Introduction: An exploration of the shadowland of armed groups and international law

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I. INTRODUCING THE SHADOWLAND

It has long been recognised that the position of armed groups within the legal landscape is fraught with legal complexity, with questions regularly asked about their legal personhood,[1] the nature and extent of their legal obligations under international law[2] and the manner in which these obligations come into being.[3] Much of this complexity emerges out of the fact that armed groups operate at both domestic and international levels, and also have a different status in the legal frameworks applicable therein. While they are commonly unlawful under domestic law, international law is generally silent about their 'legality' as entities, only prescribing their obligations in armed conflicts.[4] Additional challenges arise out of the fact that the legal framework governing non-international armed conflicts (NIACs) is especially complex. It has often been noted that international humanitarian law (IHL) and international human

[1] *See*, among others, Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) 23–50; Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law* (Oxford University Press 2018) 10–13; Katharine Fortin, *The Accountability of Armed Groups Under Human Rights Law* (Oxford University Press 2017) 71–173; Ezequiel Heffes, *Detention by Non-State Armed Groups under International Law* (Cambridge University Press 2022) 29–69.

[2] *See* generally Rodenhäuser (n 1).

[3] ICRC, *Commentary on the First Geneva Convention. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para 507; Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369.

[4] An exception to this is national liberation movements which are given a different status, evidenced by the fact that their members are given prisoner of war status on capture.

rights law (IHRL) are particularly entangled in these contexts. As Kooijmans wrote in 1991, NIACs present the 'true shadowland' between IHL and IHRL.[5] This is because members of armed groups are simultaneously fighters under IHL and criminals and citizens under States' domestic law.[6] It is also because individuals belonging to such groups, who would usually fall into the category of the 'governed' (under national legal frameworks), may become 'governors' (under international legal frameworks). Due to the multi-layered nature of the different legal frameworks in force in these areas, overlapping, complementing but also sometimes conflicting with each other, it is not outside the imagination of international law for an individual to be an armed group member, terrorist, criminal, law-abiding citizen, fighter, military leader, law-maker and law enforcer at the same moment in time.

Further difficulties emerge out of the fact that armed groups – most of the time – arise to challenge the State monopoly over the use of force under domestic law, while at the same time performing certain activities in line with (or at least as demanded by) international law. Armed groups may deliver health care and education services to civilians living in the territories under their control, at the same time as fighting governments or other groups. They may also enact rules and legislation, thus creating parallel legal systems to those of the territorial States.[7] In undertaking military and non-military endeavours, armed groups navigate through various legal frameworks, some of which are self-created. It is not surprising that such a complex ecosystem of rules – which in this volume we call the shadowland of legality and illegality – has led to numerous policy and legal debates that are yet to be settled.

We believe that the importance of analysing 'tensions' in the legal shadowland in which these actors operate stems from the increasing number of armed groups fulfilling different roles in armed conflict. In 2021, the International Committee of the Red Cross (ICRC) reported that around 600 groups were active around the world with 'the capacity to cause violence of humanitarian

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[5] Pieter H Kooijmans, 'In the Shadowland between Civil War and Civil Strife: Some Reflections on the Standard Setting Process' in Astrid Delissen and Gerard Tanja (eds) *Humanitarian Law of Armed Conflict Challenges Ahead* (T.M.C. Asser Institute, The Hague 1991) 226.

[6] Gloria Gaggioli, 'The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms' (ICRC Report, November 2013) 1.

[7] *See inter alia*, Sandesh Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice' (2009) 7(3) *Journal of International Criminal Justice* 489–513, Katharine, Fortin, 'Of Interactionality and Legal Universes: A Bottom-Up Approach to the Rule of Law in Armed Group Territory' (2021) 17(2) *Utrecht Law Review* 26–41.

concern',[8] a very different number to the 170 documented in 2011.[9] As one may expect, this has led to an increasing number of civilians living in the territories under their control or influence, with the ICRC recently estimating that about 100 million people are to be found in such situation and between 50 and 60 million live in territories where armed groups exercise State-like governance.[10] In our view, these statistics create a humanitarian imperative to examine outstanding legal questions: if this was not the case, the protection of civilians may be put at risk, since there could be a lack of clarity regarding the bright lines differentiating fighters and civilians, persons materially assisting a terrorist group and humanitarian workers, civilian wings and military ones, legitimate courts and illegitimate courts. Before explaining the structure and contents of this book, we will first sketch out some details of the tensions the book explores.

