way of violence but rather by using approaches that are not entirely dissimilar to governance by the state.¹⁰ In some situations of non-international armed conflict, but not in all, the rebels do become

5. See CHE GUEVARA, *GUERRILLA WARFARE: THE AUTHORIZED TRANSLATION* (1968); MAO ZEDONG, *SELECTED MILITARY WRITINGS OF MAO TSE-TUNG X* (Foreign Languages Press Peking, 2d ed. 1966).

6. HANNAH ARENDT, *ON VIOLENCE* 50–51, 56 (1970).

7. ZACHARIAH CHERIAN MAMPILLY, *REBEL RULERS: INSURGENT GOVERNANCE AND CIVILIAN LIFE DURING WAR 7* (Cornell Univ. Press 2011).

8. ARJONA, *supra* note 1, at 2, 21–22; *id.*

9. See *REBEL GOVERNANCE IN CIVIL WAR* (Ana Arjona et al. eds., 2015).

10. MAMPILLY, *supra* note 7, at 1–2; *id.* at 10, 77–78.

the providers of public goods.¹¹ One fundamental public good that armed groups often provide is security, sometimes against violence at the hand of the government, and other times to suppress criminal behavior that may be unrelated to the conflict. In some non-international armed conflicts, such as the long-lasting civil war in Sri Lanka, the insurgents provided a wide array of public goods from health care to education, land allocation, and trade regulation.¹² Again, contrary to widely held assumptions, in some instances rebels institutionalize the provision of such public goods.¹³ In periods of civil war, state institutions can become weaker and disappear, but that does not mean that no institution can arise to replace them. Armed conflict itself corresponds to a vision of violence that is institutionalized: it is a condition of applicability of international humanitarian law that hostilities take place between armed forces that either belong to a state (presumed institutionalized) or non-state armed groups “which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”¹⁴ The requirements of “responsible command” and “sustained and concerted military operations” correspond to a group institutionalized to some degree. War, as we understand it, is an activity that is organized and institutionalized to a significant degree so it should not come as a radical suggestion that aspects of insurgency other than the conduct of armed hostilities should be institutionalized as well. Ana Arjona has offered one of the first institutional analyses of rebel governance and found that, in some non-international armed conflicts, armed opposition groups broadened their grasp on public governance so much that it came to correspond to what she terms “rebelocracy,” that is the establishment of a government by the rebels that mirrors that of the official government of the state.¹⁵ She contrasts this to “aliocracy,” a more common

11. See MAMPILLY, *supra* note 7, at 1–2, 4–5; REBEL GOVERNANCE IN CIVIL WAR, *supra* note 9, at 1.

12. Ana Arjona, *Wartime Institutions: A Research Agenda*, 58 J. CONFLICT RESOL. 1360, 1377 (2014).

13. REBEL GOVERNANCE IN CIVIL WAR, *supra* note 9, at 77.

14. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. I, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. The requirement related to the organized nature of the armed groups is not stated but is implied in Common Article 3 of the 1949 Geneva Conventions. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31. It is also echoed in the references to ‘organized resistance movements’ and responsible command in the definition of prisoners of war in Article 4 of the 1949 Third Geneva Convention, Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 75 U.N.T.S. 135, and in the definition of armed forces in Article 43(1) of the 1977 Additional Protocol I. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 43(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

15. ARJONA, *supra* note 1, at 170–92; Arjona, *supra* note 12, at 1360–89.

situation in which there will be some degree of coexistence between the authority and institutions of non-state armed groups and those of the state and other agents.¹⁶

One of the most important public goods that the state provides is the administration of justice—both by way of adopting legal standards and by enforcing them through institutions like the police and the judiciary. Is it conceivable that, in the context of a non-international armed conflict, a non-state armed group would take it upon itself to enact its own “laws” and run its own “courts”? The burgeoning field of rebel governance does include the administration of justice as an object of study, but so far the analysis has been carried out from the perspective of disciplines other than law.¹⁷ To what extent are the scare quotes around the words “laws” and “courts” justified, in view of *legal* concepts that correspond to these labels? The question is, in significant ways, definitional rather than ontological. Most jurists today embrace a positivist concept of law that rests on four precepts: *monism* (the claim that law is a unified, coherent regime); *centralism* (associating the power to validly create legal standards with state sovereignty); *positivism* (viewing law as ontologically distinguished from fact, thus allowing the systematic delineation of the frontier of legality to reflect pre-existing legal standards); and *prescriptivism* (offering legal norms as external constraints descending upon legal agents to try to modify patterns of behavior).¹⁸ Adopting such a perspective, it becomes readily evident that norms adopted by non-state armed groups are not properly labelled as “law,” and institutions that they create to interpret and enforce these norms are not “courts.” This mainstream perspective on law and legal institutions is systematically adopted by governments confronted with armed opposition groups that claim to establish judicial bodies.¹⁹ For example, it informs the answer given by the Sri Lankan Chief Justice, Sarath de Silva, to the question of the character of courts set up by the LTTE (Liberation Tigers of Tamil Eelam) armed group in that country:

These courts are not consistent with our constitution and they cannot exist under our hierarchy. Our courts are fully functional in those areas and we do not recognise any other courts. The people too should not go there [. . .] We must maintain our courts because that is what holds for governance. Legal systems, courts, police are all incidence of governance. If there is an erosion then there is no state. This is the danger of it.²⁰

16. Arjona, *supra* note 12, at 1375.

17. *Id.* at 1389.

18. Roderick A. Macdonald & David Sandomierski, *Against Nomopolies*, 57 N. IR. LEGAL Q. 610, 615 (2006); Roderick A. Macdonald, *Here, There . . . and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden*, in *ÉTUDIER ET ENSEIGNER LE DROIT: HIER, AUJOURD'HUI ET DEMAIN—ÉTUDES OFFERTES À JACQUES VANDERLINDEN* 381, 412 (Yvon Blais ed., 2006).

19. Laila Nasry, *LTTE Has No Judicial Authority – CJ*, SUNDAY TIMES (Sri Lanka), Nov. 14, 2004, <http://sundaytimes.lk/021208/news/courts.html> [<https://perma.cc/USW9-NAL5>].

20. *Id.*

While the politics of a government objecting to any characterization of insurgent courts that would endow legitimacy upon a rebel group are readily understandable, such a stance does correspond to an abdication by the legal profession of its capacity to use the conceptual tools of law to better understand this practice. In other words, a blanket declaration of illegality means that no distinction can be drawn between practices that are worse violations of basic principles of law than others. Concerns about due process and international human rights generally are relegated to futile distinctions, like rearranging deck chairs on the Titanic.

While positivism warrants a narrow focus on state-driven normativity, legal pluralism, on the contrary, explodes the limits of our conception of law to encompass forms of normativity beyond those connected to the state in any way. According to a pluralistic understanding, law is *fragmented* (with no necessary coherence across law as a whole), *decentralized* (where many centers and processes exist to create and interpret law), *contingent* (norms do not exist *a priori* but emerge from an engagement with the particular circumstances of their invocation, including agents and context), and *deliberative* (law is not so much a series of commands as a space in which meaning is collectively created in relation to social practices).²¹ Detached from common institutional features linked to the state, legal normativity appears more malleable and variable according to particular contexts, cultural, and other.²² Pluralism, when turning its gaze upon itself, calls for a rejection of any essentialist definition of law, and thus can accommodate state- and non-state-centered normativity.²³ More than an acknowledgment that there are different normative regimes operating simultaneously in any given time and place, legal pluralism attempts to articulate the ways in which these different legal regimes intersect and interact.²⁴ Seeing this, legal pluralism emerges as an especially promising perspective for the analysis of the administration of justice by insurgents. This is so both because such norms and practices do not derive any legitimacy from the state, quite the opposite, but also because in many if not most civil wars the official law of the state will cohabit with norms established by armed opposition groups. Viewed in this way, insurgent jurisprudence appears as legal pluralism incarnate.

21. I have discussed the implications of legal pluralism for international law more fully in Rene Provost, *Interpretation in International Law as a Transcultural Project*, in INTERPRETATION IN INTERNATIONAL LAW 290–308 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015).

22. Macdonald & Sandomierski, *supra* note 18, at 620–22, 625–27 (2006).

23. Macdonald, *supra* note 18, at 403.

24. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1238 (2007).

II. REBEL JUSTICE IN COLOMBIA

In the limited literature on rebel governance, when the administration of justice is examined, two cases are always mentioned as amounting to unusually developed insurgent legal regimes: Sri Lanka and Colombia.²⁵ Likewise, in the handful of international law studies that have discussed the creation of courts by non-state armed groups, the same two countries are often brought up as vignettes of how far this practice can be developed.²⁶ In this Article, I aim to go beyond the small vignette and delve deeper into the reality of rebel administration of justice by the FARC in Colombia, to tease out whether in such a practice we can discern legal norms and judicial institutions as understood using the insights of legal pluralism. I start by situating the conflict and presenting the governance structure of the FARC in Section A before turning to its legal system per se in Section B.

A. The Civil War in Colombia and FARC Governance

The origins and evolution of the conflict in Colombia are briefly sketched as a background to the presentation of the FARC's general governance structure and institutions. Both provide context to the discussion of the administration of justice by the FARC in the following section.

i. The Civil War in Colombia

The Colombian armed conflict has its roots in the period referred to as *La Violencia*, a civil war that started with the assassination of the presidential candidate Jorge Eliécer Gaitán in 1948.²⁷ This era of Colombian history was marked by violence between the two traditional parties, the Liberals and the Conservatives, carried out by self-defense militias, guerrillas, and criminal organizations.²⁸ The conflict originated in disputes over land and political agendas. Although there have been several stages in this conflict, it never ceased completely. Early in the history of the conflict, guerrilla groups came to emerge, including the FARC, the *Ejército de Liberación Nacional* (ELN), and the *Ejército Popular de Liberación* (EPL).²⁹ They were later joined by right-wing paramilitary groups or *Autodefensas Unidas de Colombia*

25. MAMPILLY, *supra* note 7, at 116–17; REBEL GOVERNANCE IN CIVIL WAR, *supra* note 9, at 189. I leave a closer study of Sri Lanka for another segment of this project.

26. Sandesh Sivakumaran, *Courts of Armed Opposition Groups: Fair Trials or Summary Justice?*, 7 J. INT'L CRIM. JUST. 489, 493 (2009).

27. 1 GERMÁN GUZMÁN CAMPOS, ORLANDO FALS BORDA & EDUARDO UMAÑA LUNA, *LA VIOLENCIA EN COLOMBIA* X (2005); HUMAN RIGHTS WATCH, *WAR WITHOUT QUARTER: COLOMBIA AND INTERNATIONAL HUMANITARIAN LAW* 136 (1998); MARY ROLDÁN, *BLOOD AND FIRE: LA VIOLENCIA IN ANTIOQUIA, COLOMBIA, 1946–1953* X (2002); Maria Cristina Cardenas, *Colombia's Peace Process: The Continuous Search for Peace*, 15 FLA. J. INT'L L. 273, 298 (2002).

28. Norman Offstein, *An Historical Review and Analysis of Colombian Guerrilla Movements: FARC, ELN and EPL*, 52 DESARROLLO Y SOCIEDAD 99, 101 (2003).

29. *Id.* at 104.

(AUC).³⁰ Throughout the civil war, criminal groups, referred to as the *bandas criminales* (BACRIM) or drug lords, operated across the conflict zones.³¹

The FARC has been involved in the Colombian conflict in its current form since 1966.³² Although the emergence of the FARC is commonly associated with the apparition of the *Bloque Sur* (Southern Bloc) in 1964, its roots can be traced to the period of *La Violencia* (the Violence) and resistance carried out by *Autodefensas Campesinas* (peasant self-defense organizations).³³ At its origins, proclaiming itself “the revolutionary army” of Colombia, the movement received support from the Colombian Communist Party and the USSR.³⁴ *Autodefensas Campesinas*’ main goals were to fight poverty in agricultural regions of Colombia and improve peasants’ quality of life.³⁵

From the late 1960s to mid-1970s, the government carried out important investments in the rural agricultural sector, with a significant impact on peasant well-being.³⁶ These investments in rural areas, combined with a changing international context, significantly weakened support for the FARC and other guerrilla groups.³⁷ As a result, in the mid-1970s, the FARC became involved in drug trafficking, a pattern which intensified in the 1980s. Reportedly, the FARC ensured their financial viability through involvement in coca growing, drug trafficking, kidnapping, and extortion.³⁸ Peace talks were initiated by the government leading to both parties to agree to a cease-fire, but it was never respected.³⁹ After this failed agreement, some commentators argue that the FARC abandoned its commitment to the best interest of the people and the revolution, and turned instead to profiteering.⁴⁰ That said, despite internal dissensions, the membership of the FARC increased tremendously, from three to twenty-seven fronts between 1974 and

30. Constantin von der Groeben, *The Conflict in Colombia and the Relationship Between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces*, 16 J. CONFLICT & SECURITY L. 141, 143 (2011).

31. *Id.*

32. Offstein, *supra* note 28, at 103.

33. *Id.*

34. Breanne Hataway, *The FARC’s Drug Trafficking as Political Crime: Determining the Success of Colombia’s Peace Talks*, 41 N.C.J. INT’L L. 163, 167 (2015); Offstein, *supra* note 28, at 103.

35. Arturo Carrillo-Suarez, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT’L L. REV. 1, 14 (1999).

36. Offstein, *supra* note 28, at 106.

37. *Id.* at 105.

