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Hyeran Jo

**Rise and Decline of International Rule of Law:  
Case of Non-State Armed Actors**

Berlin Potsdam Research Group „The International Rule of Law – Rise or Decline?“

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Berlin Potsdam Research Group  
International Law – Rise or Decline?

Unter den Linden 9  
10099 Berlin, Germany

[info@kfg-intlaw.de](mailto:info@kfg-intlaw.de)  
+49 (0)30 2093-3322  
[www.kfg-intlaw.de](http://www.kfg-intlaw.de)

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## **Rise and Decline of International Rule of Law: Case of Non-State Armed Actors**

*Hyeran Jo\**

### **Abstract:**

*This paper assesses the rise and decline of international rule of law in the case of non-state armed actors. Both signs of rise and signs of decline of international rule of law show in the case of non-state armed actors. Signs of rise include the expansion of coverage of international humanitarian law (IHL) and international criminal law, as well as international legal argumentation and rhetoric made by non-state armed groups. Some non-state armed actors express that they are governed by IHL in public statements or bilateral agreements with international actors, partly acknowledging universality of international humanitarian norms, and sometimes act as such. Signs of decline in the international rule of law also show – although some of them can be seen as business-as-usual – privileging of military advantage, instrumental use of international law (as justification and local interpretations), as well as conflicting understanding of IHL between local and global norms. The multiplicity of non-state actors also portends the decline of international rule of law, with the proliferation of many non-organized groups without legitimacy-seeking motivations.*

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\* Associate Professor of Political Science, Texas A&M University.

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**Contents:**

- 1. Introduction: International rule of law on the periphery.....5
- 2. Argument: Conditions and pathways for the rise of international rule of law.....6
  - a) Condition #1: Incentive compatibility.....7
  - b) Condition #2: Consistency in interpretation .....7
  - c) Pathways: How decentralized norm can strengthen international rule of law .....8
- 3. Signs of Rise .....9
  - a) Broadening reach of international law .....10
  - b) Adopting or acknowledging interational law.....10
  - c) Compliant behaviors..... 13
- 4. Signs of Decline .....14
  - a) Justifications .....14
  - b) Local interpretation .....16
  - c) Non-compliant behaviors.....16
- 5. Conclusion: Harmony and discord ..... 17

## 1. Introduction: International rule of law on the periphery

Non-state armed actors are individuals or groups that pursue their political, social, or economic goals with military means. The status of their legal personality as well as the extent of legal binding-ness is continuously debated,<sup>1</sup> but in post-Cold War contemporary era, it is clear that non-state armed actors are part of international law, particularly in the areas of international humanitarian law (IHL), international human rights law (IHRL), and international criminal law (ICL).<sup>2</sup> This thickening of international law can be termed as “international rule of law.”<sup>3</sup> Has the broad legal development and the thickening of international rule of law affected non-state actors? How do non-state armed actors respond to the international rule of law?

A primary tension exists with respect to non-state armed actors. States, as primary subject of international law, make and consent to international law through the means of signing and ratification. Without such privilege residing on the “periphery,” non-state actors do not enjoy the same rights and responsibilities in terms of international law. Would non-state actors have an incentive to contribute to the rise of international rule of law? Or, would they just attempt to undermine international rule of law completely? Would the thickening of international law permeate to non-state armed actors? The goal of the paper is to answer those questions by analyzing the pattern for the rise and decline of international rule of law on the part of non-state armed actors. Among the non-state armed actors, this paper will focus its discussions on rebel groups – non-state armed actors that have clear goal of fighting national governments, only bringing in, as necessary, the discussion on other categories of non-state armed actors, such as criminal gangs or other organized crime groups.<sup>4</sup>

It is important to assess the rise and decline of the international rule of law on the part of non-state armed actors for two major reasons. One is for human security reasons. Many non-state armed actors are perpetrators of international humanitarian law in the course of their use of

<sup>1</sup> For legal personality of non-state armed groups, see Fortin, Katharine, *Accountability of Non-State Armed Groups* (2017, Oxford University Press); Sivakumaran, Sandesh, *The Law of Non-International Armed Conflict*. (2012, Oxford University Press); Nijman, Janne Elisabeth, “Non-state actors and the international rule of law: revisiting the ‘realist theory’ of international legal personality” in M. Noortmann, & C. Ryngaert (eds.), *Non-state Actor Dynamics in International Law: from Law-takers to Law-makers* (2010, Farnham: Ashgate) pp. 91-124.

<sup>2</sup> In general, applicable laws to non-state armed actors include international humanitarian law, international human rights law, and international criminal law. International humanitarian law regulates wartime behavior, including rebel groups in civil conflicts. International human rights law governs peacetime individual rights, but given that wars’ end is not clear in most civil conflict settings, human rights of civilians and minorities become relevant with respect to conduct of non-state actors inflicting harm on individual rights. International criminal law has gained more relevance over time with respect to non-state armed actors, with the establishment of the International Criminal Court based on the Rome Statute where non-state armed actors are subject to accountability and away from impunity from international atrocity crimes. For more, see Krieger, Heike (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (2015, Cambridge University Press); Alston, Philip and Ryan Goodman, *International Human Rights*. (2012, Oxford University Press).

