RENÉ PROVOST, McGill University (Montreal, Quebec)

Expertise:
#human rights
#humanitarian law
#international law
#legal theory

» **Trudeau project:** Engaging Insurgent Justice: The Administration of Justice by Non-State Armed Groups in Wartime

Project objectives: To move the discussion beyond the beaten paths so as to address the difficult question of whether there are any conditions under which it might be legitimate for an armed, non-state group to apply justice by establishing insurgent courts. This project will gather information on and analyze the practices of non-state courts in various conflicts and describe the legal and political consequences of attempts to enforce standards of justice and equity in such proceedings. The ultimate goal of this project is to promote a public intellectual dialogue that will support innovative policy with regard to insurgent justice.

A. Introduction

In Syria, dozens of women and men are held in unofficial 'prisons' run by some of the armed groups fighting ISIS. The detainees are accused of a variety of offenses, including war crimes, and wait to be tried by one of the several, competing courts established by different groups. Some courts are presided by former judges and others by clerics or military leaders. They apply anything from a "Unified Arab Criminal Code" prepared by the Arab League, to the judge's own personal interpretation of the Sharia. Trials are quick, and punishment is often death. In a similar fashion, in the rebel-held part of Ukraine in early November, two men were accused of sexual assault and tried by the 'First People's Court' established by insurgents. On the basis of a public vote in the town hall, one man was condemned to death by firing squad, the other to serve on the front line to "redeem his honour in combat". This mirrors the practice of insurgents in other wars in Sri Lanka, El Salvador, Nepal, Sierra Leone, Colombia, Rwanda, Sudan, Kosovo, and many other places where irregular tribunals were created.

What should an insurgent group do when it captures someone who has committed serious crimes, and even war crimes or crimes against humanity? This Trudeau Project seeks to move the discussion beyond the headlines to ask the hard question of whether there are any conditions under which it might be legitimate for a non-state armed group to apply justice through the creation of insurgent courts. The project will compile and analyse the practice of non-state courts in various wars, and map out the legal and political implications of an attempt to infuse justice and fairness in these proceedings. Ultimately, the project seeks to foster public and intellectual dialogue that can sustain policy innovation concerning insurgent justice.

B. Background

This Trudeau Project sits at the confluence of three branches of my prior research, which come together here in a novel way.

One of my earlier studies investigated the structural ties between international humanitarian law (which governs armed conflict) and human rights (which sets out the principles of due process). That study expounded the separate normative frameworks of these two areas of international law, the distinct role that reciprocity plays in them and the way that factual characterisation manages to overcome the vague nature of legal standards. This work culminated in

the publication of a monograph titled *International Human Rights and Humanitarian Law*, at Cambridge University Press.
The second branch of my research, related to my mandate as founding director of the McGill Centre for Human Rights and Legal Pluralism, sought to apply to international human rights law the teachings of legal pluralism developed in the context of domestic law. These investigations targeted not only the "horizontal" diversity of the standards that regulate state activity, reflected in the literature on the fragmentation of international law, but also a "vertical" diversity that expands the field of legal agents that are considered to take part in the production of international legal standards. One outcome of this study was a volume that I co-edited, published by Springer Verlag in 2013, called *Dialogues on Human Rights and Legal Pluralism*.

The third branch of my research that touches on the proposed project is the most recent: the interdisciplinary team of the "Centaur Jurisprudence" project. I am the senior researcher on this team which is composed of legal scholars and anthropologists exploring how the concept of culture is transformed when it is invoked in the formal application of law. The situation I am particularly interested in relates to the application of international criminal law to insurgent groups during the civil war in Sierra Leone. In 2013, I published an initial article related to this research ("Magic and Modernity in *Tintin au Congo* (1930) and the Sierra Leone Special Court", (2013) 16 *Law, Text, Culture* 183-216). In 2014, I chaired an interdisciplinary conference and wrote another article ("Cannibal Laws") which will be included in a volume I am editing that will be the culmination of this project (*Centaur Jurisprudence: Culture in the Domains of Law*).
In its interrogation of the links between humanitarian law and human rights, its expansion of the development sites for international law and its openness to the cultural diversification of applicable law, the proposed project sets the challenge of reconciling these highly diverse views in a single, cohesive approach that could inform an effective policy for improving insurgent justice.