38. Hataway, *supra* note 34.

39. JUNE S. BEITTEL, CONG. RESEARCH SERV., R42982, PEACE TALKS IN COLOMBIA (2014).

40. Offstein, *supra* note 28, at 111.

1984.⁴¹ The number of FARC fighters then grew from an estimated 3,600 in 1986, to about 17,000 around the year 2000, down again to about 7000 at present.⁴²

The 1990s was the bloodiest decade of the civil war in Colombia. Even though the government agreed to a new constitution, the FARC did not settle or demobilize.⁴³ The FARC did try to enter the political arena, but “their attempt to participate in politics ended in disaster when their political party, the Patriotic Union, ‘faced an extermination campaign by right-wing paramilitary groups and extreme elements within the state, particularly the military.’”⁴⁴ In 2000, the United States officially got involved in the Colombian conflict with ‘Plan Colombia’: initiated by Colombian President Andrés Pastrana and U.S. President Bill Clinton. With an allocation of \$1.3 billion from the United States, Plan Colombia was intended to stop drug trafficking.⁴⁵ That said, the fight against the insurgency, especially against the FARC, was a key component, with U.S. special units training the Colombian military in counterinsurgency tactics.⁴⁶ As a consequence, the FARC was pushed further in the Colombian jungle. The government attempted another round of peace talks with the FARC, which failed in 2002. Nonetheless, Colombia did reach an agreement with right-wing paramilitary groups, which demobilized between 2003 and 2006.⁴⁷

The latest peace negotiations began in August 2012, with the signing of the General Agreement for the Termination of the Conflict and Building of a Stable and Long-Lasting Peace (Havana Accord).⁴⁸ The Havana Accord sets out six agenda items for the talks: (1) integrated agricultural development policy; (2) political participation for the FARC; (3) ceasefire and disarmament; (4) the problem of drugs trafficking; (5) reparation for victims; and (6) implementation, verification, and ratification by the Colombian People.⁴⁹ The negotiations progressed steadily and a general ceasefire agreement was reached in June 2016. The narrow rejection of a proposed accord by referendum in Colombia in October 2016 was one more

41. MARIO AGUILERA PEÑA, CONTRAPODER Y JUSTICIA GUERRILLERA: FRAGMENTACIÓN POLÍTICA Y ORDEN INSURGENTE EN COLOMBIA (1952–2003) 243 (2014); Hataway, *supra* note 34, at 168.

42. JONATHAN D. ROSEN, THE LOSING WAR: PLAN COLOMBIA AND BEYOND (2014). The estimated size of the troops from year to year is available at: *Revolutionary Armed Forces of Columbia - People's Army*, STAN. U., <https://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/89> [<https://perma.cc/N9MU-S5K5>] (last updated Aug. 15, 2015).

43. Hataway, *supra* note 34, at 168.

44. *Id.*

45. Catherine C. LeGrand, *The Colombian Crisis in Historical Perspective*, 28 CAN. J. LATIN AM. & CARIBBEAN STUD. 165, 166 (2003).

46. *Id.*

47. Hataway, *supra* note 34, at 168; Enzo Nussio, *Learnings from Shortcomings: The Demobilisation of Paramilitaries in Colombia*, 6 J. PEACEBUILDING & DEV. 88, 88 (2011).

48. Hataway, *supra* note 34, at 164.

49. *Id.* at 164–65.

hurdle before a final peace agreement between Colombia and the FARC was approved by the close of 2016.⁵⁰

ii. FARC Governance

From the formation of the FARC in 1964 until 2008, Manuel Marulanda Vélez, (also known as “Tirofijo”—meaning sure shot) acted as the supreme leader of the FARC.⁵¹ The FARC was very well organized, with a highly centralized command.⁵² Marulanda and his companions commanded the FARC from what they called the General Secretariat.⁵³ This organ of the FARC was composed of “seven individuals, each responsible for specific regions or duties, like international outreach. In addition, the FARC has a *Estado Mayor* (General Staff) responsible for military operations and the *bloques* (blocks), which join several fronts as regional forces.”⁵⁴ In 1997, it was estimated that there were sixty-two rural fronts, three urban fronts, and nine elite units, mirroring the army’s specialized counterinsurgency brigade.⁵⁵ The Statutes of the group reveal that the organization of the FARC is modelled on that of the military.⁵⁶ Although block commanders were dispersed throughout the country, often in remote regions far away from the reach of the central FARC administration, Marulanda and the General Secretariat are said to have maintained tight control over these units so as to determine the group’s general strategy.⁵⁷ Marulanda died in 2008, and the current leader of the FARC is Timoleón Jiménez, also known as Timochenko.

Governance over a population by a non-state armed groups is said to correspond to three fundamental goals: “(1) defend the populace from foreign enemies, (2) maintain internal peace and order, and (3) make contributions to the material security of the population.”⁵⁸ The FARC did not deviate from this model, adopting a strategy of *doble poder o poder de dos caras* (dual strategy)⁵⁹ of

50. Julia Symmes Cobb & Nicholas Casey, *Colombia Vote Overturns Deal to End Its War*, N.Y. TIMES, Oct. 3, 2016, at A1. The peace process is monitored at COLUMBIA PEACE, <http://colombiapeace.org> [<https://perma.cc/WGE2-44UE>] (last updated May 26, 2018).

51. JAMES J. BRITAIN, REVOLUTIONARY SOCIAL CHANGE IN COLOMBIA: THE ORIGIN AND DIRECTION OF THE FARC-EP 14 (2010); Simon Romero, *Manuel Marulanda, Top Commander of Colombia’s Largest Guerrilla Group*, N.Y. TIMES, May 26, 2008, at B6.

52. BRITAIN, *supra* note 51, at 27.

53. Carrillo-Suarez, *supra* note 35, at 13.

54. HUMAN RIGHTS WATCH, *supra* note 27, at 137.

55. *Id.* at 137.

56. FUERZAS ARMADAS REVOLUCIONARIAS DE COLOMBIA, ESTATUTO (2013), <http://farc-ep.co/wp-content/uploads/2013/10/Estatutos.pdf> [<https://perma.cc/8FAF-9EF4>].

57. Elena M. Valencia, *Theories of Compliance in International Conflict: The Place of the Third Geneva Convention in the Colombian Armed Conflict*, 21 TEMP. INT’L & COMP. L.J. 445, 449 (2007).

58. Timothy Wickham-Crowley, *Del Gobierno de Abajo al Gobierno de Arriba . . . and Back: Transitions to and from Rebel Governance in Latin America, 1956–1990*, in REBEL GOVERNANCE IN CIVIL WAR, *supra* note 9, at 47, 49.

59. PEÑA, *supra* note 41, at 102.

instrumentalization and marginalization: they would try to infiltrate state institutions to gain a legal protection and orient measures taken to improve the population's well-being, and at the same time try to impede the State credibility by showing its lack of legitimacy and limited capacity.⁶⁰ Colombia in fact had quite strong state institutions, and government agencies could still operate even where the rebels “own[ed] the monopoly over the use of violence.”⁶¹ The Colombian guerrillas rarely developed state structures as such. Indeed, Arjona argues that:

In general, armed actors in Colombia do not directly engage in the creation of health or education systems as insurgents have done in other countries. Instead, they usually influence how local government officials provide those services, and sometimes fund certain projects. Armed groups frequently gave orders to mayors and council members directing expenditures of public funds for infrastructure, education, or health projects.⁶²

Moreover, the same author posits that, “[w]ith a few exceptions, neither the guerrillas nor the paramilitaries sought to dismantle the formal local government altogether. Rather, they tried to control it by forcibly intervening in its decisions, capturing it through the appointment of their own members or allies, or both.”⁶³ That said, in some rural communities where the State was basically absent, such as in San Vicente del Caguán (Caquetá department) during the 1970s, the FARC became “the de facto ruler, intervening in social, political, and economic activities, and regulating many types of conducts.”⁶⁴ The FARC went “to the locality peacefully, telling the community they were there to protect it.”⁶⁵

The degree to which the FARC and other armed opposition groups could exert authority over a population varied from place to place. This political geography of power was translated into the FARC's own territorial organization within what were called *zonas de retaguardia* (rearguard zones).⁶⁶ There were two types of *zonas de retaguardias*. The first one was the area next to the battle front,

60. *Id.* at 108 (“Con sus ambigüedades o dualidades, los contrapoderes han significado un reto para el Estado, en tanto que estos pararon de ser únicos, marginales y muy locales (germinales o de Resistencia) a multiplicarse y formar verdaderas franjas de control compartido entre el Estado y la guerrilla, llegando a ofrecer una imagen creciente de fragmentación y de colapso del Estado.”).

61. Arjona, *supra* note 12, at 1370.

62. Ana Arjona, *Civilian Resistance to Rebel Governance*, in *REBEL GOVERNANCE IN CIVIL WAR*, *supra* note 9, at 180, 190 (2015).

63. *Id.*

64. In this community:

Most interviewees agreed that civilians had little autonomy vis-à-vis the rebels. “The control that the armed actor had when I arrived here was total”, said a community leader who came in 1980. Nevertheless, locals found ways to communicate their preferences to FARC commanders and influence some of the ways in which things were done.

Id. at 192.

65. *Id.* at 193.

66. PEÑA, *supra* note 41.

which served as a refuge or a place to regain forces, also called the *frente guerrilleros* (guerrilla front). The second was the *retaguardia nacional* (national rearguard zone), which was chosen in light of the political and social capital that could be developed in an area or in view of the pre-existing influence of communist groups in the 1950s.⁶⁷ The latter areas were essential to propagate the revolution, secure FARC influence on the population, and militarily defend the movement. Once a zone was well controlled it could qualify as a *zona liberada* (liberated area). Such a qualification would have been the achievement of the first step of the revolution, and indicate that the group had taken a step further in the revolutionary process.⁶⁸ The next step would have been for the population to take control of their land and, with the guerrilla, carry out an offensive against the central government.⁶⁹ This stage in fact was never reached by any rebel group in Colombia—there were areas controlled by insurgents, but never completely liberated areas.⁷⁰ Although the FARC was never truly capable of developing zonas liberadas, it did develop frentes guerrilleros and, more importantly, it developed retaguardia nacional that was undoubtedly more stable and long-lasting than that of other guerrilla groups in the country.⁷¹

FARC governance during the civil war was thus always intertwined with other sources of governance. In that respect, the *Juntas de Acción Comunal* (JAC) are important local organizations when it comes to understanding what role the Government was playing in contested zones or zones under the control of the FARC.⁷² The JAC are peasants organizations that were established by the State in order to give local communities representatives that could dialogue with the central government.⁷³ In addition, the JAC normally run conciliation committees, communal dispute-resolution mechanisms that are often the first place local people turn to when seeking justice. Although established by the state, the JAC remained independent of the government to some degree, and acted as interlocutors in communications with both the state and non-state armed groups.⁷⁴ Created by the

67. *Id.* at 93.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 94–95. They were located in the departments of Meta, Guaviare, Putumayo and Caquetá, and lasted broadly from 1980 to 2003.

72. *Id.* at 93.

73. *Id.* at 96.

74. *Id.* at 99 (“[L]as juntas en esas condiciones no quedaron subordinadas a la insurgencia ni entraron a formar parte del organigrama político de los aparatos armados. Las JAC compartían los mismos espacios de las guerrillas, realizaban actividades complementarias de gobierno y de justicia, pero generalmente actuaban con independencia en la adopción de planes y programas para cubrir las necesidades de las veredas, en los desarrollos de sus comités de trabajo y en sus gestiones ante las autoridades regionales. Las JAC serían el Gobierno en algunas zonas controladas por las guerrillas y estas asumirían el papel coactivo. Las JAC eran el eje común entre la comunidad y la guerrilla, y estas no se atreverían por regla general a imponer sus puntos sin alterar las reglas de juego democráticas que predominan en la vida interna de dichos organismos.”).

state and imposed as a vehicle for official governance, the JAC were nevertheless also supported by the FARC.⁷⁵ The JAC remained mostly independent from the FARC, but in rural regions where the FARC had a strong influence, they typically maintained a close relationship. In some cases, the FARC infiltrated the JAC as a way of ensuring their collaboration. Conversely, FARC respect for the JAC enhances its credentials in the eyes of the population.⁷⁶

All forms of governance imply some element of power and repression, and governance by non-state armed groups is no exception.⁷⁷ The FARC, like all guerrilla groups, imposed rules not only on its own members to maintain discipline but also on civilians to direct their behaviors, regulating issues such as free speech, mobility, sexual conduct, personal appearance, labor standards, commercial trade, etc.⁷⁸ While there are a few reports that some armed groups may have posted pamphlets to publicize what their rules were, mostly this was done through public statements by FARC commanders and word of mouth.⁷⁹ Nonetheless, 90% of civilians interviewed by Arjona living under the control of an armed group stated that they always knew how to behave and what rules to observe; they knew what to expect from the members of the guerrilla.⁸⁰ What's more, the population often turned to the rebels when they encountered problems. Indeed, "in about two-thirds of the cases, civilians turned to combatants to solve problems related to public order."⁸¹ The control over the population by the FARC also translated into tax collection. Even though some guerrillas in Latin America did not tax the population in order to avoid having to put a financial burden on the population, the FARC, since the 1980s, did selectively collect taxes from coca traders, cattle owners, and merchants.⁸² In the 1980s, this practice not only allowed the FARC to grow significantly because of its greater financial capacity, but it also imposed some order on the illegal economy that greatly contributed to violence and insecurity in Colombia.⁸³

In closing on FARC governance, two reactive aspects bear mentioning: on the one hand, the operationalization of rebel governance often triggered a backlash by

75. Nicolás Espinosa Menéndez, *La Justicia Guerrillera en Colombia. Elementos de Análisis para los Retos de la Transición Política en una Zona de Control Insurgente (el Caso del Piedemonte Amazónico)*, in ESTUDIOS LATINOAMERICANOS 87, 91 (2016) ("[U]n modelo de organización social agenciado por el Estado, exigido por las instituciones oficiales para cualquier tipo de trabajo entre Estado y comunidad, y paradójicamente, promovido por la guerrilla en las zonas rurales.").

76. PEÑA, *supra* note 41, at 99.

77. Wickham-Crowley, *supra* note 58, at 48.

78. PEÑA, *supra* note 41, at 146; Arjona, *supra* note 12, at 1373.

79. Arjona, *supra* note 12, at 1373.

80. *Id.* at 1371.

81. *Id.* at 1372.