<sup>3</sup> The term and definition of “international rule of law” and the meaning of “thickening” follow the Krieger and Nolte’s founding paper, in Krieger, Heike and Georg Nolte, “The International Rule of Law – Rise or Decline? Points of Departure” KFG Working Paper Series. No.1. Berlin Potsdam Research Group “The International Rule of Law – Rise or Decline?” Berlin, Germany, October 2016.

<sup>4</sup> This focus includes insurgent groups and some terrorist groups. Empirically, there is substantial overlap between rebel groups and terrorist groups, according to the study of civil wars and terrorism in the study of international relations (see for example, Stanton, Jessica, “Terrorism in the Context of Civil War”, (2013) *Journal of Politics*, 75(4): 1009-1022). However, this focus excludes lone-wolf terrorists and some terrorist groups that do not have political agenda (either center aims to topple the government or secessionist aims to have autonomous regions).

violence. Understanding how non-state armed actors react to the rise of international rule of law will help us devise proper international legal and policy responses directly related to the fate of many civilians around the world. Second, as the number of actors in international system proliferates, knowing how international rule of law is accepted by end-users of the law will allow us gauge the relevance of international rule of law.

This paper will analyze both signs of the rise and decline of international rule of law. It will first demonstrate that some non-state armed groups express their commitment to abide by international humanitarian law, which can be interpreted as a sign of rising international rule of law. Non-state armed actors sometimes exhibit behaviors consistent with what is prescribed by international humanitarian legal principles, potentially contributing to the rise of international rule of law. The signs of decline (or status quo) also show. The decline of international rule of law among non-state armed actors are manifested through rhetoric and behavior. We see the cases of outright rejection of international rules in terms of words, as well as outright flaunting of international rules in terms of deeds. The heterogeneity and different types of non-state armed groups will account for the patterns of rise and decline of international rule of law.

In presenting the patterns for rise and decline of international rule of law for non-state armed actors, I also advance a theoretical argument that the rise of international rule of law is likely associated with two conditions: incentive compatibility and consistency in interpretation. When non-state armed actors have congruent interpretations at the local level with global norms, and when non-state armed actors have incentives to get to know and comply with IHL, we are more likely to see the rise of international rule of law. Without these two conditions – when incentive compatibility condition fails and when local norms are too disparate from global understanding of rules, we are likely to observe decline of international rule of law among non-state armed actors.

The paper proceeds as follows. Section 2 explicates my argument for the theoretical conditions for the rise and decline of international rule of law. Section 3 and Section 4 present empirical patterns and indicators for the rise and decline of international rule of law in the case of non-state armed actors, particularly in the case of rebel groups in civil wars. Section 5 concludes with implications.

## **2. Argument: Conditions and pathways for the rise of international rule of law**

Under what conditions would decentralized norms in the case of non-state armed actors contribute to the rule of law on the international level? I propose two conditions: compatibility and consistency. Compatibility refers to the incentive compatibility between local actors and global normative structures. Consistency refers to the matched interpretation between local and global norms. My central claim here will be that the international rule of law will rise when international rules are locally interpreted as such, and when it is incentive compatible for non-state armed actors to adopt global and follow rules. The two conditions can reinforce each other: having local interpretation consistent with global rules can help non-state actors to behave in a more incentive compatible fashion. In turn, incentive compatible environment can spur rebel groups to have local interpretation that match global understanding of international law. I discuss these two conditions below each in detail.

**a) Condition #1: Incentive compatibility**

The first contributor to the rise of international rule of law is the incentive compatibility. When it is in their interest to comply with IHL, non-state actors are likely to acknowledge and apply international law, consequently contributing to the thickening of international law. When for example, non-state armed actors are negotiating for peace talks, incentives for international appeal increases. This then can contribute to the rise of international rule of law by producing peace agreements with IHL and IHRL provisions, and subsequent compliance.

The hard fact is that political and military imperatives of non-state armed actors are, more often than not, conflicting with the central goal of international humanitarian law of restraining wartime behavior. To some non-state armed actors, however, accepting international rule of law becomes incentive compatible at some point in their life cycle. Expressing commitment to international law (or soft lawmaking process) is part of non-state armed groups' desire to be part of international community. When those non-state armed actors are willing to be accepted as internationally legitimate political actors, they tend to join by expressing conformity and sometimes joining what states do. Political science research shows (now in abundant body of research) that rebels rule and govern, they conduct foreign diplomacy, and they do express and commit to IHL. These are the class of non-state armed groups that are more likely to contribute to the thickening of international law, compared to their counterparts.

When incentive-compatibility condition is not satisfied, we are likely to observe the problem of non-state actors that consistently reject the very structure and authority of international law – akin to the problem of “persistent objectors.”

**b) Condition #2: Consistency in interpretation**

The second contributor to the rise of international rule of law is the consistency in interpretation at local and global levels. The congruent match of understanding at the global and local level is going to be needed if international law were to remain relevant at local levels. If local and global understandings are matched (and rebel groups accept it without reservation or revision), then international rule of law might rise. However, when local understanding challenges global understanding in a fundamental way (and sometimes in an irreconcilable fashion), then, we can say that international rule of law might be in decline – but rather, that non-state armed actors, or rebel groups' rule of law prevails in local settings.<sup>5</sup>

Differences in interpretations can arise because of the differences in social, historical, or religious contexts across societies. The differences can also arise when actors deliberately want to interpret the global rules to play up their political interests. Whenever local understanding is in conflict with global understanding (e.g. as to what is a ‘child,’ what is a ‘civilian’) we might see the decline or erosion of the international rule of law, especially if such local understanding constantly challenges global understanding of international law. In this case, international law will not have the ultimate authority, but rather local actors will. The danger here is that the law can lose coherence. Via decentralized development, with so many interpretations, the incongruence between global and local levels can ultimately lead to the erosion of international rule of law.