II. TENSIONS IN THE SHADOWLAND

A. International Law, Domestic Law and Armed Groups

Firstly, this volume explores the tensions that arise between international law and domestic law. If law is an expression of power, then the way in which armed groups are addressed by any legal regime is a consequence of power dynamics. In a State-centric international legal system, armed groups' position has been determined by their domestic illegality. States are sensitive about conferring armed groups with any legitimacy. They are afraid that recognising that these entities as 'subjects' of international law may welcome them into the elite club of 'subjecthood', that has traditionally been reserved for their own kind. They also worry that to acknowledge that these actors can act 'lawfully' under international law might somehow trump any domestic designation of those same groups as unlawful actors and their acts as domestic crimes. It is a demonstration of just how sensitive States were to armed groups even being bound by IHL in the 1970s, that the term 'parties' was erased from the final version of Additional Protocol II.[11] The fact that armed groups are absent from

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[8] Bruno Demeyere, 'Editorial' (2021) 102 *International Review of the Red Cross* 979, 979. From those 600, the ICRC notes that more than 100 can be considered parties to NIACs, ibid.

[9] Vincent Bernard, 'Editorial: Understanding Armed Groups and the Law' (2011) 93 *International Review of the Red Cross* 261, 262.

[10] Irénée Herbet and Jérôme Drevon, 'Engaging Armed Groups at the International Committee of the Red Cross: Challenges, Opportunities and COVID-19' (2020) 102 *International Review of the Red Cross* 1021, 1026.

[11] For an analysis on this point, *see* Mantilla, Chapter 2 in this volume.

every article of this treaty, except Article 1, turns them into the legal equivalent of Voldemort in this treaty: 'they who shall not be named'.

Because armed groups are unlawful under States' domestic laws, they remain at the periphery of a legal landscape that on every occasion tries to exclude them, and even deny their existence. In this context, armed groups can be described as both 'subjects' and 'objects' in the grammar of international law. They are subjects of international law, in that they bear the same obligations under IHL as States, according to the so-called principle of equality of belligerents.[12] But at the same time, they remain objects of international law because they rarely have any legal agency and are seldom able to engage in formal mechanisms of procedural accountability. Perhaps most importantly (and as will be expounded in more detail below) obligations are often imposed upon them by treaty law or customary international law.[13] It is out of this subject-object dichotomy that many important challenges arise, and further analysis is needed.

Of course, it is important to acknowledge that there have been some relevant developments over the past decades. For example, the fact that it is now accepted that armed groups are bound by humanitarian norms demonstrates an acknowledgment that, under certain circumstances, many will have the capacity to perform activities in accordance with international law. By focusing on the lawfulness of armed groups' behaviour and remaining agnostic to the permissibility of their actual existence, IHL provides a toolbox of rules that can effectively shape and guide an armed group towards legality and away from illegality, at least in the international realm. It creates a space in the international legal order under which they can act lawfully, by governing and even conducting war within a well-established normative framework.

The recognition that armed groups have international obligations has also led to the development of new tools of engagement that have been intended to bring armed groups in from the 'procedural cold', encouraging them to take ownership of the norms that are binding upon them.[14] These varied efforts have focused on mitigating some of the negative consequences that may flow from the aforementioned paradox that armed groups have no say in the law applicable to them. New mechanisms that have been developed under the auspices of Geneva Call and the UN have sought to find a place and relevance for the consent of armed groups.[15] Efforts have also centred on ways to understand

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[12] ICRC (n 3) para 504.

[13] *See* Section II. B. of this Introduction for further information on this issue.

[14] Katharine Fortin, 'Armed Groups and Procedural Accountability: A Roadmap for Further Thought' (2016) 19 *Yearbook of International Humanitarian Law* 157–180.