C. <u>Project Statement</u>

The issue of insurgent justice is fast becoming one of the most sensitive in various environments where the collapse of the state means that non-state justice becomes the norm rather than the exception. The legitimacy of entire rebellious efforts often seems to hinge on how they will respect human rights, especially when it comes to their perceived "enemies". This is vividly illustrated by the challenges posed for the Canadian Government in joining the struggle against ISIS in Syria. Confronted with credible reports that ISIS fighters have committed widespread war crimes, how should Canada and the international community react if armed groups, in the name of 'justice', establish their own courts to prosecute ISIS fighters? What are the standards that should apply to non-state forms of trials? I propose to establish a multidisciplinary working group to document and analyse this practice and make policy recommendations to engage insurgent groups so that they commit to respecting basic standards in the administration of "rebel justice". Insurgent groups are typically represented as wholly permeated by illegality, from the very resort to armed force to the involuntary recruitment of fighters to the means and methods of warfare used; they are taken to be truly *outlaws*, and often encompassed under a very broad understanding of "terrorism". International law broadly has refrained from declaring as illegal the use of force by or against the state in a national setting, limiting itself to extending to insurgents the same criminal sanctions for breaches of the laws of war as are applicable to governmental armed forces, and posing few limitations on a state's ability to criminalise insurgency under domestic law.

Despite the political characterisation of insurgent groups as outlaws and international law's disengagement from issues touching on the internal legality of such groups, the reality on the ground is that non-state armed groups are normative actors, that both seek to be bound by norms and produce them. This is particularly evident in non-state armed groups' wide spectrum of attitudes towards the laws of war. Past experience has shown that it is not impossible to engage with insurgent groups with a view to bring their behaviour in line with applicable international legal standards. A particularly interesting experience has been carried out over the last several years by the Swiss NGO Geneva Call, which has approached insurgent groups in different conflicts to persuade them to adhere to the ban on anti-personnel landmine entrenched in the Ottawa Convention. While insurgents cannot ratify the Ottawa Convention, Geneva Call succeeded in getting three dozen groups to sign a 'deed of commitment' to respect a similar ban, along with monitoring measures.

With respect to accountability, non-state armed groups can share many attributes with governmental armed forces at the organisational, institutional and functional levels, while markedly differing in other respects.

The international community should exert a pull towards greater compliance by insurgent groups with international law, including international criminal law and human rights. As such, attempts by rebel groups to hold individuals accountable for war crimes and crimes against humanity should be recognised and supported if they align with applicable international norms. Inevitably, non-state groups imprint the values and aspirations of their own community in administering insurgent justice. The resulting ethno-cultural pluralism poses a challenge for which the unique Canadian experience of managing diversity within a common social project can prove extremely useful.

D. Objectives

- **Explore the reality of insurgent justice**, to offer an understanding of the motives that lead armed groups to establish their own tribunals and to provide an accurate picture of the extent and characteristics of this practice. Using documentary analysis and semi-directed interviews of individuals that have been involved in insurgent courts, the study will collect data that will be analysed in light of legal requirements and political realities in the countries concerned at on the global stage.

- **Foster public and intellectual dialogue** on the issue of insurgent justice, via a working group bringing together actors representing a diversity of constituencies concerned with this under-studied practice of armed groups during armed conflicts. Participants will hail from academia, civil society organisations, national governments, and international organisations.

- **Devise policy recommendations** that can provide guidance to Canada and other governments as to the appropriate and lawful stance to adopt when confronted with judicial institutions created by non-state armed groups. This will take the form of principles or guidelines adopted by the working group described above. A communication strategy will be developed to ensure broad dissemination of recommendations well beyond academia to all classes of actors on the global stage.