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<sup>5</sup> Taliban's *Layeha* (internal code of conduct) is one such example, where Taliban's definition of civilian is expansive. See later discussion in Section 4.

Consistency of interpretation between local and global actors is therefore another necessary condition for the sustainment of or the rise of international rule of law among non-state armed actors.

The two theoretical conditions imply that we see the rise of international rule of law when non-state armed groups' incentives are aligned to follow international rules, and when their interpretations of international law are consistent and congruent with global ones. In other words, international rule of law is likely to rise when local understanding is consistent with global understanding, and when the incentives to invoke international law is compatible with political and military incentives of non-state armed groups. When the two conditions collectively fail, we are likely to observe the decline of international rule of law with respect to non-state armed actors. The consistency and compatibility requirements ensure the rise of international rule of law in the case of non-state armed actors.<sup>6</sup> Lack of those two twin conditions are likely to lead to the decline of international rule of law.

### **c) Pathways: How decentralized norm can strengthen international rule of law**

If consistency and compatibility conditions are satisfied, decentralized norm development can contribute to international rule of law in several ways.<sup>7</sup> The first point would be the hold of periphery, or the existence of an anchor. When the centralized lawmaking or developments fail, decentralized norms can still hold and develop on its own. This is analogous to the essence of the portfolio theory<sup>8</sup> – diversification of norms would make norms more robust to weathering storms. In this sense, decentralized norms can serve as insurance mechanisms to the erosion at the center.

Second, development of decentralized norms can be effective in generating compliance. Social scientists long recognized the value of decentralized solutions to solve the problem at the center.<sup>9</sup> In a decentralized norm development, ultimately, end-users of law can internalize the norm by developing their own understanding and own the rules. Users can develop their own sanctioning mechanism, and enforce it without central enforcer. This aspect of decentralized enforcement is especially important for international law where central enforcer does not exist more often than not. This is in line with the observation the wars can be effectively regulated when the divide between norm-makers and norm-takers is narrowed down.<sup>10</sup> Such decentralized lawmaking occurs

<sup>6</sup> This argument could be more generally applied beyond non-state armed actor setting. For one, incentive compatibility is also important for state actors' compliance with international law, as well as other categories of non-state actors (such as private companies). For the other, consistency in interpretation between national courts and international courts, or how national courts accept international courts, can influence the strength of international rule of law.

<sup>7</sup> For existing arguments on this question, see Jean d'Aspremont, "Do Non-State Actors Strengthen or Weaken International Law? The Story of a Liberal Symbiosis" in Krieger, Heike, Georg Nolte, Georg, and Andreas Zimmermann (eds), *The International Rule of law – Rise or Decline? – Approaching current foundational challenges* (2019, Oxford University Press).

<sup>8</sup> More on this point on the diversity in normative contestation, see Simmons, Beth and Hyeran Jo, "Measuring Norms and Normative Contestation: The Case of International Criminal Law", (2019) *Journal of Global Security Studies*, 4(1): 18-36.

<sup>9</sup> Ostrom, Elinor, *Governing the Commons: The Evolution of Institutions for Collective Action* (2015, Cambridge University Press); Kube, Sebastian and Christian Traxler, "The interaction of legal and social norm enforcement", (2011) *Journal of Public Economic Theory*, 13(5) 639-660. The literature on federalism also highlights the delegation of authority and policy experimentation as the core values of decentralized policymaking.

<sup>10</sup> Fazal, Tanisha, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* (2018, Cornell University Press).



during the rule of law promotion among non-state armed actors done by international humanitarian actors.

Whether non-state armed groups recognize and accept international legal order depends on how they perceive the value of international legal rules. Uncertainty in IHL does create misunderstanding, misinterpretation, or politicization of international law, or even silence. Next section empirically examines these questions.

### 3. Signs of Rise

Conventionally, international rule of law might appear to be in constant decline in the case of non-state armed actors. At the extreme, some might think that international rule of law simply does not exist among non-state armed actors. To be sure, civil wars or non-international armed conflicts is not the usual place where we would expect robust international rule of law operation. As will be demonstrated, however, the study of rebel documents, social media, and reported narratives show that some, if not all, non-state armed actors have developed their own understanding of international law. This in general contributes to the rule of development of international law, because such development of local understanding of international law means that armed groups are aware and accept international law as law governing their conduct.

How do we measure the rise and decline of international law in the case of non-state armed actors? Standard yardsticks to assess the rise and decline of international law spectacularly fail in the case of non-state armed groups. Various general measures of international rule of law's rise and decline, such as treaty membership, or treaty withdrawal, cannot be applied to non-state armed actors' setting directly, since there exist no formal procedures for accepting and ratifying international law into non-state armed actors' institutions or organizations. Institutional measures such as the rise of treaties and conventions, ratification or domestication of international law, or withdrawals from international law membership – they are in a way prerogatives of states. To non-state armed groups, those measures of treaty-making or ratification are off-limits, so we cannot observe any rise and decline by looking at such measures.