[15] *See*, in this regard, Ezequiel Heffes, 'Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs' in Ezequiel Heffes, Marcos D Kotlik

how armed groups use international law vis-à-vis different constituencies. There has also been an increased focus on what factors cause armed groups to comply with international law.[16]

Yet, in parallel to these developments at the international level, there has also been a more networked approach to the criminalisation of armed groups under national law. In the last 20 years, States have increasingly relied on their law enforcement frameworks to fight insurgencies alongside their military force. Armed groups' members are often charged with crimes under counter-terrorism laws and ordinary criminal laws for acts that may be lawful under IHL. Counter-terrorism legislation has also criminalised interactions between armed groups and external entities, reducing the ability of international and humanitarian organisations to engage with them on matters relating to civilian protection.[17] Case law providing guidance on 'material support' provisions have denied the idea that humanitarian organisations can engage with the civilian branch of an armed group, without also assisting its military activities.[18] Civilians living in territory under the control of armed groups have been accused of armed group 'membership', with no account taken of the fact that it was often impossible to flee the area and very common for people to interact in some way with the armed group.[19] Lawyers helping civilians who lived under the territory controlled by armed groups to regain their civil status documentation have been accused of supporting the armed group.[20] And lawyers seeking to help armed groups use the law for their own advocacy

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and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020); Marcos D Kotlik, 'Compliance with Humanitarian Rules on the Protection of Children by Non-State Armed Groups: The UN's Managerial Approach' in Heffes, Kotlik and Ventura (eds), ibid. http://link.springer.com/10.1007/978-94-6265-339-9_14 accessed 16 November 2020.

[16] Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015).

[17] Centre for Humanitarian Action, Counterterrorism Measures and Sanction Regimes: Shrinking Space for Humanitarian Aid Organizations (2020) https://www.chaberlin.org/en/publications/counterterrorism-measures-and-sanction-regimes-shrinking-space-for-humanitarian-aid-organisations/ accessed 14 December 2022.

[18] *Holder v Humanitarian Law Project et al.* [2010] US Supreme Court 561 U.S. 1 5.

[19] United Nations Assistance Mission for Iraq, OHCHR, Human Rights in the Administration of Justice in Iraq: Trials under the anti-terror laws and implications for justice, accountability and social cohesion in the aftermath of ISIL (January 2020) 10–11 https://www.ohchr.org/sites/default/files/Documents/Countries/IQ/UNAMI_Report_HRAdministrationJustice_Iraq_28January2020.pdf accessed 14 December 2022.

[20] Amnesty International, The Condemned: Women and Children Isolated, Trapped and Exploited in Iraq (2018) 23.

activities are at risk of being found to be materially supporting the groups as terrorist entities.[21]

These developments demonstrate that the international (legal) safe space in which armed groups can supposedly operate in has been increasingly encroached upon by national criminal law. As a result, the ability of humanitarian organisations to help civilian communities under the control of these groups has also been severely restricted, even though this scenario is explicitly envisaged under IHL.[22] There has been insufficient attention given to the power of national law or counter-terrorism laws to damage the delicate system of positive reciprocity upon which this international normative landscape relies on and upset the principle of neutrality which informs humanitarian work.

B. International Law-Making and Armed Groups: Active and Passive Actors

A second (connected) tension that the volume explores relates to the limited role that armed groups have had in law-making processes. Indeed, the fact that armed groups exist in contravention to domestic laws has prevented them from participating in the development of international law. Even though armed groups are bound by the same IHL norms as States in armed conflict, they have had little (or no) formal part in its creation. Their consent is generally not thought to be necessary or relevant to whether they are bound by IHL treaty law, and the fact that they are bound by this body is largely thought to be grounded in the acts of the State against which they are fighting.[23] The same is true for customary international law. Even though customary norms might be considered as the embodiment of a normative process based on consent, it is often held that the practice and *opinio juris* of armed groups do not have any formal relevance in the crystallisation process out of which the customary IHL binding upon them emerge.[24]

The different status that States and armed groups enjoy in international law-making processes and the lack of participation of the latter are evidenced

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[21] *Holder v Humanitarian Law Project et al.* (n 18) 33–34.

[22] Common Article 3 to the 1949 Geneva Conventions explicitly envisages the possibility that impartial humanitarian bodies offer their services to the parties to the conflict, including armed groups.

[23] *See* Fortin (n 1) Chapter 7.

[24] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press 2005) 36. For a recent analysis on the role of armed groups in the development of IHL, *see* Marco Sassòli, 'How will International Humanitarian Law Develop in the Future?' (2022) 104(920–921) *International Review of the Red Cross* 2072–2076.

in the actual content of the rules. They partly explain why there is a marked difference between the treaty law that applies in international armed conflict versus the rules of NIACs. For example, there are no belligerent privileges in this type of conflicts, no prisoner of war status, no explicit authority to detain for armed groups and no legal ability to withhold their consent to relief operations. It also explains why under international law, the armed group as a collective actor predominantly has obligations, not rights. In contrast, States, due to the multiple arenas in which they exercise their legal prerogatives, enjoy a richer panoply of both rights and obligations.