E. Project Summary

There are three aspects to the research that this project must cover in order to provide a coherent, cogent and effective solution to the issue of the administration of justice by insurgent armed groups. The first aspect is a legal analysis of the international law framework that applies to this practice. The second aspect is a survey of the experiences of non-state armed groups in establishing and operating courts. Finally, the third aspect is a normative study of the potential for engagement with insurgent groups, largely based on the experience of Geneva Call and the International Committee of the Red Cross.

Legal Analysis. There is both an asymmetry and a paradox in the structure of international humanitarian law applicable to non-international armed conflicts. The asymmetry refers to the fact that state and non-state parties to the conflicts are by and large bound by the same rules on the conduct of hostilities and on the protection of civilians and other non-combatants. This equality of obligations is translated by the balanced application of international criminal responsibility for war crimes, applied equally to government and insurgent combatants. Despite this, the status of insurgent and government forces under humanitarian law is entirely different, because rebels do not enjoy what is called 'combatant immunity', that is the principle that a soldier cannot be held accountable for participating in an armed conflict in which he or she behaves in a manner consistent with humanitarian law. There is in humanitarian law no concept of 'lawful combatant' that can be applied to rebels. As a result, no immunity attaches to participation by insurgents in a civil war, even if they behave in a manner that respects international legal standards in every way.

The paradox of international humanitarian law applicable to internal armed conflicts is that it seems to demand on the one hand what it fails to authorise on the other. Thus under Common Article 3 of the 1949 Geneva Conventions, the

single provision of these Conventions applicable to internal wars, "each party to the conflict" is required to respect a number of minimal humanitarian imperatives. Yet, in the part of the provision which deals with enforcement measures presumably required to implement these obligations, the Conventions limit judicial activity to "regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized peoples". The expression "regularly constituted courts" is widely understood to cover only courts established according to the laws in force in the country, to the exclusion of any 'court' set up by insurgent groups. It is thus as if non-state groups are required to respect the laws but that their efforts in ensuring such respect are not ratified as such and they are deprived of what would ordinarily be a key means of enforcing the law.

The same paradox is partly retained in the 1977 Protocol II to the Geneva Conventions, which further develops international humanitarian law applicable to internal conflicts: on the one hand, in order for this Protocol to be applicable, the insurgent must demonstrate the ability to implement its provisions (Art. 1); on the other, the Protocol fails to recognise any legality to an insurgent that actually does implement its provisions vis-à-vis its own members. There is a concrete and pressing need to carefully analyse the standards of international criminal law, human rights, and humanitarian law. This task involve the complex interrelations among these strands of international law which still operate largely in isolation one from the others. Critically, in order for this legal analysis to be meaningful, it must be rooted in an accurate understanding of the practice of armed groups in setting up their own courts.

Survey of Insurgent Practice. One of the key challenges facing anyone attempting to grasp a better understanding of insurgent courts and develop approaches to bring this practice closer to international legal standards is the fact that very little is known about it. This reflects in a general sense the nature of insurgency as seeking to escape detection in every respect. There is no trace of any attempt to survey this practice as a transnational legal phenomenon.

What are the features of insurgent justice that would inform an understanding of the practice and permit a sharper legal analysis and more effective recommendation for action? A first significant aspect is to better understand the motivations of non-state armed groups in setting up their own tribunals. There is little doubt that internal discipline is a key objective, going towards developing greater operational effectiveness as a fighting unit. Being perceived as committed to justice by the population on whose support they depend may often be a significant factor as well. Broader domestic and international legitimacy may be gained by the formalisation of mechanisms to sanction violations of minimum standards of humanity. Such motives, if they were confirmed in a survey, appear not inconsistent with respect for international law.

A second important feature of insurgent justice is the type of structures created by insurgents to administer 'justice'. The available fragments of information suggest a wide spectrum of practices as regards the formality of the institution, its membership, its relation to military commanders, etc. It would be significant to determine the extent to which any notion of judicial independence is alien to the conception of these courts as revealed in insurgent narrative. Whether these tribunals operate in a reciprocal fashion is likewise revealing, that is whether the same procedures and norms are applied to a captured enemy and to the group's own fighters.