Analogous measures can be developed, however. We can measure non-state armed actors' commitment to international law and how they behave over time. For example, non-state armed actors contribute to the rise of international rule of law via institutionalization through soft law commitment.<sup>11</sup> Non-state armed actors also contribute to norm internalization through their own internal code of conduct consistent with international law.<sup>12</sup> Additionally, non-state armed actors' rhetoric or discourse can be the measure for the rise of international rule of law. Likewise, non-state armed actors' rejection or acceptance of global rules or different interpretations can also serve as indicators for the rise and decline of international rule of law. Lastly, non-state armed actors' behaviors consistent or inconsistent with global rules might contribute to our evaluation of whether international rule of law is on the rise or not. In short, the rhetoric/discourse or behavioral/institutional indicators can be analogously developed as in the case of our evaluation of state actors' contribution to the rise and decline of international rule of law. Below, I discuss three aspects and signs of rise with respect to international rule of law: broadening reach of

<sup>11</sup> Roberts, Athena, and Sandesh Sivakumaran, "Lawmaking by non-state actors: engaging armed groups in the creation of international humanitarian law", (2012) *Yale Journal of International Law*, 37(1): 107-152.

<sup>12</sup> Sivakumaran, *supra* note 1.

international law to the case of non-state armed groups, rhetoric from non-state armed actors about international humanitarian law, and their behaviors.

#### **a) Broadening reach of international law**

The “reach” of international law with respect to non-state armed actors has been broadened over time during the course of the 20<sup>th</sup>-21<sup>st</sup> century. Traditionally, international law regulated the interstate behaviors (state-to-state behaviors) but with the rise of private actors (multinational firms, private security actors, non-state actors)<sup>13</sup> international law now covers a variety of actors, including the case of non-state armed actors.<sup>14</sup> The Geneva Conventions’ Common Article 3, as well as Additional Protocols expanded the reach of international law with respect to non-state armed groups’ obligations. Human rights treaties, such as the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), also cover non-state actors’ restraints in behavior during wartime.<sup>15</sup> The signing of the Rome Statute and the establishment of the International Criminal Court and its operation has demonstrated that international law has reached the non-state armed actors in an unprecedented way.

It is important to note here the role of domestic law in assessing the reach of international law to non-state armed actors.<sup>16</sup> Essentially non-state armed groups and their behaviors are regulated by domestic law. For example, Taliban would be subject to the Afghan domestic law in terms of treason, death penalty or domestic criminal law. The dense web of international counterterrorism cooperation has generated the coordination between domestic and international law.<sup>17</sup> This also contributes to the thickening of international law in the case of non-state armed groups.

#### **b) Adopting or acknowledging interational law**

Some non-state armed actors have been increasingly committing themselves to international law, through peace agreements, unilateral declarations, or agreements with international organizations. These are signs of international rule of law in the case of non-state armed actors. We can particularly detect the trend in the database of international humanitarian commitment by non-state armed actors. The database feature more than 600 documents by about 60 non-state armed groups that are unilaterally or bilaterally concluded with respect to international law.<sup>18</sup> Figure 1

<sup>13</sup> Clapham, Andrew, *Human Rights Obligations of Non-State Actors* (2006, Oxford University Press).

<sup>14</sup> In the field of human rights, for example, individuals now have rights to file disputes under international mechanisms.

<sup>15</sup> These non-state armed groups’ human rights obligations are analyzed in Fortin, *supra* note, 1; Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, “International law and armed non-state actors in Afghanistan”, (2011) *International Review of the Red Cross*, 93(881): 47-79.

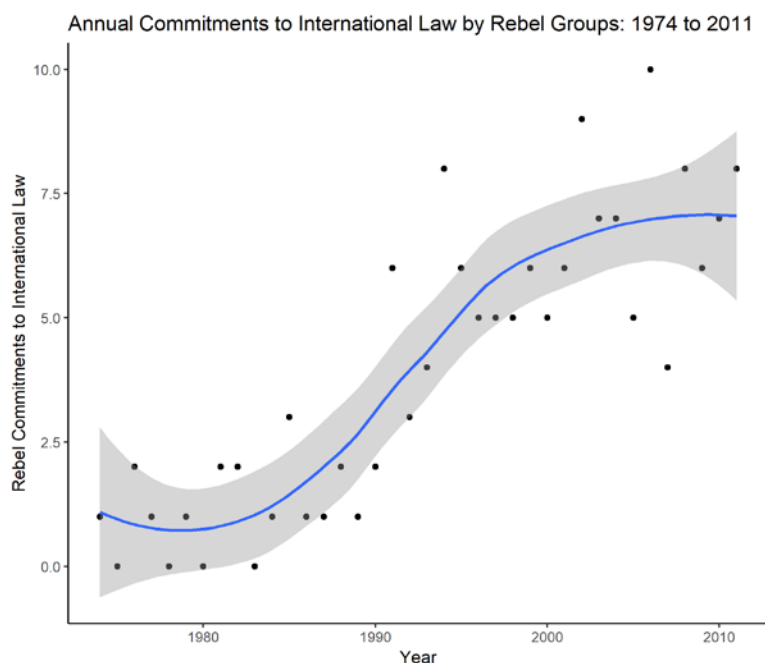
<sup>16</sup> The repression tactics or how national governments treat their non-state armed groups with their domestic legal tools will also affect the rise of international rule of law. If governments in general use political or military tactics consistent with international law, we might see the rise of international rule of law – with respect to the governments’ treatment of non-state armed actors. On the other hand, if governments use tactics against international law (e.g. brutal repressive policies going against international human rights standards), we might observe the decline of international rule of law.