82. Wickham-Crowley, *supra* note 58, at 58.

83. PEÑA, *supra* note 41, at 280 ("[E]n esos lugares, por lo general de reciente colonización, la guerrilla aparecía como la única fuerza armada capaz de imponer un orden en el marco de economía ilegal y en donde tendían a operar diversos factores de violencia e inseguridad.").

the Colombian government against the population, in the hope that people could be intimidated into withdrawing any degree of support for or acceptance of rebel rule.⁸⁴ It is not clear that this succeeded in mitigating support for armed opposition groups, as sometimes the population would respond to terror tactics by the government or paramilitaries by seeking protection by insurgents.⁸⁵ On the other hand, rebel rule, like any other type of rule, can trigger its own resistance by the population. There is likely to be some degree of popular resistance to any attempt by a non-state armed group to impose its rule. The more significant and wide-ranging the rule by rebels, the more likely and significant the resistance by the population. This can take the form of spontaneous individual requests to rebel commanders, or collective, organized opposition to a perceived lack of respect by armed opposition groups. Arjona provides one example of civilian resistance to FARC rule in Colombia by an isolated and well-organized community:

According to one of the community's leaders, "at the beginning [the FARC] tried to rule over everything. They came to our meetings. They told us what we could do, where we could go, and when. We could not let this happen. We had been our own rulers for years." To stop the FARC from taking control of their local cooperative, the community decided to talk to the commander: "We told [him] very clearly that we did not want militiamen in the area. That it was not needed. "If what you need is some information, we will give it to you. But we do not need orientation or guidelines. We don't need any of that. We know very well what we need to do." And at the end, the commander agreed. After a long discussion that included threats and insults, the guerrillas agreed to respect the cooperative and avoid intervening in its affairs.⁸⁶

There are even examples of indigenous communities resisting direct physical violence or death threats by the FARC and succeeding in effectively resisting its rule.⁸⁷ This illustrates the limits of insurgent governance grounded in violence alone. Rebel governance, indeed all forms of governance, must be grounded in some degree of symbiotic relation between those wielding power and those subject to it. One facet of governance in which this interactive dimension is especially apparent is in the administration of justice.

B. FARC Justice

Like many other non-state armed groups, the FARC started as a small group without any fixed territorial basis, to later grow into a much more imposing movement with a heavier footprint in some parts of Colombia. As discussed in the

84. Wickham-Crowley, *supra* note 58, at 56–57.

85. See Alfredo Molano, *La Justicia Guerrillera*, in *CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* 331, 338 (Boaventura de Sousa Santos & Mauricio García eds., 2001).

86. Arjona, *supra* note 62, at 198.

87. *Id.* at 196–97.

previous section, rebel governance is evolving and transitory, a reflection of the group's military strength and relationship with the civilian population. It is useful to trace the evolution of FARC justice over the course of the civil war before turning to more specific analysis of its internal/military and external/civilian components.

i. Evolution of FARC Justice

Mario Aguilera Peña, who has carried out the most extensive historical study of guerrilla justice in Colombia, claims that the FARC's perspective on the law is reflective of its origins as a rural peasant movement.⁸⁸ At the beginning, in the 1950s, FARC rules were very basic: "do not steal, do not kill, do not rape, do not take someone else's woman."⁸⁹ For Peña, despite the initial influence of the Communist party, the FARC's perspective on law remained a fundamentally pragmatic one.⁹⁰ The FARC may call it "*justicia revolucionaria*" ("revolutionary justice") but it is not revolutionary in the sense of being innovative since it incorporates large segments of *derecho burgués* (state law), albeit with simplified procedures and applied in a more arbitrary manner.⁹¹ That said, FARC norms evolved significantly over the years, and the group became the guerrilla with the most developed corpus of norms in Colombia.⁹² Peña divides the history of guerrilla justice in three phases, on the basis of the objective pursued: *exemplary justice* (1964-1976), *retaliatory justice* (1976-1985), and *local empowerment justice* (1985-2003).⁹³ Each phase is briefly presented.

Exemplary justice (1964-1976). One of the prominent features of this era is described by Peña as *expedicionaria* (expeditionary), which consists in an approach that directs attention toward small offenses and ends with death penalty or forced exile for the offender and was rather expeditious in its format.⁹⁴ This approach aimed to gain sympathy from the population that was living in conflict zone, but also to intimidate the people and deter criminality.⁹⁵ The demand for this justice against authors of crimes came from the peasant population itself, and the FARC wanted to answer the people's security concerns with exemplary justice.⁹⁶ When someone was sentenced to death, the sentence was published in a pamphlet and distributed among the population. This corresponds to a time when the FARC was mostly nomadic. In order to keep their influence and power on the local population,

88. Mario Aguilera Peña, *Las Guerrillas Marxistas y La Pena de Muerte a Combatientes: Un Examen de los Delitos Capitales y del "Juicio Revolucionario,"* 41 ANUARIO COLOMBIANO DE HISTORIA SOCIAL Y DE LA CULTURA 201, 208 (2014).

89. *Id.* at 209.

90. *Id.*

91. PEÑA, *supra* note 41, at 115.

92. Peña, *supra* note 88, at 211.

93. PEÑA, *supra* note 41, at 125.

94. *Id.* at 126.

95. *Id.*

96. PEÑA, *supra* note 41.

they would use the *autodefensa campesina* (peasant self-defense organizations) or the *autodefensa agraria* (rural self-defense organizations), groups sharing common values with the FARC but not part of the guerrilla or the military.⁹⁷ Thus, in certain zones under the control of *autodefensa agraria*, where the State was absent or unwelcomed, these community organizations would self-govern to a great extent, controlling access to the region, regulating trade, etc.⁹⁸ They would also deal with minor offences such as stealing or being intoxicated in public, by imposing sanctions from small fines to expulsion. However, in cases of more serious crimes like murder or rape, and to deal with *sapos* (government informants), the FARC could intervene and possibly impose the death penalty.⁹⁹ In the zone where its headquarters were located, the FARC was completely in charge. Inhabitants within 3000 square kilometers were completely subordinated to FARC governance, including penal repression of crimes such as murder, theft, rape, use of marijuana, punishable by forced labor, exile, or execution.¹⁰⁰ The FARC's administration of justice compared favorably in that period to that of the ELN, the second largest rebel group in Colombia, in which "justice" did not usually imply any form of trial and for which the outcome was usually execution.¹⁰¹

Retaliatory justice (1976-1985). This type of dissuasive and symbolic justice was popularized by the M-19 rebel group, but subsequently adopted by all guerrilla movements in Colombia to deal with two types of people: enemies of the people and enemies of the revolution.¹⁰² In common with other emerging criminal law regime, the death penalty was its climactic focal point, although the FARC used it less than other insurgent groups.¹⁰³ It was not a very transparent justice, with the indictment elaborated by the FARC regional commander and the trial and capital punishment sometimes pronounced unbeknownst to the individual in question.¹⁰⁴ The administration of justice is said to have corresponded to three distinct dynamics during that period: *justicia defensiva* (i.e., cases dealing with the security of the guerrilla group itself, often against informants, politicians, or state officials); *justicia expeditionaria* (i.e., cases dealing with felony or misdemeanor crimes within the civilian population); and *justicia comunitaria* (i.e., cases dealing with disputes among members of the community, often delegated to community organizations).¹⁰⁵

Local empowerment justice (1985-2003). In this period, justice was aimed at taking control of local and municipal power, most significantly in the *zonas de retarguardias*

97. *Id.* at 243-47.

98. *Id.* at 251.

99. *Id.*

100. *Id.* at 252.

101. Molano, *supra* note 85, at 332.

102. PEÑA, *supra* note 41, at 128, 257, 315.

103. See generally Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17 (Douglas Hay ed., 1975).

104. PEÑA, *supra* note 41, at 315-19.

105. *Id.* at 350.

nacional (national rearguard zone).¹⁰⁶ This local justice was largely criminal, dealing with local corruption, appropriation of public funds, mismanagement of public affairs, and collaboration with paramilitary militias.¹⁰⁷ This justice took the form of trials of mayors and their advisors as well as members of congress. The FARC carried out a true judicial offensive, acting as an *instancia extraordinaria* (special jurisdiction) to deal with private law disputes, family matters, and criminal offences. Insurgent justice was also found in the *zonas de disputas* (contested areas), but in a very sporadic manner, mostly aiming to protect the *frentes guerrilleros* (guerrilla fronts).¹⁰⁸ There were attempts to exert greater centralized control on the way in which justice was run at the local level, especially in relation to the death penalty. There was a retreat from what was by then perceived as an excessive resort to capital punishment, by substituting it for forced labor or exile in many cases, and by requiring that any death sentence be confirmed by FARC headquarters.¹⁰⁹

ii. FARC Military Justice

Many non-state armed groups initially develop internal regulations and disciplinary mechanisms to ensure order within their ranks and increase the military effectiveness of their unit. As such, there is a pattern of insurgents having much more elaborate standards to deal with the administration of justice within their group than with respect to the civilian population. This is certainly the case for the FARC, whose code of conduct and internal processes are older and more elaborate than their rules applicable to the general population. Indeed, external administration of justice is by and large derivative of internal justice. For that reason, the analysis is best started with the internal administration of justice whereby the FARC applies a type of military justice to its own fighters.

The Statute and internal regulations of the FARC provide combatants with guidelines on how to behave, and their rights and duties as a member of the movement. The document containing the Statute, the Disciplinary Regulations (Regulation), and the Internal Norms of Commandment was first approved in 1966, and revised in 1978, 1982, 1993, and 2007.¹¹⁰ The current version, conveniently available online on the FARC website, appears to date from 2013.¹¹¹ The discipline regime is described as a new way of perceiving military discipline,

106. *Id.* at 129.

107. *Id.*

108. *Id.* at 130.

109. *Id.* at 129–31.

110. Peña, *supra* note 88, at 211; Juan David Laverde Palma, *Un Vistazo al Régimen Disciplinario de las Farc*, EL ESPECTADOR, May 23, 2014, <http://www.elspectador.com/noticias/paz/un-vistazo-al-regimen-disciplinario-de-farc-articulo-494178> [<https://perma.cc/4CUA-ET69>].

111. FUERZAS ARMADAS REVOLUCIONARIAS DE COLOMBIA, REGLAMENTO DE RÉGIMEN DISCIPLINARIO DE LAS FUERZAS ARMADAS REVOLUCIONARIAS DE COLOMBIA (2013), <http://farc-ep.co/wp-content/uploads/2013/10/Estatutos.pdf> [<https://perma.cc/8FAF-9EF4>].

which is not brutal and does not discriminate, and is referred to as a “proletarian-military.”¹¹² Section 8 of the Regulation also provides that the members of the group must prevent the war from being a total war that will harm the people.¹¹³ The Statute and Regulation are filled with revolutionary values, such as solidarity, equality, and complete devotion to the cause. The Regulation lists a number of prohibited acts, starting with a prohibition to kill fellow members of the FARC and men and women from the civilian population. The Regulation also prohibits of sexual violence and looting.¹¹⁴

Chapter I of the Regulation provides for sanctions applicable to all members of the movement found to have committed disciplinary breaches, regardless of rank.¹¹⁵ The guerrilleros who fail to comply with the Statute or Regulation can permanently or definitively lose their rights to hold a position within the FARC or may have to perform forced labor or any other activity as a sanction that will be imposed through a decision of the appropriate body.¹¹⁶ For the most serious crimes, including treason, spying, desertion, killing, sexual violence, and looting, there is a specific mechanism to establish the sanction: the *consejo revolucionario de guerra* (revolutionary court-martial).¹¹⁷ The court-martial is composed of a president, a secretariat, five “juries of conscience,” and a prosecutor, who are all elected by the general assembly of guerrilleros, composed of a minimum of twenty-five fighters.¹¹⁸ The defender is chosen by the accused from among those in the general assembly. The defender is given access to relevant documents and will be allocated a reasonable time to confer with the accused. The FARC unit commander that convened the court-martial is not allowed to take part in the proceedings, and must withdraw to another location.¹¹⁹

Informants indicate that the hearings are not tightly structured, and that various participants can intervene as many times as they think useful. Meanwhile, the accused is normally tied to a tree during the proceedings. The defender will usually invoke the right to life as a fundamental natural right, the irreparable nature of the sanction, the involuntariness of the crime, the degree of seriousness of the allegations, and the youth of the accused. What is more, the Regulation provides an exemption from criminal responsibility where the order given could lead to a crime.¹²⁰ The prosecutor will always invoke the specific section of the Regulation that has been violated, evoke the need to maintain discipline within the FARC, and

112. *Id.* at 23.

113. *Id.* at 25.

114. *Id.* at 28–29.

115. *Id.* at 30–32, 34.

116. *Id.* at 32–33.

117. *Id.* at 28–30.

118. *Id.*

119. *Id.* at 31.

120. *Id.* at 33.

invite the jurors to decide not based on their emotions but on their conscience.¹²¹ The verdict is rendered by a majority of jurors, who can declare the accused guilty or discharged. The verdict has to be approved by the Assembly. The participants in the Assembly can comment on the verdict and provide the reasons why they agree or not with it. Witness accounts suggest that it would not be rare for half of the Assembly members to intervene during the discussions to speak their mind. For example, in one account of a court-martial for a fighter accused of desertion, members of the Assembly did not hesitate to express their view that the fault laid with the unit leader who had unfairly harassed this fighter for months, making her life in the unit unbearable.¹²² If the verdict is rejected by the Assembly, the President has to read the judgment again which is followed by a new vote.¹²³ It is also noteworthy that deserters can be judged *in abstentia* but otherwise the accused must be present and given a chance to participate. Peña argues that although the FARC incorporated some basic principles of criminal law in their norms, several principles were left aside, such as different modes of participation, mitigating and aggravating circumstances, and criteria to define the appropriate sanctions.¹²⁴

The process of a court-martial is established by the Regulation and is quite ritualistic, composed of nine stages: (1) Hymn of the FARC; (2) Record of the meeting and the attending members; (3) Reading of the convocation; (4) Election of court-martial members (i.e., prosecutor, defender, juries); (5) Read the report (the allegations); (6) Discussion by the assembly (the commanders are not in the room and the discussion starts with the Defender, followed by the Prosecution, and the members of the Assembly, if they want to give their opinions); (7) Jury Deliberation; (8) Reading and approval of the verdict; (9) Conclusions (final reading of the judgment).¹²⁵

There is a range of sanctions that can be imposed by the court-martial, including physical labor, being disarmed for a period of time, having to study the Regulation, etc. Capital punishment is also a potential sanction, limited to the most serious crimes, such as murder and treason, desertion, disclosure of secret information, killing of a FARC member or a civilian, and “crimes of similar seriousness,” which could include sexual violence and looting of civilians, depending on the circumstances.¹²⁶

Notwithstanding the fact that execution is a sanction restricted for the most serious offences, it is the most controversial and frequently raises attention in the media. *La Semana*, a Colombian newspaper, reported in 2010 that the FARC

121. Peña, *supra* note 88, at 228.

122. Molano, *supra* note 85, at 351–52.

123. Peña, *supra* note 88, at 229.

124. *Id.* at 212.

125. *Id.* at 225–27.