The fact that States retain such a monopoly over the creation of the legal framework has inevitable consequences on the manner in which armed groups are conceived by this same legal framework and in the discourse that surrounds it. The State-dominated lens that prevails and defines both the international and domestic normative landscapes has a constitutive effect both on the space in which armed groups can lawfully operate and also on whether the international community is prepared (or able) to engage with them. Indeed, it is likely as a result of this State-based lens that humanitarian organisations sometimes find it easier to engage with armed groups when they present themselves as military entities, than when they are delivering public services to civilian communities, humanitarian assistance and governance. This raises the question of whether armed groups should be seen as entities that raise complex legal dilemmas or rather as actors that tests the system of international law as a whole.

C. Armed Groups as Rulers of Territories and Population

Thirdly, the book explores the tensions that arise as a result of armed groups being increasingly rulers of territories and populations. An important body of social and political science scholarship on rebel governance is addressing this phenomenon, providing details regarding armed groups' justice systems, police forces, taxation and public services such as healthcare, education and governance.[25] It challenges the idea that armed groups should be exclusively examined through their military goals and highlights that the fate of civilians living in these areas is deeply entangled with the armed group, showing that there is a high degree of everyday interaction between civilian communities and armed groups. Rather than being simply passive and uninvolved victims of armed conflict, civilian communities find ways of protecting themselves,

[25] *See*, e.g., Zachariah Cherian Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life During War* (Cornell University Press 2011); Megan Stewart, *Governing for Revolution: Statebuilding in Civil War* (Cambridge University Press 2021); Ana Arjona, Nelson Kasfir and Zachariah Cherian Mampilly (eds), *Rebel Governance in Civil War* (Cambridge University Press 2015).

by negotiating with armed groups, taking part in armed groups' governance projects and utilising the legal systems of the armed group to seek protection.[26] These dynamics have been particularly explored in a newer field of scholarship connected to rebel governance and civil wars, exploring the notion of 'civilian agency'.[27] While the issue of civilian agency is as yet little discussed within the domain of international law, it connects very intimately with many of the legal themes explored in this volume.

A particular tension created by this reality is that international law recognises at the same time that armed groups are capable of subjecting people to their own laws and that their members remain subject to the laws of the *de jure* government. As mentioned already, these entities' members can be both 'governed' and 'governors', which should not be considered as anything equivalent to 'sovereignty' over the territory under international law. Indeed, armed groups are not free to control what happens in that area. To a large extent, the territorial State remains the gate-keeper of the armed group's ability to seek assistance or cooperation from third parties.[28] Perhaps as a result of this dynamic, any international cooperation with armed groups designed to increase their capacity to respect the rights of individuals living in their territories is scarce. Likewise, in practice organizations often feel the need to obtain the authorization of the *de jure* government to establish a humanitarian dialogue with armed groups.

Once again here, it can be seen that armed groups exist within a complex legal framework made up of national and international laws. It is constituted of a web of prohibitions and permissions that sometimes contradict each other, but also need to somehow stay in balance to remain effective. If the framework swings out of balance towards permissibility, there is a danger that armed groups will gain legitimacy and threaten the existence of the State. In a State-centric normative architecture, this is difficult to conceive. If, on the other hand, the framework becomes skewed towards prohibitions, there is a danger that it will lose credibility and its entire existence may come under threat. We believe that the need to keep these forces in balance requires joined-up thinking on issues which are usually dealt with within separate spheres of academic discourse. Legal writings tackling issues relating to the obligations of armed groups under IHL and IHRL, counter-terrorism and legal personality do not take enough account of writings on rebel governance and civilian agency. The opposite is also true. As long as the two bodies of

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[26] Ashley Jackson, *Negotiating Survival: Civilian-Insurgent Relations in Afghanistan* (C Hurst & Company 2021).

[27] *See* Fortin, Chapter 6 in this volume for further information.

[28] Heffes (n 1) 39.

literature exist in these separate silos, opportunities are being missed to find solutions on issues that ultimately relate to civilian protection.