<sup>17</sup> Julia Morse’ work shows that the recommendations by the Financial Action Task Force (FATF) were adopted by banks and subsequently legalized into domestic crime statutes. Morse, Julia, “Blacklists, Market Enforcement, and the Global Regime to Combat Terrorist Financing”, (2019) *International Organization*, 73(3): 511-545.

<sup>18</sup> These are partly due to the interaction with international actors, as well as incentive compatibility. See Hyeran Jo, Josh Alley, Yohan Park, and Soren Jordan, “International Engagement and Rebel Groups’ Soft Lawmaking,” Manuscript, Texas A&M University.

shows the increasing trend of these commitment documents, as collected by the Geneva Call's *Theirwords* archive.<sup>19</sup>

Figure 1. Increasing Trend of Non-State Armed Groups' IHL Documents



Note to Figure 1: the figure plots annual non-state armed actors' commitments from 1974 to 2014, as well as a trend line, estimated with loess regression. The commitment increases dramatically after 1990, and then plateaus after 2000.

Figure 2 shows the snapshots of specific times to highlight the evolution of expressions in *Theirwords* archive, in 1981 and 2014, respectively. The word cloud of 1981 is based on two documents: 1) "SWAPO Declaration to the International Committee of the Red Cross" from the South West Africa People's Organization (SWAPO), a national liberation movement in Namibia, and 2) "Political Agreement between the FMLN and Youth for Military Army of New Constitution" by the Farabundo Martí National Liberation Front (FMLN) in El Salvador. In 2014, we see the words of the National Coalition of Syrian Revolutionary and Opposition Forces, from the document titled "Declaration of Commitment on Compliance with IHL and the Facilitation of Humanitarian Assistance."

Back in 1981, at the height of national liberation movements and Marxist rebels, we see words like "revolutionaries" "people" etc., as in the words of SWAPO and FMLN. Now, fast-forward to 2014, we see words like "humanitarian", "protect", "refrain" etc., as in the words of the National Coalition of Syrian Revolutionary and Opposition Forces. These word clouds are evidence, at least in part, of normative shifts on the part of rebel groups. This shift may well be due to the changing nature of rebellions, but that in and of itself is important in noting that rebel groups engage in international "law talk."

<sup>19</sup> Directory of Armed Non-State Actor Humanitarian Commitments, available at: <http://theirwords.org/>

Figure 2. Comparing Non-State Armed Actors' Words-in-Documents Overtime, 1981 and 2014



The statements by FARC in their main website, provide examples of changing rhetoric over time.<sup>20</sup> The origin of rebellion and insurgency often stems from the rejection of state-centric system. Especially in Marxist movements, international law is something that was imposed by hegemonic rules. For example, in 2001, Gabriel Angel, a FARC commander, criticized IHL as a tool to expand US hegemony,<sup>21</sup> pointing out exclusion of “Peoples” in the law-making process.

*“... Trying to tie their conduct under the rules of that so called IHL, that more than representing the ethical aspirations of all of mankind, really translate the interests of the dominating class of the dominating states in the world, because they have never been enacted democratically by Peoples in struggles, but by the conclaves that were victorious in international wars. To apply it, according to the interested parties, to nations that must bend backward, even if they themselves attack each time they deem necessary with impunity.”*

Fast forward, in 2016, Iván Márquez, former FARC leader, at the news of President Santos’ Nobel Peace Prize, made an announcement that is rather accepting to IHL framework in the wake of the historical peace agreement in Colombia.

*“Without any desire to revive the controversy, want it or not, because of the simple fact that our recent peace treaty is conceived within the spirit and letter of IHL, it constitutes a Special Agreement with everything that such an agreement entails domestically and in the international arena. International Protocols are not ratified to be ignored.”<sup>22</sup>*

These changing rhetoric across and within non-state armed actors signal that international rule of law is penetrating into non-state armed actors to a certain extent.

Recently, the Islamic Emirates of Afghanistan (Taliban) also expressed the consistency between their values and global values in a speech of its delegation in 2019 at a conference.

<sup>20</sup> I thank Maria Abadia for translations of FARC documents from Spanish to English.

<sup>21</sup> Gabriel Angel, “Is the possibility to triumph so remote?”, available at: <http://www.farc-ep.co/opinion/gabriel-angel/es-tan-remota-la-posibilidad-del-triunfo.html>

<sup>22</sup> Available at: <http://www.farc-ep.co/blogs/intervencion-de-ivan-marquez-al-recibir-el-premio-nacional-de-paz.html>

**Islamic Emirate of Afghanistan has taken the following practical measures for the prevention of civilian casualties:**

1. In order to prevent civilian casualties, Mujahidin are provided with guidelines by scholars on regular basis and independent seminars are held in this regard.

2. Delegations pay visit to Mujahidin circles from time to time in order to investigate incidents of civilian casualties and prosecute the perpetrators.