126. *Id.* at 216.

executed more of their own troops than they killed enemies in combat.¹²⁷ The journalist described the trials organized by the FARC, and qualified those trials as “mock trials, fraud trials.”¹²⁸ The newspaper *El Espectador* claimed that the FARC is sentencing guerrilleros to death by firing squad for ridiculous reasons, encompassed in the criminalization of “any activities that could go against the revolutionary morale of the troops.”¹²⁹ “They have been shooting their own troops for more than 30 years,” said another newspaper, while former guerrilleros who fled from the FARC are quoted as saying that a minor offence or fault could be punished with a death sentence.¹³⁰ While there are reliable reports of insurgent groups in Colombia carrying out executions of their own members, such media reports often appear to owe more to anti-rebel propaganda than accurate depiction of the regular operation of military justice in groups like the FARC. There are indeed some detailed accounts by FARC informants that convey the hesitations that commanders would often feel before meting out such a drastic punishment upon one of their own. In one case, a commander recalls how a fighter, well-liked in his unit was accused by a civilian woman of sexual assault, with no other witness. Confronted with a classic “he said/she said” situation and suspecting that this might have been a romantic encounter gone wrong, he nevertheless felt pressured by the community to convene a court-martial to prosecute the fighter.¹³¹ The case was put to an assembly of villagers, with FARC fighters not entitled to vote, and a majority favored execution. The verdict was challenged, a new assembly convened, and again the death penalty was approved.¹³² In the end, the fighter confessed and was duly executed. The commander remarked, “el pueblo habla, el pueblo manda” (roughly equivalent to “vox populi, vox dei”), such that a guerrilla group that strays from the people cannot survive.¹³³

According to the Regulation, there is a possibility to appeal a verdict if the sanction can be considered unfair.¹³⁴ If the appeal is perceived to be inspired by malicious intention, a more severe sanction can be granted. Both the accused and the commander and secretariat can appeal the sanction.

127. *Los Fusilados de las FARC*, SEMANA, Feb. 13, 2010, <http://www.semana.com/nacion/Article/los-fusilados-farc/113072-3> [<https://perma.cc/2PQB-MK35>].

128. *Id.*

129. Palma, *supra* note 110.

130. *Consejos de Guerra y Fusilamientos de las Farc, los Temas Pendientes que Buscan Justicia*, PULZO, July 27, 2015, <http://www.pulzo.com/nacion/consejos-de-guerra-y-fusilamientos-de-las-farc-los-temas-pendientes-que-buscan/381031> [<https://web.archive.org/web/20151023175608/http://www.pulzo.com/nacion/consejos-de-guerra-y-fusilamientos-de-las-farc-los-temas-pendientes-que-buscan/381031>]; Gonzalo Guillen, *Las FARC Fusilan a Sus Proprios Guerrilleros*, EL NUEVO HERALD, Feb. 21, 2010, <http://www.elnuevoherald.com/noticias/mundo/america-latina/colombianas/article2003277.html> [<https://perma.cc/2PUQ-67NK>].

131. Molano, *supra* note 85, at 354–55.

132. *Id.* at 357.

133. *Id.* at 358.

134. FUERZAS ARMADAS REVOLUCIONARIAS DE COLOMBIA, *supra* note 111, at 34.

iii. FARC Civilian Justice

As was suggested at the beginning of the previous section, the administration of justice for civilian matters was, for the FARC as much as for other non-state armed groups in Colombia, an afterthought. Institutional thinking about norms and institutions occurred in relation to internal matters or, put differently, military justice. When the FARC came to wield some power over certain civilian populations, one aspect of rebel governance that organically grew was a form of administration of justice. One FARC informant made a parallel to the Far West, where any figure of authority that appeared was solicited to help in the resolution of disputes and in the sanction of unacceptable behavior.¹³⁵ This was especially so in those parts of the country where the state was present in a very limited way or altogether absent. The FARC saw it as part of their revolutionary project to resolve these problems for the general population.¹³⁶ The FARC was active both at the normative level, determining applicable law, and at the institutional level, providing structures to apply that law.

In the 1990s, the FARC was controlling or maintaining a strong presence in 40 to 50% of the 1071 municipalities in Colombia.¹³⁷ Where the State was absent, the FARC would implement a state-like structure and apply “some primitive law.”¹³⁸ Basically, the insurgents would invoke local customs, rooted in the values and traditions of peasant life, which happened to accord with those embraced by the FARC’s own ideology.¹³⁹ This was especially so if the local community was unified and well-organized when the FARC arrived.¹⁴⁰ The law applied to the civilians was thus rarely explicitly written, which did not pose a problem when local norms were applied.¹⁴¹

The FARC issued a manual of obedience with forty-six points.¹⁴² This manual is directed toward the inhabitants of FARC-controlled territories and it is said to be a guide for the good functioning of the community, regulating, *inter alia*, church activities and economic life. Another document commanding the population to

135. Interview with FARC Commander (July 2016).

136. *Id.*

137. Organization of American States, Inter-American Commission on Human Rights, Feb. 26, 1999, Doc. 9 rev. 1, <https://www.cidh.oas.org/countryrep/Colom99en/table%20of%20contents.htm> [<https://perma.cc/XP32-BDJ9>].

138. Carrillo-Suarez, *supra* note 35, at 94.

139. Molano, *supra* note 85, at 334.

140. Arjona, *supra* note 62.

141. Menéndez, *supra* note 75, at 100 (“Las FARC, como he mencionado antes, no tienen una normatividad establecida para trabajar la justicia local. Pero tomando en cuenta que las comunidades tienen definido el criterio de lo justo como factor que debe primar para solucionar un conflicto, las FARC trabajan sobre estos criterios.”).

142. Javier Alexander Macías, *Así se Vive Bajo la Ley de las Farc en el Bajo Putumayo*, EL COLOMBIANO, Oct. 18, 2013, http://www.elcolombiano.com/historico/asi_se_vive_bajo_la_ley_de_las_farc_en_el_bajo_putumayo-AYEC_265713 [<https://perma.cc/P3M2-4MND>].

obey to the FARC, the “normas de convivencia ciudadana” (“norms of coexistence”), was displayed in public places.¹⁴³ In both cases, these were norms designed specifically for the civilian population rather than for FARC members. That being said, Peña informed us that norms used by the guerrilla to resolve interpersonal conflict are, at 95%, the official law of the state.¹⁴⁴ However, with regard to procedural rules and criminal sentencing, there were marked differences between FARC practices and official law.¹⁴⁵ The guerrilla members are the ones who interpret the norms, decide what is fair and what is not, and determine whether there is a complementary conflict resolution mechanism from peasant organizations.

At an institutional level, there is some uncertainty as to the approach taken by the FARC. Molano claims that the FARC created a judicial apparatus with “tribunales elementales y las asambleas” (“basic courts and assemblies”), first established to judge combatants but later used for civilians.¹⁴⁶ Espinosa disputes this assessment, and rather posits that the FARC did not establish a judicial apparatus, but used an array of different mechanisms to resolve conflicts within the communities.¹⁴⁷ They agree that when a decision was taken by an elder from the community, called *conciliador* (mediator), the FARC would respect the decision.

For private law matters, the approach seemed to have been mostly minimalistic but nevertheless quite effective. The FARC tried to make an appearance in villages on market days, not only to stock up on essentials for its own needs, but also to interact with the population for political and other matters.¹⁴⁸ The commander would set up a table in a public place, typically the school, and people would line up to present their problems.¹⁴⁹ This could cover the entire gamut of private law disputes, from neighbors fighting over property lines to abandoned wives seeking support from their ex-husbands, debt collection to injuries caused by

143. Molano, *supra* note 85, at 333.

144. PEÑA, *supra* note 41, at 107.

145. *Id.* at 107 (“[L]as normas jurídicas que usan los insurgentes para resolver los conflictos interindividuales son en un 95% normas estatales, en lo que respecta a disposiciones o figuras sustantivas, mas no así en procedimientos y penas, en las que habría una involución respecto al derecho estatal. La reglas sustantivas usadas pueden catalogarse como de dominio público pues aparecer inscritas en los usos y costumbres campesinas, hacen parte del sentido común y del derecho consuetudinario, se inscriben en las prácticas de las relaciones entre individuos o comunidades con las instituciones y los representantes del Estado . . .”).

146. Molano, *supra* note 85, at 334.

147. Menéndez, *supra* note 75, at 101 (“Esto implica que las FARC-EP no manejan una sola forma y una sola estrategia para solucionar problemas sino que hacen uso de varios mecanismos: se valen de los Comités, se apoyan en las comunidades, mantienen comandantes de área, envían comisiones con poderes, en ocasiones levantan actas, etcétera.”).

148. Interview with FARC Commander (July 2016).

149. Menéndez, *supra* note 75, at 98 (“Por lo general las reuniones se hacen en una escuela donde se cita a la comunidad de una vereda, de varias veredas o incluso a todas las veredas de la subregión.”).

animals. Often, both sides to the disputes came, or the commander would send word for the missing side to come immediately. The commander would listen to both sides and possibly hear from other witnesses as well. If some aspects remained unclear, the commander could ask around or go see the piece of land or damaged good.¹⁵⁰ In some types of cases, for example a decision as to who had title to a piece of land, the commander would provide a written, signed decision to be kept by the parties should enforcement measures be needed. In some cases, the decision was recorded in the official registry of decisions maintained by JAC, the local authority.¹⁵¹ The intimation in any case was that it would not be advisable to ignore or challenge a decision handed out by the FARC.

For disputes around illegal business, which could hardly be brought before the state courts, the civilians would turn to the guerrilla.¹⁵² This was a very significant aspect of local justice in regions where the drug trade accounted for an enormous proportion of economic activities. In one case, a prostitute complained that a man had beaten her, broken her teeth, and that as a result she could not resume her trade.¹⁵³ The commander assessed her lost income and the cost of dental work, and ordered the man to pay the specified amount, overlooking the fact that the decision took account of illicit activities.¹⁵⁴ According to the population from La Macarena department, the State judicial institution and the judges in any case were not to be trusted. They would say that, in contrast with the judges, at least the guerrilla was not corrupt.¹⁵⁵ Before the FARC demobilization in this region, the guerrilla opened a complaint office to handle all disputes in the area, headed by an old guerrilla leader who provided justice, settled disputes, and generally stood as the visible face of the guerrilla's law and order.¹⁵⁶ This office only lasted one year, and the duty of communitarian conflict resolution went back to the *Comité de Conciliación* (mediation

150. *Id.* at 99 (“Cuando la guerrilla interviene directamente en el arreglo de un problema, y si las condiciones de la zona se prestan (no hay presencia militar), el o la Comandante de área cita a las partes interesadas, pregunta por testigos que puedan confirmar versiones e inspecciona –si es necesario– los sitios en disputa o donde se lleva a cabo el litigio (verificar el trazado de un camino, ubicar los linderos, mirar daños causados por ganado, fuego, etcétera). En problemas complicados, comisiona milicianos o colaboradores para que le averigüen datos, lo acompañen en las inspecciones o las hagan ellos mismos. En problemas sencillos (por ejemplo, de convivencia entre vecinos), con sólo leer un acta el o la comandante toma la decisión. Se ha sabido de casos en donde los o las comandantes reciben a la gente únicamente con un acta firmada por el Comité de Conciliación.”).

151. *Id.* at 100.

152. *Id.* at 95 (“[C]uando habitantes del casco urbano tienen conflictos en situaciones ilegales – como puede ser una transacción fallida con pasta base de coca, concerniente a la venta ilegal de combustibles o al comercio de maderas protegidas– buscan en la zona rural a la guerrilla para tramitar allí, y con ellos, sus conflictos.”).

153. Molano, *supra* note 85, at 344.

154. *Id.*

155. Menéndez, *supra* note 75, at 95.

156. *Id.*

committee), which is a branch of the JAC.¹⁵⁷ The strategy behind this was to give back the resolution of conflict to their stakeholder, in order for the FARC to straighten its authority.¹⁵⁸ However, when the local institutions are weak, the FARC takes charge of communitarian conflict resolution.¹⁵⁹

For criminal matters, the FARC would hold popular trials in rural areas for civilians who were accused of misdemeanors or felony. The range of misdeeds would go from “rape, spouse abuse, theft, or failing to pay a ‘war tax.’”¹⁶⁰ The popular trial, according to civilians from the region of Guaviare interviewed by Human Rights Watch, works as follows: the trial is announced by the FARC, then, the civilian population converges to the community meeting, and the FARC hears what people have to say.¹⁶¹ The civilians testify and then the FARC decides and executes the decision. According to another civilian, the FARC can decide on the guilt of someone without consulting anyone, and they can take drastic decisions. In 1997, Human Rights Watch reported that approximately thirty people were killed for being suspected of having links with right-wing paramilitary groups.¹⁶² The Human Rights Watch report also alleged that the FARC, while conducting those popular trials, rarely informed the accused of the charges that were held against them and did not allow them to present a suitable defense.¹⁶³ For Human Rights Watch, fundamental rights such as the presumption of innocence were not being respected.¹⁶⁴ However, Sivakumaran reminds us that the “criticisms of courts for failing to guarantee the right to appeal, for example, are misleading given that no such obligation is required of armed groups,” referring to the criticism addressed by Human Rights Watch on the FARC popular trials.¹⁶⁵

The rather strident critique of FARC justice offered by Human Rights Watch seems certainly justified if its description of insurgent administration of justice is accurate. Indeed, what they describe are extrajudicial executions, pure and simple. Significant ethnographic work carried out since then suggests that the picture painted by the human rights organization may have validly represented some events,

157. *Id.* at 97 (“La decisión de traspasar a las Juntas la responsabilidad de la resolución de conflictos comunitarios significó una nueva etapa para el proyecto insurgente de control territorial, en donde el poder local de carácter comunitario ha sido una prioridad, y su movilización, en función de reivindicaciones regionales ante el Estado, parte fundamental de la plataforma insurreccional.”).

158. *Id.* at 101 (“El papel de las comunidades en la resolución de conflictos fue observado por Alfredo Molano como una estrategia de la guerrilla para fortalecer su autoridad, pues ‘(. . .) la guerrilla tuvo que crear un sistema jurídico y organizar la justicia. El comandante ya no podía seguir juzgando como durante mucho tiempo lo hizo, por lo que comenzó a crear y fortalecer aparatos de justicia como los tribunales elementales y las asambleas.’”).

159. *Id.* at 97.