A third feature of insurgent justice that would significantly inform an analysis is the extent to which rebel courts invoke formal standards of international human rights and humanitarian law. In the available information, there are common mentions of insurgents adopting their own laws. The extent to which these laws appear linked to or compatible with universal standards would significantly affect the likelihood that non-state groups would be willing to commit in a formal fashion to respect international law in their administration of justice. Finally, a survey could identify obstacles or limits to fairness in insurgent justice, from the lack of individuals trained in the law to the absence of a stable geographic basis for the activities of insurgent courts.

Policy Recommendations for Normative Engagement. The challenge presented by this project is not only to critically analyse the practice of insurgent justice on the basis of a more informed understanding of what is happening on the ground, but also to attempt to translate this analysis into policy recommendations which can be implemented to bring rebel courts closer to what is mandated by international legal standards. What objectives are realistic in this

extraordinarily difficult environment, and what are the means best suited to pursue them? The work of two organisations provides an enormously valuable body of experience in this respect: the International Committee of the Red Cross (ICRC) and Geneva Call.

The IRCR is one of the oldest international non-governmental organization active in the field of the protection of fundamental rights. Today, the ICRC devotes most of its energy and resources to providing humanitarian assistance in civil wars, including the dissemination of international humanitarian law. Several decades of experience in talking to non-state armed groups gives the ICRC unparalleled ability to understand how to translate the abstract principles of humanitarian law into concrete guidelines that can be understood and accepted by rebel fighters, often illiterate and nearly always operating in difficult circumstances. The ICRC has produced or commissioned studies to better understand what makes rebels comply with humanitarian law, identifying the limits of what can be achieved by legal norms in the context of internal conflicts. On the other hand, the ICRC has never analysed the practice of non-state groups setting up their own tribunal to administer law.

Geneva Call/*Appel de Genève* is a much younger organization that emerged in the wake of the Ottawa process to ban anti-personnel landmines. That process, spearheaded by the Canadian Government, led to the adoption of the Ottawa Convention whereby states commit to abandon the production and use of anti-personnel landmines. Non-state armed groups, although they do use these mines as well, cannot ratify this treaty reserved to states. As a result, Geneva Call was created to establish a parallel mechanism to induce non-state groups to sign a 'Deed of Commitment' which replicates the core undertakings of the Ottawa Convention. Since 2000, Geneva Call has succeeded in convincing over three dozen armed groups in Africa and Asia to sign this Deed and abandon the use of anti-personnel landmines. The organization lately has expanded its scope and added efforts to generate commitments not to recruit and use child soldiers and to afford special protection for women in armed conflicts.

The project aims to take the very significant experiences of the ICRC and Geneva Call as a point of departure to devise policy recommendations to infuse insurgent justice with greater respect for international legal standards of fairness. A key contribution of the project is to bring to bear a critical legal pluralist approach to the way in which we understand how international law can generate compliance in a context that seems so averse to any type of legal regulation. According to this approach, the force of law stems not from a pedigree linking rules to a source viewed a legitimating, but rather from the normative status given by the commitment of the very agents whose behavior we seek to regulate. Viewed in this way, the key to generating compliance by non-state armed groups with international law is to allow them to have ownership of these norms. Such ownership is unlikely to be achieved by what civil law would label a contract of adhesion, whereby international law is accepted lock stock and barrel. More ambitious attempts such as infusing justice in the operation of rebel courts, will require a process allowing non-state groups to translate international norms into their own vernacular and, in the process, transform them. The outcome is a pluralized international humanitarian order in which there is no absolute consistency of legal standards in every place and for every actor. The promised benefit to reap is a legal order that reaches into confines that the current understanding of international law cannot influence significantly. In concrete term, this translates into a policy recommendation that the approach advocated by humanitarian entrepreneurs like the ICRC and Geneva Call ought to be abandoned or significantly modified in favour of an engagement with non-state groups that supports their legal agency in the shaping of a humanitarian regime that is reconcilable with both their own identity and international law.