It must also be said that for the sake of the country and prosperous life of our people, the Islamic Emirate of Afghanistan considers building and maintaining of places of public utility as a dire need. It considers bridges, tunnels, dams, electric power stations, electric supply centers, mineral extraction and oil refining centers and its equipments, educational institutions, Madrasas, mosques, schools, universities, health centers, clinics, hospitals, and other public utility places as national asset and public property of the Afghan nation and considers their safety its responsibility. We consider religious and modern education necessary for the success of all Afghans and Afghan society.<sup>23</sup>

In the same speech, the IEA delegation also highlighted guaranteeing security to humanitarian assistance as well as women's rights. These are the signs that non-state armed actors increasingly feel the reach of international law and they have to speak international law language. It is interesting to note that in the same website "voice of jihad," several announcements were highlighted that IEA soldiers killed the "puppets" of government, extolling its victories and disparaging government behaviors. No doubt that these are public relations measures on the part of non-state armed actors, but the recognition of international legal principles, and the conscious appeal to international legal values, could be considered as one of contributing factors for the rise of international rule of law in the case of non-state armed actors.

**c) Compliant behaviors**

Some behaviors indicate the rise of international rule of law in the case of non-state armed actors. We see some trends in observing humanitarian restraints. In the issue of anti-personnel mines, for example, there is evidence that rebel groups that commit to international law change their behaviors.<sup>24</sup> Rebel behaviors related to civilian killing and child soldiering are not stable, heavily contingent on the exigencies of war.<sup>25</sup> Although child soldiering is stopped at the wake of peace agreements in the case of Colombia's FARC (Fuerzas Armadas Revolucionarias de Colombia), Philippines' MILF (Moro Islamic Liberation Front), and Sierra Leone's RUF (Revolutionary United Front), we see resurgence in the case of Yemen's Houthis and some non-state armed groups operating in Syria. Rebel courts that emulate justice mechanisms is also one aspect of the

<sup>23</sup> "Complete Transcript of Speech delivered by delegation of Islamic Emirate in Moscow conference" (February 05, 2019), available at: <http://alemarahenglish.com/?p=41268>

<sup>24</sup> Gleditsch, Kristian Skrede, Simon Hug, Livia I. Schubiger and Julian Wucherpfennig, "International Conventions and Non-State Actors: Selection, Signaling and Reputation Effects", (2018) *Journal of Conflict Resolution*, 62(2): 346–380; Fazal, Tanisha and Margarita Konaev, "Homelands versus Minelands: Why do Armed Groups Commit to the Laws of War?", (2019) *Journal of Global Security Studies*, 4(2): 149-168.

<sup>25</sup> For the patterns of civilian killing and child soldiering, as well as detailed procedures, measures, and sources, see Jo, Hyeran, *Compliant Rebels: Rebel Groups and International Law in World Politics* (2015, Cambridge University Press).

potential rise of international rule of law, although its effects are hotly disputed.<sup>26</sup> LTTE (Liberation Tigers of Tamil Eelam) in Sri Lanka, armed groups in Syria, and Taliban in Afghanistan employed their own justice mechanisms. Depending on how they serve the purpose of fair trials consistent with the objective and practice of international justice, it could contribute to the rise of international rule of law.

It is difficult to determine whether the change in behavior was due to the genuine respect for the international rule of law or directly guided by international legal concerns. Nevertheless, these behaviors are at least consistent with international law standards. Existing and emerging research shows that the processes of changing behaviors were partly driven by the rule of law promotion activities by international humanitarian organizations – the Geneva Call, in the case of anti-personnel mines issue,<sup>27</sup> and the UN special office on children and armed conflict, in collaboration with peacekeeping/DPKO and UNDP.<sup>28</sup> Some evidence of rise in international rule of law among non-state armed actors upsets the simple assumption that non-state armed actors undermine the international rule of law. Some of the international law-consistent practices potentially strengthen the rule of law among non-state armed groups, as well as some growing recognition and support for international law.

Who are these non-state armed actors that commit to international law? Who complies? Recent political science scholarship shows that non-state armed actors with democratic foreign sponsorship are less likely to abuse civilians<sup>29</sup>; secessionist groups are more likely to care about international law, being mindful of international audiences, in their pursuit of sovereignty in international arena; jihadist groups (not including moderate Islamist groups) are more likely to reject international law. The typology of non-state armed groups therefore helps us understand the rise and decline of international rule of law, acknowledging the variation across non-state armed actors.

#### **4. Signs of Decline**

Signs of decline with respect to the international rule of law also shows in the words and deeds of non-state armed groups – in their justifications for potential violations, when they privilege local norms over global norms, and when they blatantly violate international law.

##### **a) Justifications**

The signs of potential decline can be detected in the clash between international rule of law and rebels' rule-of-power. The central tension in armed conflicts is the fight between rule of law and rule-of-power. International humanitarian law governs the conduct of warring parties, but often, the logic of military power and victory prevails. This is also the case for non-state armed groups that often justify their actions and interpret the rules to their advantage.

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<sup>26</sup> Klamberg, Mark, "The Legality of Rebel Courts during Non-International Armed Conflicts", (2018) *Journal of International Criminal Justice*, 16 (2018), 235-263; Provost, Rene, "FARC Justice: Rebel Rule of law", (2018) *UC Irvine Law Review*, 8, 227-274.

<sup>27</sup> Gleditsch et al; Fazal and Konaev in *supra* note 24.

<sup>28</sup> Jo, Hyeran and Joowon Yi, "Engaging Rebels: Humanitarian Engagement in Conflict Zones and the Case of United Nations Action Plans", (2019) Manuscript, Texas A&M University.