160. HUMAN RIGHTS WATCH, *supra* note 27, at 142.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 142–43.

165. Sivakumaran, *supra* note 26, at 508.

in particular the treatment of those thought to be government spies or paramilitaries, but that there are nevertheless many other events in which the FARC did adopt practices that come closer to what could be called administering justice.¹⁶⁶ There are many narratives of proceedings dealing with crimes committed by civilians which quite closely follow the rules for court-martials of FARC fighters.¹⁶⁷ Not rarely, the FARC in fact plays a calming role, when mob lynching appears as the most likely alternative to FARC justice. Sometimes, the trial looks more like a restorative justice model. For example, in a case where some men were accused of not contributing to the community and harassing women, the FARC commander asked if the accused acknowledged the harm they had caused and estimated an amount of money that corresponded in his view to the injury, money that would go to the community.¹⁶⁸ If the community did not agree, they could suggest another amount or another sentence.

The sanctions applied to civilians by FARC justice are, more often than not, financial penalties.¹⁶⁹ If there was a specific victim, that person would be entitled to receive compensation for the harm done, including moral damages. There was often a community fine as well, money that would be paid into a community fund used to cover expenses benefitting the community as a whole, such as building a school or repairing a road or dam. Finally, the FARC would also collect the equivalent of court fees for its troubles. Repeat offenders or authors of more serious crimes could be ordered to leave the region and never come back. Exile was considered a harsh penalty for local offenders, because in times of war people are distrustful of strangers. To send a local person away was to put him or her at risk of being taken for a spy, a criminal, or any other type of undesirable, with unpredictable consequences. Finally, when the crime was of extreme gravity, such as murder, the FARC felt pressured to impose the death penalty. To fail to do so would be taken as a sign of weakness, a failure to fulfil the rebel's role in the community's governance, and lead to a loss of legitimacy and thus of authority.¹⁷⁰

It appears that the civilian population often trusted the FARC, and not only out of fear. However, it would not be fair to argue that the legitimacy enjoyed by the FARC did not sometimes come from fear of the arbitrary use of their power.¹⁷¹

III. REBEL RULE OF LAW

The picture that emerges from this more extensive ethnographic survey of FARC governance related to matters of justice begs the question of how it should

166. *See, e.g.*, Molano, *supra* note 85.

167. *Id.* at 332.

168. *Id.* at 345.

169. Interview with FARC Commander (July 2016).

170. Molano, *supra* note 85, at 360–61.

171. Menéndez, *supra* note 75, at 10, 103.

be characterized. As we see with the FARC, and indeed in the operation of other armed opposition groups in armed conflicts across the world, rebel governance does not necessarily emerge as a proto-state, mimicking the structure and practices of the government, although there is no questioning the fact that the latter can indeed be a model that is followed by rebels in significant ways. This is certainly so for the FARC, which grew nearer to a form of governance guided by liberalism than some other insurgents such as, for example, Daesch in Syria and Iraq.¹⁷² With respect to governance touching on matters of justice, this raises the question of whether it should appropriately be described as a form of administration of justice. Is rebel justice a valid challenge to the uniqueness of the model embraced by all states, as a reflection of the concept of sovereignty, under the guise of the rule of law? Is there a legitimate concept of a rebel rule of law that can provide a benchmark and an ideal against which judicial practices such as the FARC's can be measured?

In Section A, I argue that the exclusive association of the rule of law with the state is conceptually both recent and unjustified, as there are non-state institutions and practices corresponding to the rule of law. In Section B, I discuss the adjustments to the rule of law to reflect the unique constraints on the administration of justice during war within formal law applicable during armed conflicts. From that recognition, and in consideration of the insights gleaned from the closer study of the practice of non-state armed groups like the FARC in Colombia, I suggest the basic components of a rebel rule of law in Section C.

A. Fragmented Rule of Law

The idea of the rule of law is one that seems to attract support from every corner, whether it be national governments or international organizations, whether they be democratic or authoritarian, whether they embody western traditions or those of other parts of the world, whether they speak for the necessity of public authority or the defense of individual liberty: everyone seems in favor of the rule of law.¹⁷³ The rhetorical popularity of the rule of law can be explained in at least two ways. First, as evocatively put by Mark Massoud, the rule of law is “a construct of desire,” such that it occupies a space that can never entirely correspond to reality.¹⁷⁴ As such, it has something to offer to any society, no matter how accomplished it is. By the same token, it is ineluctable that there will be rule of law issues in a given place and time, because these can and will arise in every place and at all times. When everyone fails, to some degree, to comply with the aspirational objectives that correspond to the rule of law, then to stand accused of the same does not amount to the most damning indictment. The answer can and will always be that this is a

172. PEÑA, *supra* note 41, at 115.

173. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1–5 (2004).

174. Mark Fathi Massoud, *Ideals and Practices in the Rule of Law: An Essay on Legal Politics*, 41 L. & SOC. INQUIRY 489, 494 (2016).

work in progress. Second, the popularity of the concept of the rule of law is a reflection of the malleability of its content. It is a label so broad and fuzzy that it answers many aspirations and hides many sins. The lack of a fixed content is not an accident nor the failure to bring to fruition a diplomatic negotiation or theoretical conversation; rather, the ambiguity of the rule of law is one of the concept's defining features. The range of actors invoking the rule of law madly off in all directions actually sustains the demand for conceptual obscurity.¹⁷⁵ This is compounded at the international level by the challenges of translating the concept of rule of law, from *état de droit* to *pravovoe gosudarstvo* to *fabzi* (法规), with every language offering a label that orients its substance in one direction or another.¹⁷⁶

The fact that the rule of law is an essentially contested concept does not mean that it is wholly impossible to explore its content. The possible content of the rule of law has been the subject of numerous studies that catalogue its component parts, although none attracts anything like a wide consensus.¹⁷⁷ Generally speaking, descriptions of the rule of law range on a spectrum from “thin” to “thick” versions, progressively locating more and more content within the concept. The 2004 definition included in the UN Secretary-General report on the rule of law and transitional justice is often given as a starting point:

[The rule of law] refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of the supremacy of law, equality before the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁷⁸

This corresponds to a “thick” version of the rule of law, also endorsed by the EU Venice Commission and by scholars like Lord Bingham and Lon Fuller.¹⁷⁹ As can be seen from the definition quoted above, there is in this view a considerable overlap between the rule of law and other notions like human rights, democracy, good governance, and constitutionalization. At this end of the spectrum, perhaps

175. Peer C. Zumbansen, *The Rule of Law, Legal Pluralism, and Challenges to a Western-Centric View: Some Very Preliminary Observations*, 47 *TRANSNAT'L L. INST.* 2, 4 (2016).

176. RANDALL PEERENBOOM, *ASIAN DISCOURSES OF RULE OF LAW* (2003); Robert McCorquodale, *Defining the International Rule of Law: Defying Gravity?*, 65 *INT'L & COMP. L. Q.* 227, 279 (2016).

177. TOM BINGHAM, *THE RULE OF LAW* (2010); TAMANAHA, *supra* note 173; *THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE* (Machiko Kanetake & André Nollkaemper eds., 2016); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175 (1989).

178. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

179. BINGHAM, *supra* note 177; LON LUYVOIS FULLER, *THE MORALITY OF LAW* (1969).

most clearly embodied in Bingham's writing, the debate corresponds to the extent to which the rule of law incorporates all "fundamental" human rights standards.¹⁸⁰ It stands for an affirmation that a legal regime issued from a non-democratic authority that fails to respect basic principles of equality under the law or judicial independence cannot be described as corresponding to the rule of law.¹⁸¹ This is meant as a rejection, at times in emphatic terms, of a "thin" version of the rule of law according to which the concept is a looser guide to the ways in which governmental authority must be bounded by rules that are fixed and knowable prior to their application. Advocates of this approach make the point that if all our aspirations are rolled into the concept of law, then it loses much of its usefulness because it will add little to the sum of its component parts. In this view, the rule of law speaks more to a set of values and meta-principles that must guide how governments behave; to paraphrase Hannah Arendt, it amounts to "speaking law to power."¹⁸² Thus for Joseph Raz, this is an important virtue that we seek to develop in any legal regime, but only one among many, not coextensive with human rights, democracy, or justice.¹⁸³ As a result, he concluded, it is not impossible that an undemocratic government that persecutes some of its citizens on the basis of discriminatory policies could nevertheless be compliant with the rule of law.¹⁸⁴ At the same time, the concept cannot be diluted to the point at which it merely becomes a validation of state sovereignty. Even in its thin version, there is some identifiable content to the rule of law, including the need for laws to be prospective, clear, and stable, and that there be an independent and accessible mechanism to oversee the application of these laws.¹⁸⁵ Whether defined as thicker or thinner version of the rule of law, it is agreed that the concept embodies aspirational values that remain unlikely to be fully achieved in any state. As such, the invocation of the rule of law in any context does not lead to all-or-nothing conclusions, but rather to situating the government under consideration along a spectrum of compliance with its tenets, however defined.¹⁸⁶

Up to this point, the analysis of the rule of law has taken the state as a focus. Even in its thin version, a central ambition of the concept is to subject the exercise of governmental authority to legal regulation. There is here a certain circularity in that we seek to control the state by way of laws emanating from the state. This approach also raises the question of whether the exercise of authority by entities

180. BINGHAM, *supra* note 177, at 67.

181. *Id.* at 66–67; Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315 (2011).

182. HANNAH ARENDT, ON VIOLENCE 56–57, 63 (1970).

183. JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 211 (1979).

184. *Id.* Arguably, one example could have been South Africa during the Apartheid regime. See DAVID DYZENHAUD, HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY 223–57 (2d ed. 2010).

185. RAZ, *supra* note 183, at 214–19.

186. McCorquodale, *supra* note 176, at 291.

other than the state ought to be subject to the rule of law, as well as the question of whether the rules that regulate nongovernmental authority can only emanate from the state, or whether they could find their basis in non-state actors. The fact that rule of law scholarship—with a few, marginal exceptions—focuses on the state is a reflection of the attribution to the state of a monopoly on law. Law is both a product of and a justification for the sovereignty of the state, leading the UN Secretary-General to remark that “[t]he rule of law is at the heart of State sovereignty.”¹⁸⁷

It is worthwhile to be reminded of the relative novelty of the association of law and the state. Until a few centuries ago, law was an aspect of life that reflected in a significant manner social structures other than the state.¹⁸⁸ Going back even further to the Middle Ages, we see that the law was not an instrument of earthly power to be wielded by the prince. Quite the opposite, the law was essentially customary, “an unwritten and unchanging eternal norm” that evolved slowly and invisibly rather than by the fiat of a ruler.¹⁸⁹ The capture of law by the state was a slow and progressive process, extending over many centuries and following patterns that differed from country to country. For very long periods, multiple legal regimes overlapped in any given place. Some were applied only to certain classes of society, the nobility with its *leges feudorum*, the merchants with the *lex mercatoria*, and city dwellers with municipal law; some laws followed geography, with each village and valley having its own custom, often expressed in the distinctive local dialect; some laws followed blood rather than land, on the model of the Ottoman millet system; other laws still attached to religious identity, with canon law acting as a transnational *ius commune* for Christians across Europe, but also Islamic law and Talmudic law in parallel; and the rediscovery of Roman legal texts in the twelfth and then again in the sixteenth century, thanks to the rise of the university, overlaid “scientific” legal norms that weren’t linked to any segment of the population nor to the state but that played an important role in private law matters, especially property law.¹⁹⁰ In many cases, there were courts that corresponded to particular communities or legal regimes, from manorial courts and royal courts to merchant courts and church courts.¹⁹¹ There was no neat division between court and law, such that a given court could be called to apply norms from a range of regimes depending on the identity of the parties and the nature of the issue in dispute.¹⁹²

187. U.N. Secretary-General, *supra* note 178, at ¶ 48.

188. RAOUL CHARLES CAENEGEM, *LEGAL HISTORY: A EUROPEAN PERSPECTIVE* 115–16 (1990).

189. *Id.* at 123.

190. CAENEGEM, *supra* note 188; JEAN-LOUIS GAZZANIGA, *INTRODUCTION HISTORIQUE AU DROIT DES OBLIGATIONS* 51–53 (1992); Paul R. Hyams, *What Did Edwardian Villagers Understand by ‘Law,’* *MEDIEVAL SOC’Y & MANOR CT.* 69 (1996).

191. Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 *SYDNEY L. REV.* 375, 377–78 (2008).

192. *Id.*

In France, the state appears in the picture in a push to force the writing down of customary laws, ordered by Charles VII in 1454, to bring some order to the more than 300 distinct customs applied in the kingdom at the time.¹⁹³ During the same period, *Ordonnances Colbert*, a small number of ordinances, were issued by the king, to impose rules touching on some discrete fields. This started a process of appropriation that combined with the intellectual dominance of the Paris custom to make possible the revolutionary codification of French law in the Napoleon Code of 1804, replacing in one fell swoop the myriad non-state customs with a single state law.¹⁹⁴ In England, the state's capture of law was more significantly institutional, with royal courts travelling on periodic circuits around the country to bring the king's justice to the people, in a manner that was initially complementary to other courts but that gradually came to assume a prominence that reflected the centralization of law in the state.¹⁹⁵ Similar patterns have been mapped in colonial contexts with the writing down of indigenous custom by colonial officials and the parceling of jurisdiction to various types of bodies, resulting not only in a profound transformation of local law but also the progressive appropriation of what had been decentralized popular law into institutionalized state law.¹⁹⁶

The purpose of this quick historical excursus is to underscore the fact that the exclusive association of law with the state is one that is not very old, and as such rooted neither in the concept of law nor in the idea of the state. As discussed in the first section of this paper, legal pluralism's frontal attack of the positivist precept of centralism stands as a denial that the state's capture of law was ever successful.¹⁹⁷ Law, it is argued, has never been a state monopoly: there are many non-state centers and processes that create, interpret, and apply law.¹⁹⁸ The state may be the most comprehensive legally based organization of our time, but there are others as well.¹⁹⁹ It is said that in some parts of Africa, upwards of 90% of disputes, including land disputes, are resolved by way of non-state mechanisms.²⁰⁰ As a result, the concerns embodied in the concept of the rule of law understood in its fuller sense speaks to the manner in which law operates in all these legal centers and processes, including those not connected to the state.

193. GAZZANIGA, *supra* note 190, at 56–60.

194. *Id.*

195. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 237–41 (5th ed. 2014).