F. Methodology

The project methodology combines documentary and doctrinal research, the use of networks of people working in human rights and post-conflict justice, and meetings with an international multidisciplinary working group.

Some aspects of these three project components call for an **analysis of existing literature** in the fields of international humanitarian law and human rights, from legal theory, with special focus on legal pluralism, to international relations, military studies and especially insurgency and counter-insurgency (COIN) strategies, and legal anthropology. Undergraduate, graduate and post-graduate research assistants in law, political science and anthropology will prepare reports on the application of international humanitarian law to non-state armed groups, on the logic and practice of insurgent military strategies, on state justice administration practices during armed conflict, on the role of international legal standards in the approach taken by the International Committee of the Red Cross and Geneva Call. As I did with my interdisciplinary research team on "Centaur Jurisprudence," combining legal and anthropological viewpoints on the way law constructs culture, I intend to bring together these assistants from different programs in a seminar that will allow for direct discussion, in order to further their reflections and train them in interdisciplinarity.

One of the major challenges of this project is making the connection between insurgent practices on the ground and the legal and theoretical analysis of the contributions of international law. To this end, I propose to use **networks** of people working in organizations that are involved in the protection of victims of war and post-conflict reconstruction, including Geneva Call, the ICRC, Human Rights Watch, and the International Center for Transitional Justice. The objective is to identify people in the target countries who will agree to take part in semi-directed interviews on the practices of insurgent courts. The results of these interviews will be collated and analysed by research assistants at McGill.

Finally, the cornerstone of the project will be the creation of a **working group** that will meet under the auspices of the Trudeau Foundation in Montreal, to discuss the empirical and theoretical research results and formulate recommendations on the approach most likely to produce concrete results in the way insurgents administer justice. The immediate objective will be to sketch out guidelines for normative engagement with non-state armed groups on justice during armed conflict. This working group will bring together some of the people involved in the data collection, including at least one representative of the ICRC and Geneva Call, as well as experts in international law, humanitarian assistance, and international relations. I also hope to include legal experts from the Office of the Judge Advocate General of the Canadian Armed Forces, with whom I have already collaborated, whose experience is directly relevant due to their deployment in Afghanistan.

G. Integration in the Trudeau Foundation community

The Trudeau community offers a wealth of thinkers with expertise related to the themes of the project and whom I would like to invite to participate.

The proposed project generally reflects three of the four Trudeau Foundation themes. Primarily, the project is directly linked to the theme of **human rights and dignity**, in that it aims, on one hand, to protect the fundamental rights of people subjected to insurgent justice, and, on the other, to reconsider insurgent justice as a platform for articulating the values and aspirations of communities caught up in armed conflict. In a less direct but nevertheless compelling connection, the project asks whether a person can be both an insurgent and a **responsible citizen**. Ethnocultural diversity is closely linked to the idea of multicultural communities, political spaces in which practices of legality – such as the insurgent courts studied here – develop. There is a similar tension in Canadian multiculturalism, where we try to reconcile the relative independence of communities with adhesion to certain values that transcend distinctiveness. This touches on the third Trudeau Foundation theme, **Canada in the world**, underlining the country's wealth of experience and expertise on the issue of insurgent justice. In addition to its involvement in managing differences through a multicultural approach, Canada has played a central role in the development of norms and institutions of international justice in recent decades. Its ongoing participation in peacekeeping operations, the leadership role it played in creating

the International Criminal Court, and its involvement in regional and national efforts, such as the Special Court for Sierra Leone, have given Canada an unparalleled pool of expertise on matters related to international justice. Finally, Canada abounds with non-governmental organisations involved in international humanitarian support which have developed collaborative approaches with governments and communities that can serve as models for supporting community emancipation in countries affected by war.