<sup>29</sup> Salehyan, Idean, David Siroky, and Reed Wood, "External Rebel Sponsorship and Civilian Abuse: A Principal-Agent Analysis of Wartime Atrocities", (2014) *International Organization*, 68(3):633-661.

Take the example of Taliban’s internal code of conduct, *Layeha*.<sup>30</sup> Throughout the text, “infidels” are at the center of the dividing line between legitimate target and illegitimate target. This overlay of religious commitment is certainly different from western conception of what civilians are.<sup>31</sup> In “Section 4. Concerning those who provide logistical support or [carry out] construction for the enemy” as part of the translated text of the 2010 version, the Taliban code of conduct instructs:

24. Drivers who transport supplies for the infidels – during that transportation and if the mujahedin are well-informed that they are transporting [supplies] for the infidels or their enslaved administration – shall be killed and their vehicles burned...<sup>32</sup>

The text in the 2010 version of the *Layeha* is against the notion that civilians cannot be targeted unless they take part in direct hostilities, as embodied in the principle of distinction between combatants and civilians under international humanitarian law. Previously, the code was different. In the 2009 version, the related part of the text read as follows:

20. If a driver is arrested while he is transporting supplies to the infidels, the provincial official shall decide whether to punish, exchange or release him...” (Section 4. Concerning those who provide logistical support or [carry out] construction for the enemy)

The change from 2009 to 2010 text might well have been the reaction to the US’ renewed military commitments and “Afghan surge” of 2009. Internal codes of conduct are often used to discipline soldiers, and this change can be interpreted to pose a stronger reaction to the US military moves. As well, Taliban acknowledges the authority of *jirga* (traditional assembly of leaders), *sharia*-based court with *uelma* (Muslim scholars), *imam* (first commander), or *nayeb* (deputy commander) – not the rule by international law.

Taliban still disputes the central concepts of civilians in a discursive way. In the recent response to the UN report on civilian protection, Taliban disputed the western conception of civilians:

*On several occasions, UNAMA counted the American and Kabul administration related armed forces as a civilian while not wearing military uniform and some others, while they do not distinguish between civilian and non-civilian Mujahideen. All those Taliban who are working in administration, education, health, court, reconstruction and other civilian sectors, are counted Taliban and their killings are not counted as civilian casualties. American and Kabul administration usually assume that all civilians that have been remained under control of Islamic Emirate Mujahideen are a legitimate target. Similarly, Mujahideen strictly limits its operations to military objectives while UNAMA criticizes them for using IEDs that IEDs cannot distinguish targets. While on the other side, they shut their eyes on American and Kabul*

<sup>30</sup> Kelsay, John, *Arguing the Just War in Islam* (2009, Harvard University Press); Nagamine, Yoshinobu, *The Legitimization Strategy of the Taliban's Code of Conduct Through the One-Way Mirror* (2015, Palgrave); Jo, Hyeran and John Niehaus, “Through Rebel Eyes: Rebel Groups, Human Rights, and Humanitarian Law”, (2018) *Law and Contemporary Problems*, 81(4): 101-120.

<sup>31</sup> Crawford, Emily, *Identifying the Enemy: Civilian Participation in Armed Conflict* (2015, Oxford University Press); Kinsella, Helen, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (2011, Cornell University Press).

<sup>32</sup> In Kate Clark, “The Layha: Calling the Taleban to Account.” (2011) Appendix 1. The Taleban Codes of Conduct in English. Afghanistan Analysts Network. (page 7) available at: [http://theirwords.org/media/transfer/doc/ut\\_af\\_taliban\\_2010\\_2009\\_2006\\_03-b2481f1239ed5ce85dd66df080cdba29.pdf](http://theirwords.org/media/transfer/doc/ut_af_taliban_2010_2009_2006_03-b2481f1239ed5ce85dd66df080cdba29.pdf)

*administration's airstrikes that do not distinguish civilian and non-civilian and make civilian casualties inevitable.*<sup>33</sup>

### **b) Local interpretation**

Another example is the disparity between local and global understanding of what 'child' is in the context of child soldiering. International law in Optional Protocol to the Convention on the Rights of Child on the Involvement of Children in Armed Conflict (OPAC) has it at the age of 18, which was ratified by 167 of 197 UN member states as of 2018, while the Additional Protocols to the Geneva Conventions (1977) and the Rome Statute (1998) has it at the age of 15. Eid Kabalu, the spokesman for the Moro Islamic Liberation Front (MILF) in the Philippines' Mindanao region, noted the cultural differences, mentioning that the local Islamic law considers boys over 13 as adults.