196. Sally Engle Merry, *Law and Colonialism*, 25 L. & SOC'Y REV. 889 (1991); Terence Ranger, *The Invention of Tradition in Colonial Africa*, in PERSPECTIVES ON AFRICA: A READER IN CULTURE, HISTORY, AND REPRESENTATION (1997).

197. *See supra* Part I.

198. *See* Provost, *supra* note 21.

199. Joseph Raz, *Why the State?* 2 (King's Coll. London Law Sch. Research Paper No. 2014-38, 2013), <https://papers.ssrn.com/abstract=2339522> [<https://perma.cc/MEE3-G5K8>].

200. Brian Z. Tamanaha, *A Bifurcated Theory of Law in Hybrid Societies: The Rule of Law and Non-State Justice*, in NON-STATE JUSTICE INSTITUTIONS AND THE LAW: DECISION-MAKING AT THE INTERFACE OF TRADITION, RELIGION AND THE STATE 1, 4 (2015).

Discussion of the rule of law meaningfully has ventured beyond the state with respect to one category of legal actors: international organizations. From about the year 2000, some academics argued that the nature of powers wielded by international organizations justified extending to them the principles of the rule of law.²⁰¹ Anti-terrorism measures adopted by the United Nations (UN) after the attacks of September 11, 2001 directly affected important rights and interests of individuals. For instance, the Sanctions Committee, authorized by the UN Security Council, listed individuals on no-fly lists or to be targeted for financial restrictions.²⁰² The justification, execution, and reviewability of these decisions have been challenged as falling short of what would be demanded of a state taking similar measures.²⁰³ Peacekeeping and other international missions are another instance of international organizations exercising state-like authority over population and territory, sometimes as a direct proto-governmental administrator, other times as an external actor whose presence on the territory of a state cannot be derived from the sovereign authority of that state. When such a situation occurs, the fact that a power usually associated with the government is in fact held by an international organization does not seem to be a compelling basis to deny the protection and requirements associated with the rule of law in relation to the exercise of such power. The lack of any accountability mechanism to sanction the spread of cholera in Haiti due to the failure of the UN to take necessary and available precautions has been cited as one especially glaring example of the need for rule of law principles to apply to international organizations.²⁰⁴ The internal processes of international organizations provide a final context in which powers are used in a manner that intersects with the values embodied in the rule of law. Organizations like the UN are employers that escape the applicability of national labor standards that normally prevent abuses. The UN does have internal norms and procedures, but these have been repeatedly challenged as falling short of recognized international standards on transparency, independence, and reviewability. Changes were brought that addressed some of these shortcomings, with explicit references to the rule of law.²⁰⁵ Criddle and Fox-Decent, as part of their exploration of the justification of state sovereignty, suggest that if an international organization exercises public

201. Matthew Happold, *United Nations Sanctions and the Rule of Law*, in *THE RULE OF LAW AND ITS APPLICATION TO THE UNITED NATIONS* 75–98 (2016).

202. CLEMENS A. FEINÄUGLE, *HOHEITSGEWALT IM VÖLKERRECHT: DAS 1267-SANKTIONENREGIME DER UN UND SEINE RECHTLICHE FASSUNG* 7–20 (2011).

203. *Id.*; Happold, *supra* note 201, at 75–98.

204. See Gian Luca Burci, *Enforcement Versus Immunities in the United Nations: A Rule of Law Perspective*, in *THE RULE OF LAW AND ITS APPLICATION TO THE UNITED NATIONS* 269 (2016); Ernst U. Tschoepke, *The UN Administration of Territories: The Mission in Kosovo and the Rule of Law*, in *THE RULE OF LAW AND ITS APPLICATION TO THE UNITED NATIONS* 149 (2016).

205. Clemens A. Feinäugle, *The UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN: A Reconstruction from an International Public Authority Perspective*, 7 *GOETTINGEN J. OF INT'L L.* 157, 175–78 (2016).

authority—powers that are other-regarding, purposive, and institutional in nature—then it stands in a fiduciary position vis-à-vis humanity and as such ought to be governed by standards that frame state powers.²⁰⁶ While they turn to human rights norms as a result, the argument can also be taken to point in the direction of the rule of law.

Consideration of the applicability of the rule of law to international organizations is interesting not only in that it dislodged the concept from its original state-centered ambit, but also because it triggered a reflection on the substance of the rule of law at the international level.²⁰⁷ I mentioned at the start of this section that the lack of agreement on the content of the rule of law paradoxically stands as one of its defining features. Within that observable diversity of views, however, when the international rule of law is discussed, it seems that there is a general consensus that the rule of law applicable to state actions and the rule of law applicable to international organizations cannot be the same. Because of fundamental differences in the foundation, structure, and purpose of states and international organizations, the components of the national rule of law (howsoever defined) cannot be transferred lock, stock and barrel to an international rule of law.²⁰⁸ José Alvarez notes in this respect that courts may well be called to play different roles at the domestic and international levels. In public international law, there are many situations in which there is no possibility of judicial review of the legality of an act, both for jurisdictional reasons (courts have limited rather than general jurisdiction, of an optional rather than compulsory nature) and for functional reasons (the UN Security Council plays a role in responding to threat to international peace that doesn't square easily with judicial review).²⁰⁹

As a guiding principle, the substance of the rule of law must reflect the specific and evolving context of the exercise of public authority to which it is applied, with the shift from states to international organizations as a fundamental change in context that calls for significant adjustments to facets of the rule of law that some would consider central. In this light, enriched by a legal pluralist understanding of law, the rule of law emerges as a living organism rather than a fixed list of attributes or an idealized image of justice.²¹⁰ It follows that the rule of law applied to public authority exercised by rebels would be substantially distinct from that applied to either the state or international organizations.

206. EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 283–290 (2016).

207. *THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE*, *supra* note 177.

208. McCorquodale, *supra* note 176, at 289–90.

209. José Alvarez, *International Organizations and the Rule of Law*, 14 N.Z.J. PUB. & INT'L L. 3, 25–30 (2016).

210. Zumbansen, *supra* note 175, at 6.

B. Rule of Law in Armed Conflict

War disrupts many of the values and practices that are normally considered fundamental, and as such is a type of contextual transformation that can be expected to translate into a significantly distinct rule of law. The disruptive impact of armed conflict on the rule of law is reflected in both legal regimes that regulate war, international human rights, and humanitarian law, in a fashion that speaks directly to an imagined rebel rule of law.

International human rights law does not stop producing legal effects during periods of armed conflicts, although the outbreak of war does have a normative impact on the protection of human rights. The precise nature of the relationship between human rights and international humanitarian law has been the subject of enormous academic and judicial attention over the last several decades. Positions range from the International Court of Justice's approach whereby human rights law is *lex generalis* to international humanitarian law's *lex specialis*, to the European Court of Human Rights jurisprudence in which humanitarian law could inspire the interpretation of human rights but not displace them.²¹¹ There is no longer any debate, if there ever was a serious one, on the fact that human rights remain legally applicable. The clear intent of states to this effect can be seen in the inclusion of a derogation clause that authorizes states to suspend rights and freedoms in situations of emergency that threaten "the life of the nation" in the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights.²¹² While both the European and American regional instruments mention "war" specifically, but the Covenant does not, it is a given that armed conflicts are the prototypical emergency that can threaten the life of the nation. The treaty provisions that explicitly provide for the possibility of derogation during a state of emergency include a list of rights that are deemed "non-derogable."²¹³ Tellingly, the list of non-derogable rights in the Covenant, the European Convention and the American Convention do not include due process guarantees that arguably constitute an important element of the rule of law.²¹⁴ As such, the state of emergency is a direct challenge to the foundational role

211. See generally JENS DAVID OHLIN, *THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS* (Jens David Ohlin ed., 2016); R. PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2002).

212. See American Convention on Human Rights art. 4, Nov. 21, 1969, 1144 U.N.T.S. 143; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights, Nov. 4, 1950.

213. See sources cited *supra* note 212.

214. The Human Rights Committee has offered in its General Comment 29 that due process guarantees that are necessary to ensure protection of non-derogable rights are themselves non-derogable, by necessary implication. See ALEX CONTE & RICHARD BURCHILL, *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 40–41 (2016).

of the rule of law.²¹⁵ Even if the threat to the survival of the political community is averred, however, international human rights law does not provide for the jettisoning of the rule of law. The possibility of derogation is constrained: limitations on rights must be temporary, officially proclaimed, and strictly limited to the exigencies of the situation.²¹⁶ The ensuing requirements of necessity and proportionality reinforce the conclusion offered in the previous section regarding the ever-changing requirements of the rule of law, always reflecting the specifics of the circumstances of their application. In war, as the prototypical state of emergency recognized in international human rights treaties, the rule of law must be adapted to reflect the often extraordinary circumstances in which the administration of justice takes place. Human rights treaty provisions on derogation indeed point the way as to how to carry out this necessary adjustment, in specifying that any measure taken to limit rights and freedoms during a state of emergency must comply with the state's "other obligations under international law."²¹⁷ In this respect, international human rights law is structurally connected to international humanitarian law, as well as to other fields of international law.

The possibility for states to derogate from a number of fundamental human rights, including minimally some rights that will often be taken to form part of the substance of the rule of law, supports the claim that this concept will be transformed significantly by its application to situations of armed conflict. This brief foray into international human rights law has, to this point, focused on the *state's* right to suspend fundamental rights and freedoms during an emergency. In the context of the exploration of the relevance of the concept of the rule of law to the rebel administration of justice, this begs the question of whether only a state may derogate during a state of emergency, or whether a non-state armed group may do so as well. This is of course a provocative suggestion, one that does not seem to have been considered in legal doctrine so far. An initial answer might be that the specific provisions of the treaties cited in the previous paragraph refer only to a state declaring a situation of emergency, and therefore that no other entity is competent to do the same. It is well and true that, for example, Article 4 of the Covenant on Civil and Political Rights only envisages that states can derogate, but it is equally true that Article 2 of the same treaty spells out substantive human rights obligations of states, and no one else.²¹⁸ There is thus an issue of "having your cake and eating it too" with the overly facile response resting on the wording of the derogation provisions in the treaties. Beyond the range of technical explanations that have been offered to justify the applicability of human rights standards to armed opposition

215. CRIDDLE & FOX-DECENT, *supra* note 206, at 126; EVAN J. CRIDDLE, HUMAN RIGHTS IN EMERGENCIES (2016).

216. *See generally* JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992).

217. CONTE & BURCHILL, *supra* note 214.

218. International Covenant on Civil and Political Rights, *supra* note 212.

groups,²¹⁹ the conundrum remains that if rebels exercise public authority in a manner that warrants the application of human rights, the same can be invoked to articulate a justification for a right to derogate that will mirror that proclaimed in favor of states. For instance, in a recent book Criddle and Fox-Decent offer a fiduciary foundation for both the imposition of human rights obligations on governments and for the possibility of suspension during a state of emergency.²²⁰ The final chapter of their book interrogates the applicability of a fiduciary construction of sovereignty to international organizations, leading them to conclude that inasmuch as they exercise public authority, organizations ought to be bound by human rights norms.²²¹ They do not take the extra step of asking what are the implications of this conclusion in situations of emergency, but the justification offered earlier in the book for derogation seems equally transposable to international organizations.²²² In a parallel fashion, the public authority approach can be applied to governance by non-state armed groups to justify both the applicability of human rights—or the rule of law—and the possibility of derogation.

Similar questions arise with respect to another human rights doctrine that has had a significant impact on the application of human rights in general, and derogations during a state of emergency in particular: the margin of appreciation. Initially developed by the European Court of Human Rights, the doctrine of the margin of appreciation provides that a state shall be granted a significant degree of deference in the interpretation and application of human rights.²²³ In other words, when a human rights body examines whether a measure taken by a government is consistent with its obligations, the assessment ought not to be in the nature of a *de novo* evaluation but closer to vetting the reasonableness of the position taken by the state. This form of judicial restraint has been justified on the basis of the greater proximity of the national government to the situation at hand, as compared to a supra-national court like the European Court of Human Rights, as well as the open-textured nature of human rights norms that can accommodate a diversity of legitimate interpretations.²²⁴ The same provocative question arises here again: if an armed opposition group administers justice and, as such, is said to be bound by international human rights law and subject to the rule of law, should the group be granted any margin of appreciation in the application of human rights?

219. See DARAGH MURRAY, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ARMED GROUPS 82–117 (2016).

220. CRIDDLE & FOX-DECENT, *supra* note 206.

221. *Id.* at 283–352.

222. *Id.* at 123–61, 283–352.

223. *Id.* at 149–51.

224. ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 909–10, 918–19, 927 (2005).

Unlike derogations in a state of emergency, the doctrine of margin of appreciation does not rest on any textual foundation in the treaties; as such, the easy rebuttal identified for derogation, on the basis of the explicit reference to the state in treaty provisions allowing derogations, does not obtain for the margin of appreciation. One might imagine an objection based on the foundation of the public authority wielded by non-state armed groups as opposed to governments. Two reasons can be mentioned to question the persuasiveness of this objection. First, it suggests that governments are granted a margin of appreciation because they have legitimacy, normally linked to their democratic representativeness. This would imply that governments that are in fact not democratic, or more broadly not representative, should be given a smaller margin, or none at all. Andrew Legg, in his comprehensive study of the doctrine, makes a valiant effort to defend such a reading of the jurisprudence of the European Court of Human Rights.²²⁵ He notes that in some of the cases in which the Court relies on the doctrine like *Dudgeon v. UK*, there are mentions of the government acting carefully and in good faith.²²⁶ Critically, however, he cannot unearth any passage in which the European Court would have noted the unrepresentative nature of a national government as justification for a narrower margin. The second objection to a foundational critique of recognizing a margin of appreciation to an armed opposition group speaks to the necessarily unrepresentative nature of such groups. As discussed in an earlier section of the paper, and as the conflict in Colombia illustrates, no system of governance can be grounded in violence alone.²²⁷ It would be extremely difficult for a rebel group to survive, much less exercise real governance of any kind, without some degree of support from the population. In Colombia, the FARC's behavior at times attracted support and at other times provoked resistance from the population, and the group was not necessarily less representative than the government at all times. With respect to the administration of justice, as shown, there is no evidence to point out that rebel justice was thought inherently inferior to official justice, and indeed in some ways it was felt to be closer to the ideals of the rule of law. Just like there are decent states and wicked states, there are decent rebels and wicked rebels. It is not obvious that such distinctions provide a solid conceptual basis to dismiss the possible extension of a margin of appreciation to rebel groups.

Moving from human rights to international humanitarian law, we see that the concept of the rule of law is transformed by the occurrence of an armed conflict in that its connection to state sovereignty is ruptured. This is most transparent in the regulation of occupation, when a power other than the territorial state comes to exercise authority over a conquered territory. The law of occupation, as noted by Eyal Benvenisti, is the mirror image of the concept of state sovereignty, and as such

225. LEGG, *supra* note 224, at 75–79.

226. *Id.*

227. *Id.* at 71–75.

comes to indirectly define sovereignty in international law.²²⁸ Occupation does not signal a transfer of sovereignty, a reflection of the now entrenched norm that sovereign title to territory cannot be validly acquired through the use of force. At the same time, it is acknowledged that an occupier can validly exercise some public authority over the territory and population under its control. One aspect of public authority explicitly recognized to an occupying force is the maintenance of public order and civil life,²²⁹ overlapping to a significant extent with the idea of the rule of law. For a very long time, the idea of a trustee has been used to describe the nature of the powers recognized to the occupier.²³⁰ This is of course a particular type of trust, in that it fails to incorporate any sense of intentional delegation from the territorial government in favor of the occupier, much less any sense of confidence from the former in the latter. Instead, the fiduciary dimension of occupation reflects the mere fact of occupation and the corresponding inability of the territorial state to exercise its normal authority in that territory. This is clearly conveyed in Article 42 of the 1907 Hague Regulations, the first codification of the law of occupation, which refers in the French authentic version to a territory “*placé de fait sous l'autorité de l'armée ennemie*” to the extent that this authority “*est établie et en mesure de s'exercer*”.²³¹ In this respect, occupation law can be taken as an instance of public international law grounded in the principle of *effectivité*, that is seeking to capture and regulate in law a reality as it is perceived on the ground rather than articulating norms rooted in the idea of legitimacy.²³² Indeed, the legal regulation of occupation is a regime under *jus in bello* that stands wholly insulated from the legality or legitimacy of the presence of the occupier in the given territory, an aspect that would reflect *jus ad bellum*.²³³ In this respect, for example, Iraq as an occupier further to its

228. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 1–2 (2012).

229. Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907.

230. Adam Roberts, *What Is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249, 294–95 (1985).

231. There is no official English version of this treaty, but this provision can be translated as: “Territory is considered occupied when it is actually placed under the authority of the hostile army.”

232. The principle of *effectivité* has been the subject of significant scrutiny in international legal writing in French, and to a lesser degree in German and Spanish, but very little in English. W. H. BALEKJIAN, *DIE EFFEKTIVITÄT UND DIE STELLUNG NICHTANERKANNTER STAATEN IM VÖLKERRECHT* 11–18 (1970); FLORIAN COUVEINHES-MATSUMOTO, *L'EFFECTIVITÉ EN DROIT INTERNATIONAL* 38 (2014); JEAN TOUSCOZ, *LE PRINCIPE D'EFFECTIVITÉ DANS L'ORDRE INTERNATIONAL* (1964); CHARLES DE VISSCHER, *LES EFFECTIVITÉS DU DROIT INTERNATIONAL PUBLIC* (1967); Adolfo Miaja de la Muela, *Nuevas Realidades Y Teorías Sobre la Efectividad en Derecho Internacional*, 3 ANUARIO DE DERECHO INTERNACIONAL 3 (1976). I note that some authors in English refer to it as a principle of “effectiveness,” although d’Aspremont draws a distinction between “effectiveness” and “effectivité.” See Jean d’Aspremont, “Effectivity” in *International Law: Self-Empowerment Against Epistemological Claustrophobia*, 108 AM. SOC’Y INT’L L. PROC. 165, 165 (2014); Salvatore Zappalà, *Can Legality Trump Effectiveness in Today’s International Law?*, in *REALIZING UTOPIA* 105, 106–07 (Antonio Cassese ed., 2012).

233. HENRI MEYROWITZ, *LE PRINCIPE DE L'ÉGALITÉ DES BELLIGÉRANTS DEVANT LE DROIT DE LA GUERRE* (1970).

manifestly illegal invasion of Kuwait in 1990 was in principle in the same legal situation as was the United Kingdom after it took control of part of Iraq in 2003. Two ideas interesting for our discussion of rebel governance emerge from this analysis. First, international law explicitly reflects the suggestion that the power to govern, bringing with it the principle of the rule of law, can be dissociated from sovereignty, at least in situations of armed conflict. Second, the recognition of public authority exercised by the occupying force is not tied to the legitimacy of its presence or power.

This sketch of the construction of governance and the rule of law in wartime can be sharpened with three observations. To begin with, the nature and extent of the powers of the occupier have been the subject of intense debate regarding the extent to which an invading state is required to leave in place and enforce the laws of the occupied government. An older construction of the framing idea of the occupier as trustee identified the territorial government as the beneficiary of that trust. In this perspective, the occupier is a placeholder for the territorial government, and as such is granted the most limited power to alter existing laws and public institutions. Over the course of the last century, a competing vision of occupation has come to emerge, whereby the primary beneficiary of the fiduciary powers held by the occupier is the population of the occupied territory. Under the very significant influence of international human rights law, this “transformative occupation” allows or even requires the occupier to bring the legal order of the occupied territory in line with the requirements of the rule of law.²³⁴ Regardless whether the law of occupation has fully evolved to embrace a wholly transformative approach, this is a movement towards a tighter embrace of the rule of law in situations of armed conflict, with a corresponding lesser priority given to concerns of state sovereignty.

A second, related observation touches on the steady widening of the extraterritorial application of human rights. This is, again, a much-contested development, centered in the jurisprudence of the European Court of Human Rights. In a series of cases over the last decade, the European Court has reversed an earlier approach that eschewed to a large extent the applicability of state obligations under the European Convention on Human Rights for acts that take place beyond national borders.²³⁵ The military occupation of Iraq and Afghanistan by a number of states party to the European Convention provided an opportunity

234. CRIDDLE & FOX-DECENT, *supra* note 206, at 192–94; DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 61–63, 65–66 (2002); Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT’L L. 721, 735 (2005); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 439, 451, 454, 457, 491 (Michael Schmitt & Jelena Pejic eds., 2007).

235. MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 183–84 (Vaughan Lowe et al. eds., 2011).

for the Court to revisit this position, leading it to conclude that an occupier is required to comply with its human rights obligations to a very large extent.²³⁶ The extension of this approach to contexts beyond the European Convention of Human Rights to other treaties and to customary law, as well as the particulars of when and to what extent these obligations are applicable, remain very contentious. That said, it is an evolution that both converges with a “transformative” vision of occupation and insists on the need for enjoyment of rights and freedoms regardless of who is in power in a given time and place. It converges as well with a reading of international human rights law that concludes, as noted earlier, that when non-state actors are acting in a position of public authority they should be bound to comply with human rights obligations.²³⁷

The third and final observation on the construction of the rule of law in times of war centers on the scope of the concept of occupation. Although the very first codification of the law of occupation came about in the Lieber Code and concerned the civil war in the United States, the various humanitarian law treaties that regulate occupation only apply it explicitly to situations of international armed conflict in which a state occupies the territory of another state.²³⁸ In the *RUF Case* before the Special Court for Sierra Leone, the defense tried to plead that the non-state armed group was an occupying force and as such could force civilians to carry out work and confiscate property.²³⁹ The Court rejected this plea by applying a classical understanding of the concept of occupation, inapplicable to a situation of non-international armed conflict like the war in Sierra Leone.²⁴⁰

The concept of occupation has evolved over the years and now seems less fully bound to this traditional picture of belligerent occupation. The clearest divergence is found in Article 1(4) of the 1977 Additional Protocol I which provides that rules applicable to international armed conflicts shall apply to situations of “alien occupation,” an expression broader than belligerent occupation that was widely taken as a coded reference to the Israeli-Palestinian situation.²⁴¹ More generally, the same provision of Protocol I declares that wars of national liberation in which a people is fighting in furtherance of its right to self-determination are to be deemed international armed conflict. The implication is that the national

236. *Id.*; GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY 220, 222–23, 227 (2015).

237. HUMAN RIGHTS AND NON-STATE ACTORS (Andrew Clapham ed., 2013); MURRAY, *supra* note 219, at 82.

238. BENVENISTI, *supra* note 228, at 35–36, 45; ROBERT KOLB & SYLVAIN VITÉ, LE DROIT DE L'OCCUPATION MILITAIRE: PERSPECTIVES HISTORIQUES ET ENJEUX JURIDIQUES ACTUELS (2009); Roberts, *supra* note 230, at 296–97.

239. *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T Judgment, ¶¶ 982–984 (Special Court for Sierra Leone, Trial Chamber, Mar. 2, 2009).

240. *Id.* ¶¶ 985–986.

241. This was meant to overcome applicability issues. See BENVENISTI, *supra* note 228, at 3; KRETZMER, *supra* note 234, at 32–40.

liberation movement is to be treated in every respect as if it were a state, which would suggest that this party to the conflict can also become an occupying force under international humanitarian law. There is a conceptual hurdle in applying this suggestion, in that the national liberation movement does not have a national territory beyond which it becomes an occupier. This is illustrated by the sole declaration to date that seems to have triggered the application of Article 1(4) of Protocol I, issued in 2015 by the Polisario Front in Western Sahara.²⁴² While there is a physical boundary of sort (a wall of sand in the desert) that marks the spheres of power of Morocco and Polisario, it is hardly a marker of divided sovereignty.

The solution, in accordance with the normative framework of international humanitarian law, is to examine the nature of the relationship between the population and the military force: if it is broadly marked by enmity, if the allegiances of the occupier and the occupied population link to opposing sides of the conflict, then the former should be subject to occupation law. This is indeed consistent with the approach developed by the International Criminal Tribunal for the former Yugoslavia in cases in which the accused objected that they could not be convicted of grave breaches of the 1949 Geneva Conventions because the victims were not “protected persons,” defined as nationals of an enemy state.²⁴³ The Tribunal in *Celebici* and *Tadic* concluded that the substance of differing allegiances rather than formal links of nationality ought to guide the application of the Geneva Conventions.²⁴⁴ There have been many suggestions that this reasoning should in fact apply in all non-international armed conflicts, so that a non-state armed group that finds itself exercising authority over a population with which it does not share allegiances should be bound by the law of occupation.²⁴⁵ This seems congruent with the expansion of human rights obligations to non-state actors and to the concept of national liberation armed conflict, as discussed earlier. Sivakumaran suggests that perhaps not every aspect of the law of occupation can be transposed to non-international armed conflicts, but that a piecemeal approach could identify which aspects can justifiably be found applicable by insurgents in a civil war.²⁴⁶ One key

242. THE 1949 GENEVA CONVENTIONS: A COMMENTARY 19–20 (Andrew Clapham et al. eds., 2015).

243. See *Prosecutor v. Delalic*, Case No IT-96-21-T ICTY, Trial Judgment, ¶¶ 265–266 (Nov. 16, 1998); *Prosecutor v. Tadic*, Case No IT-94-1-A ICTY, Appeals Judgment, ¶¶ 165–168 (July 15, 1999).

244. PROVOST, *supra* note 211, at 39–40; see also *Delalic*, Case No IT-96-21-T ICTY, Trial Judgment, at ¶¶ 265–266; *Tadic*, Case No IT-94-1-A ICTY, Appeals Judgment, at ¶¶ 165–168.

245. BENVENISTI, *supra* note 228, at 59–61; SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 530 (2012). One documented example is the relation between the RPF and peasants in Rwanda in the early 1990s, described as having shifted from liberation to occupation. MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 186–689 (2001).

246. SIVAKUMARAN, *supra* note 245, at 530–31.

example he gives is the maintenance of law and order which, if not taken over by the rebels, would simply fail to be enforced at all.²⁴⁷

These elements combine to suggest that the rule of law in situations of armed conflict takes on a distinct color. Substantively, as suggested by the possibility of derogation, its content is likely to have to be adapted to exigencies of war in order to provide realistic guidance that reconciles elements of the rule of law with military necessity. Subjectively, international legal standards attest to the lack of a necessary connection between the rule of law and state sovereignty, allowing for the administration of justice by states other than the sovereign territorial state and opening a door to the maintenance of law and order by non-state actors. In this context, the concept of the rebel rule of law stands as a point of convergence of various norms and trends rather than a fanciful suggestion devoid of any foundation in law or in fact.

C. Elements of a Rebel Rule of Law

The idea of the rule of law detached from the state, applied to a non-state armed group, and adjusted to the realities of armed conflict, hints at a concept of the rebel rule of law. This in turn begs the question of the content of such a concept. It is indeed at this second stage that the realistic and useful character of a proposed rebel rule of law can meaningfully be assessed. In so doing, however, I run up against the broader and largely intractable debate surrounding the content of the rule of law generally, whether it should be “thin” or “thick,” and which specific elements can justifiably be included. The main thrust of the analysis in this essay has been to demonstrate that the concept of the rebel rule of law is viable. Part of the argument is indeed founded on the notion that the rule of law is a variable concept that must be adjusted to different actors and different contexts. Logically, it seems inconsistent to attempt to map out an objective understanding of the substantive requirements of the rule of law as applied to the rebel administration of justice. In general, the rule of law can be said to be thinner in situations of armed conflict and distinct in relation to non-state actors. As a result, the elements of a rebel rule of law offered here correspond to a thin version of the concept, leaving space for more demanding components to be argued for when the circumstances allow for them. Finally, the elements of a rebel rule of law are not necessarily all derived from the rule of law as applicable to states, so that the former would be a pared-down version of the latter. As we will see, the administration of justice by non-state armed groups brings challenges that in part are unique to them, corresponding to elements of a rebel rule of law that are without equivalent for states. Using the institutions and practices of the FARC in Colombia as a case study, I suggest four elements to a rebel rule of law whereby the administration of justice

247. *Id.*

must 1. be part of a broader system of governance, 2. be carried in a regular fashion, 3. include some minimum elements of procedural fairness, and 4. rest of a narrative of social justice.