*"We adhere to the standards set by the UN," Kabalu told IRIN. "While there is no forced conscription among our ranks, there are certain definitions that are different from [the western norms]. These children identified so far by UNICEF are not really fighting on the frontlines, but are helping in MILF communities. It is an obligation for anyone born into the struggle to help achieve our goal of a Muslim homeland."*<sup>34</sup>

These kinds of local interpretations that are sometimes at odds with interpretations at the global level do not bode well for the rise of the international rule of law, as inconsistent or incompatible interpretations certainly become obstacles. This is especially so when the non-state armed actors' legal weight – whether they are norm makers or not-- is not very clear.<sup>35</sup>

### **c) Non-compliant behaviors**

The most obvious sign of decline of international rule of law would be an increase in behavioral patterns of illegal behavior. Abuse of power or explicit denunciation of international law can undermine international rule of law, without shortage of examples: the destruction of cultural property by the Islamic State in Syria, hostage-taking and sexual violence by Boko Haram in Nigeria, growing use of anti-personnel landmines in Afghanistan, the approximately 60 non-state armed actors that are still on the list of shame for recruiting and using children in armed conflict.<sup>36</sup>

<sup>33</sup> United Nations Assistance Mission in Afghanistan (UNAMA) and United Nations Human Rights, Office of the High Commissioner, *Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2017* (February 2018), at ANNEX VIII: *Taliban Response to the 2017 Afghanistan Annual Report on Protection of Civilians in Armed Conflict* (page 75-76) available at:

<https://www.ohchr.org/Documents/Countries/AF/ProtectionCiviliansAnnualReport2017.pdf>

<sup>34</sup> IRIN, "Philippines: Moves to end use of child soldiers, but problem persists" (8 April 2011) available at: <https://www.refworld.org/docid/4da3f6542.html>

<sup>35</sup> See the debates in the following articles: Roberts and Sivakumaran, *supra* note 11; d'Aspremont, Jean, "International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?" in M. Noortmann, and C. Ryngaert (eds), *Non-State Actor Dynamics in International Law – From Law-takers to Lawmakers* (2010, Ashgate) Chapter 8, pp. 171-194.

<sup>36</sup> Turku, Helga, *The Destruction of Cultural Property as a Weapon of War: ISIS in Syria and Iraq* (2018, Palgrave Macmillan); Iyi, John-Mark, and Hennie Strydom (eds.), *Boko Haram and International Law* (2018, Springer); "Afghanistan's chief executive on growing number of non-state actors using improvised landmines" (27 February 2018), Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, available at: <https://www.apminebanconvention.org/en/newsroom/press-releases/detail/article/1519743726-afghanistans-chief-executive-on-growing-number-of-non-state-actors-using-improvised/>; Annual Reports published by the United Nations Office of Children and Armed Conflict available at: <https://childrenandarmedconflict.un.org/virtual-library/>



Of course, not all illegal behaviors are detected; and for most of new phenomena, legality is hotly debated.

Besides the signs of decline that are highlighted above, general trend in international law can affect the trend among non-state armed actors. The development of international rule of law has been centrally driven by democratic powers that promoted rule of law internationally that mirrored domestic rule of law systems. The decline of democratic values and rise of strongmen therefore might signal the decay in the general support for international law. This general trend might be reflected in the case of non-state armed actors: as repression grows, as international law is disregarded at the national level, the power of international rule of law could weaken in the case of non-state armed groups. Also, with the proliferation of criminal gangs, organized crime groups, and other violent groups without central organization, the reach of international law is likely to be reduced.<sup>37</sup>

### **5. Conclusion: Harmony and discord**

Recent trends discussed above highlight that the international rule of law exists even to peripheral actors like non-state armed groups. Some evidence for harmony exists where some, not all, non-state actors strive to be aware, acknowledge and conform to international rule of law. The above analysis also sketched out the central tension between the international rule of law and rebels' rule of law.

This article does not provide a definite conclusion as to whether it is the rise or decline of international rule of law in the case of non-state armed groups. There are signs for both, and it is difficult to conclude which trend wins, primarily due to the measurement difficulties as well as inherent legal uncertainties in international humanitarian law. At a minimum, the above analysis shows that non-state actors are part of rise and decline of international rule of law. Some are aware of, care about, commit to existing international rules and some attempt to abide by those rules. Others however refuse to be governed by international rule of law, but rather create their own order depending on their religious or social context.

This article additionally provides a theoretical point as to the conditions under which we are likely to observe the rise or decline of international rule of law in the peripheral case of non-state armed groups – actors or subjects of law that do not have given authority to make international law, but nonetheless actively interpret and attempt to try make sense of the law in their practice of armed struggle. They are part of growing international rule of law, for sure, in the making of peace agreements, incorporating IHL in their internal codes of conduct, and practicing court of law in their rebel courts. These are signs of the reach and coverage of international rule of law in the realm of civil conflicts/non-international armed conflicts.

Obstacles and hindrances to the rise of international rule of law are abundant. The reasons include the mismatch between the interpretation of global rules and how much is lost in translation; oft-ingrained social norms that might be jarring to the development of “global” norms. International rule of law will continue to have a role in increasing the restraints in times of warfare and

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<sup>37</sup> Organization of criminal gangs and terrorist groups are less visible and detectable, compared to rebel groups. Tadić case shows the territorial control as the central criteria where non-state armed groups are bound by international law. Following the logic in Tadić, we can also argue that criminal gangs or terrorist groups, degree of organization can be also applied in determination of international law's coverage.

contribute to the humanity of war, but we also have to recognize that there are local constraints and limits to how and to what extent international rule of law can operate in the case of non-state armed groups. Recognizing the limitations and possibilities will be important in our judgment as to whether we want to advance international rule of law in the case of non-state armed actors.

## The Author



Hyeran Jo is Associate Professor of Political Science at Texas A&M University in the United States. She joined the Berlin Potsdam International Law Research Group as a Humboldt Scholar (2018-2019). Her primary research interests lie in international institutions and international law, with the interdisciplinary focus on international humanitarian law, international criminal law, and international human rights law. She is the author of *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015).

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.