The rule of law is a concept that situates the administration of justice within a broader framework of legitimacy and accountability in the exercise of public authority. It seems difficult to imagine a system of justice that could correspond to the aspirations of the rule of law if it operates in isolation from other components of public governance. This does not necessarily correspond to a “state-within-a-state” established by an armed opposition group. The FARC in Colombia is a good illustration of the complex nature of rebel governance, described earlier as corresponding to a dual strategy of instrumentalization and marginalization of official powers.²⁴⁸ Where the government was absent or weaker, the FARC would assume powers more broadly, consistently, and institutionally, but always incorporating community actors. Where the government had a strong foothold, the FARC would undermine and influence state authorities to orient them in a manner consonant with the rebels’ priorities. In all cases, a web of relations was established between the FARC and the population covering many facets of life. This web of social relations is what constituted, for a segment of the population, the FARC as a legitimate actor to whom individuals could turn to resolve disputes. Indeed, as expressed by some insurgent leaders, the FARC was drawn into the administration of justice in a rather organic fashion, by its mere presence and power, contributing to the legitimacy and stature of the group within the population. Conversely, their administration of justice could be a burden, and failure to discharge it in a manner that was felt to be adequate by the community could have undermined their authority and, as a result, their strategic effectiveness.

This is related to a certain presence of armed groups in a certain territory which allowed them to exert some authority continuously. This is not to say that the rebels must necessarily control the territory, meaning that they can exclude government presence. In Colombia, as in many other civil wars, the government was most often present in some way, not rarely concomitantly with the rebels.²⁴⁹ Even if there was state military presence, the FARC could withdraw but still be virtually present: if one needed to find the FARC, for instance to bring a dispute, there were often known ways to reach them.²⁵⁰ Not all non-state armed groups engage in this type of governance. One extreme example of a group not engaged in governance is the Lord’s Resistance Army in Uganda, which appears to live off the population

248. I rely in this Section upon the findings described in Sections II.A.ii and II.B.iii, above, without repeating all the sources cited therein.

249. ARJONA, *supra* note 1, at 174–75.

250. The LTTE in Sri Lanka provides a striking example of a rebel group that did control territory but whose courts had a “jurisdiction” that extended even beyond, with civilians in government-controlled areas frequently crossing into LTTE territory to file complaints in LTTE courts. MAMPILLY, *supra* note 7, at 119.

through terror and kidnapping rather than the sort of interactive engagement that underpins governance.²⁵¹

A second element of the rebel rule of law is a degree of stability and predictability in the application of rules. There are both normative and institutional dimensions to this element. Normatively, the administration of justice can be said to correspond to the rule of law if it sanctions the application of rules that are known or knowable to those to whom they are applied.²⁵² This can mean either that the armed opposition group is sanctioning customary norms that exist within a given community, or that the group has issued its own rules. Although war is a practice of social disruption, it does not usually entirely displace social structures that preceded it, especially in civil wars. This can be the case as regards norms administered by rebels, corresponding to values shared between the rebels and the general population. In the case of the FARC, it is reported that many of the norms they incorporated into their administration of justice overlapped with peasant values, a reflection of the origins of the movement.²⁵³ At other times or in respect of specific questions, the rebels can issue directives imposing rules of behavior that must be complied with by the population. Whether these be about crimes, commerce, taxation, etc., they can be printed and nailed to trees or simply proclaimed orally during community meetings. Often produced by people without any legal training, they tend to be expressed in simple terms that are well-understood by everyone. Non-state armed groups in some other armed conflicts produced considerably more elaborate standards, including the LTTE in Sri Lanka which promulgated its own civil code and criminal code.²⁵⁴ In her extensive field work throughout Colombia, Arjona found that 90% of the time, civilians had a clear expectation of what the rebel rules were and how the group would behave.²⁵⁵

The requirement of stability and predictability also has institutional implications. While the ideal of a permanent, public rebel judicial system is likely unattainable in a great number of armed conflict, the concept of the rule of law speaks to the need to inscribe the exercise of public authority in legal practices. As such, authority that is exercised without any predictable patterns of how and by whom decisions are made cannot be said to comport with the rule of law. For instance, the Colombian ELN in its early days was led by commanders who would order executions without any process for matters that reflected their own

251. See Tim Allen & Koen Vlassenroot, *Introduction to THE LORD'S RESISTANCE ARMY: MYTH AND REALITY* 1, 10 (Tim Allen & Koen Vlassenroot eds., 2010).

252. Peña, *supra* note 88, at 222. The principle *nulle poena sine lege* is rendered in the CODIGO PENAL GUERRILLERO. CODIGO PENAL GUERRILLERO art. 2 (1961) ("Ningún comandante podrá imponer sanción alguna que no esté de acuerdo con el código y conforme a las normas en él contenidas.")

253. Molano, *supra* note 85, at 334.

254. E. Pararajasingham, *Tamil Eelam Legal System*, TAMILNATION.ORG (Oct. 30, 2003), <http://tamilnation.co/tamilceelam/defacto/031030judicial.htm> [<https://perma.cc/C6NB-WBAQ>].

255. Arjona, *supra* note 12, at 1371.

impulses.²⁵⁶ The practice of the FARC evolved to be very different from this picture: even without standing institutions, there were known ways of getting the rebel group to become seized of a matter, either because of open meetings on market days or by passing word to “those in the know” who could alert the FARC. This is far from filing a motion to initiate an action, but it does convey a sense that justice—at least of a sort—was at hand when it was needed. In this sense, the rule of law supports individual agency by allowing people to plan their lives.

The institutional and normative dimensions of the stability and predictability of justice lead to the third element of a rebel rule of law: a minimum degree of fairness in the way in which decisions are made. What due process requirements are, in the context of the rebel administration of justice, is a complex question that cannot be fully explored here. A full answer would require a thorough exploration of the applicability of international human rights obligations to non-state armed groups as well as an articulation of due process rules in the very particular context of the administration of justice on the battlefield. Inevitably, it would enlarge the concept of the rule of law to the thicker end of the spectrum described earlier, at which human rights and the rule of law become fused. In keeping with the announced ambition to articulate here a thin version of the rebel rule of law, four implications of the requirement of fairness can be suggested, all reflecting the idea that the exercise of authority must be constrained by rules. A first implication is that rules bind not only those subject to authority but also those who wield it.²⁵⁷ It reflects a necessary reciprocity between the governed and the governing whereby there is a general expectation on the part of the population that the armed opposition group will abide by its own standards.²⁵⁸ The fact that, for the FARC as well as for many other armed groups, the administration of justice grew organically from internal discipline to a more public form of justice is one way in which the rules applicable to the population and those applicable to the group are connected. The possibility of complaining to rebel leadership of the behavior of a member or even of the group, as did occur at least in some occasions in Colombia, is another indication of this element of reciprocity. A second implication is that the established practices or institutions to administer justice be marked by some degree of impartiality. This does not mean neutrality, as the rebel administration of justice can surely reflect the broad governance objectives of the armed group just as official justice does that of the state. On the other hand, it means that rules must be applied in a spirit of objectivity as opposed to simply giving effect to preferences of the decider. It is not rare, in non-international armed conflicts, for tribal connections of a party to a dispute to have a decisive influence on the outcome. The study of FARC

256. Molano, *supra* note 85, at 332.

257. Alvarez, *supra* note 209, at 24.

258. Arjona, *supra* note 12, at 1374; Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 24 (1969).

governance in Colombia does not suggest that this is the case there, but its presence would be in tension with the requirements of the rule of law. A related implication is the need to listen to all sides of a dispute before reaching a decision. Again, many informers on FARC administration of justice confirm that the principle of *audi alteram partem* is part of the regular decision-making process of the group.²⁵⁹ FARC commanders remarked on the importance of fact-finding more broadly, including the possibility of calling other witnesses and going to inspect the evidence if it cannot be brought to the hearing. Finally, fairness speaks to the need for a resolution of the legal issue that is clear and final. The FARC often issued written decisions to ensure that there be no further disputes, and at times these were even entered into official ledgers of community dispute settlement mechanisms.²⁶⁰ In some cases, the FARC allowed for the possibility of an appeal of a decision, including in cases where the death penalty was imposed for a serious crime.²⁶¹ Otherwise, there is a sense that it was unwise to ignore a decision by the FARC, for sanction could be quick and harsh.

The fourth and final element of the rebel rule of law is discursive: the armed opposition group must relate its administration of justice to objectives that are consonant with social justice. Not all armed non-state actors claim the mantle of justice when exercising public authority. Some may have an approach that is more overtly predatory, as in the example of the Lord's Resistance Army mentioned earlier, and others may feel distrust of the local population that they wish to keep at bay rather than engage by way of justice mechanisms, as the Rwanda Patriotic Front reportedly did during its initial takeover of Rwanda.²⁶² In two decisions, the Special Court for Sierra Leone found that accountability mechanisms established by non-state armed groups aimed primarily to maintain internal discipline, and had very little or nothing to do with a wish to sanction international criminal law or to act on the basis of moral, ethical, or religious opposition to behavior that amounts to violations of the laws of war.²⁶³ UN Secretary General Kofi Annan suggested that the rule of law should apply to any institution that seeks to promote it, and perhaps we should add only to them.²⁶⁴ If, as advanced by Rod Macdonald, "as a technique

259. Interview with FARC Commander, *supra* note 135.

260. *Id.*

261. *Id.*

262. MAMPILLY, *supra* note 7, at 8.

263. *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T Judgment, ¶ 712 (Special Court for Sierra Leone, Trial Chamber, Mar. 2, 2009) ("[T]he RUF disciplinary system functioned essentially to allow the leadership to maintain control over all the RUF fighters and impose and maintain order in RUF-held territory. It failed to systematically deter or regularly and effectively punish crimes against civilians or persons *hors de combat*. The disciplinary process was fundamentally a means of keeping control over their own fighters and was not a system to punish for the commission of crimes."); *see also Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T Judgment, ¶ 1739 (Special Court for Sierra Leone, Trial Chamber, June 20, 2007).

264. U.N. Secretary-General, *supra* note 178.

of social ordering, law is the endeavour of symbolizing human conduct as governed by rules,” then it is fundamental that the rebel group itself partake in this symbolizing effort.²⁶⁵ Each armed insurgency produces its own justificatory narrative which is, more often than not, couched in terms that evoke social justice—this is certainly the case for the FARC in Colombia, as described earlier. This element of the rule of law amounts to an invitation to non-state armed groups to inscribe their exercise of public authority into such social justice narratives.

CONCLUSION

The survey of the administration of justice by the FARC in Colombia suggests that this form of rebel governance is not necessarily incompatible in all its aspects with the concept of the rule of law. The latter is sufficiently fluid and flexible to allow for a meaningful application of its fundamental elements to the rebel administration of justice, to nudge it in the direction of practices that are evolving towards the progressive realization of the aspirations of the rule of law. This does not necessarily imply the legitimization of the cause embraced by an armed opposition group such as the FARC, nor of its practices. In this sense, the rebel rule of law operates a function similar to the rule of law more generally when it is applied to the administration of justice by a state: it does not bring with it the condoning of the state or of its actions, quite the opposite since the rule of law is usually brandished to castigate a government for its failures in this regard. One difference is that states have a full international legal personality and are presumed competent to fulfil their legal obligations, although lack of resources and other externalities may excuse incomplete performance. Armed groups, on the other hand, have a legal personality that is only partial, and the idea of the rebel rule of law can be a tool to determine what their obligations should be, in addition to whether they have been met.

Governments fighting against armed opposition groups are eager to delegitimize every facet of the insurgency, and thus to dissociate whatever form of rebel *de facto* governance from any notion of justice or law. While there are sound political and even legal reasons for these governments to do so, in following their lead we deprive ourselves of both a yardstick by which to measure and criticize the practices of non-state armed groups and a tool with which to engage in a dialogue with the groups to encourage them to alter their behavior. The work of organizations like the ICRC and Geneva Call have established with unimpeachable clarity that humanitarian engagement with armed rebels is feasible and potentially

265. Roderick A. Macdonald, *Call-Centre Government: For the Rule of Law*, Press #, 55 U. TORONTO L.J. 449, 459 (2005).

transformative, and the study of the FARC suggests that this can be so for the administration of justice as well.²⁶⁶

The suggestion of a rebel rule of law has further implications for transitional justice. If a non-state armed group exerts significant control over parts of national territory for long periods of time and runs justice mechanisms, like the FARC in Colombia, then it will have created facts on the ground that will be nigh impossible to overlook or undo. It is remarkable that the discussions of the peace process in Colombia do not seem to have envisaged what will be the legal status of monetary awards, land titles, and a myriad of other decisions issued by FARC-driven processes. The end of armed conflict, just as its onslaught, can be a form of social disruption. There are examples of countries in which a principled approach was developed to assess which types of rebel judgments should stand and others be declared void, including a series of decisions of the U.S. Supreme Court after the end of the Civil War in relation to decision of Confederate courts.²⁶⁷ The Supreme Court thus held in *Texas v. White* that decisions “necessary to peace and good order” would stand, and those “in furtherance or support of the rebellion” would not.²⁶⁸ The rebel rule of law provides a broader framing device to develop such a principled approach at the international level.

In a very different context, discussing ways to limit the powers of the President of the United States, Bradley and Morrison suggested that the mere fact of having lawyers make arguments grounded in legality could produce an internalization of its concepts and ultimately exert some pull to comply.²⁶⁹ Even if the invocation of a legal precept is merely a conceit, it carries what John Elster described as “the civilizing force of hypocrisy,” initiating a dialogue on a basis that will always owe something to earlier statements, however hypocritical.²⁷⁰ The rebel rule of law likewise can play this civilizing influence, however slowly and unevenly bringing the administration of justice by armed opposition groups closer to the ideals of the rule of law.

266. Ben Saul, *Enhancing Civilian Protection by Engaging Non-State Armed Groups Under International Humanitarian Law*, 22 J. CONFLICT & SECURITY L. 39 (2017).

267. N.D. Houghton, *The Validity of the Acts of Unrecognized de Facto Governments in the Courts of Non-Recognizing States*, 13 MINN. L. REV. 216, 230–32 (1928).

268. *Texas v. White*, 74 U.S. 700, 702 (1868); see also Houghton, *supra* note 267, at 216–17; René Provost, *Accountability for International Crimes Within Insurgent Groups*, in MILITARY SELF-INTEREST IN ACCOUNTABILITY FOR CORE INTERNATIONAL CRIMES 22–24 (2d ed. 2017).

269. Alvarez, *supra* note 209, at 32–33; Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1142–43 (2013).

270. Jon Elster, *Strategic Uses of Argument*, in BARRIERS TO CONFLICT RESOLUTION 236, 250, 257 (Kenneth J. Arrow et al. eds., 1995).