III. ALL ABOARD: NAVIGATING THROUGH THE SHADOWLAND

The purpose of this edited volume is to shine a light on how these tensions play out in several substantive areas. We have organised it around four topics, which combine legal doctrinal, socio-legal and comparative methods of analysis: (a) the position of armed groups vis-à-vis international law in situations that precede armed conflict or outside armed conflict; (b) the criminal liability of armed groups and their members; (c) the phenomenon of rebel governance; and (d) the role of armed groups in post-conflict settings. We like to think that the book is the first systematic multi-disciplinary and multi-authored study providing a comprehensive legal analysis of armed groups in the international realm. By including bottom-up perspectives that give attention to the civilian experience of armed conflict and themes relevant to an exploration of civilian agency, it also provides a deep analysis of some of the problems at the heart of the legal framework pertaining to civilian protection.

Before we introduce the various chapters, two brief remarks relating to how this book was put together are needed. First, when writing their chapters, authors were free to decide on the terminology used to refer to the entities under analysis i.e., 'non-state armed groups', 'armed non-state actor', 'State', 'state'.[29] Second, while they were offered our preliminary reflections on the tensions described above before writing their chapters in a short concept note, they were encouraged to address any related issue and were free to conclude that these tensions did not exist or were overstated.

A. Armed Groups, *Jus ad Bellum* and the Drafting of IHL

The first part of the book includes two chapters examining the position of armed groups in situations that precede armed conflict or outside armed conflict. Moffett inquires whether the legal framework on the use of force can remain silent in the face of violations of IHRL, and claims that despite the absence of an international *jus ad bellum* in NIACs, there might be some arguments in favour of armed groups having a right to resort to violence on certain

[29] We also want to note that we find it difficult to draw conclusions from the use of one term over another. In talking to scholars about this issue, we have heard repeatedly that many prefer the capital S for State simply because it helps distinguish the noun from the verb.

occasions. His chapter explores different alternatives without romanticising these entities, tracing out the moral arguments in the just war theory, the right to self-determination and to rebellion. He concludes by noting that a thorough study of this topic may serve to identify possible avenues to de-escalate violence.

Mantilla's chapter focuses on the incorporation of 'armed non-state actors' within modern IHL treaty law, showing how the drafting of the Geneva Conventions and Additional Protocols were heavily influenced by the drafting States being unable or unwilling to solve what Mantilla labels the 'identification' and 'legitimation' challenges. The 'identification challenge' refers to the ability of States to decide which armed groups are suitable to receive and reciprocate the benefits and duties of IHL. The 'legitimation challenge' refers to the fear of States that by granting armed groups legal protections and responsibilities under IHL, they will somehow be imbuing them with legitimacy. Mantilla shows how instead of working conscientiously to design IHL rules that would enhance their applicability to 'ANSAs', States found inventive ways to circumvent that goal. He concludes by arguing in favor of bilateral or domestic alternatives to include these non-State actors into the legal discussions, given the existing challenges found under international law.

B. Armed Groups: Lawful or Unlawful

The second part explores the relationship between armed groups, national and international laws, and some of the aforementioned tensions that emerge out of the fact that these entities inhabit different legal worlds, operating in the shadowland between national law and international law: legality and illegality. This is an undeniable place of tension; armed groups' criminalisation exists alongside their obligations under IHL and (arguably) IHRL.

Bartels' chapter assesses the absence of a combatant status in NIACs, which allows for armed groups' members to be prosecuted for their mere participation in the conflict, even if they act in accordance with IHL. Yet, his chapter suggests that this is differently treated at the international criminal level, where these individuals seem to receive a status similar to combatant privilege. Bartels analyses the treatment of participation in hostilities under domestic and international law, and therefore the interplay between IHL and (international) criminal law.

Gaggioli and Sobol take an additional step and tackle the notion of 'membership' in the practice of IHL and counter-terrorism laws, discussing the possible areas of tensions that such regulatory overlap creates. Their chapter finds that many of such tensions do not exist as a result of proper conflicts between norms; instead, they are created due to 'diverging interests' between the legal frameworks that can hardly be reconciled.

The last chapter of this part is the one of Jo and Appeldorn, which addresses the diverse strategies adopted by 'non-state armed actors' themselves to navigate through their legality under international law and illegality under States' laws. In their view, these non-State actors often employ three different strategies to navigate this shadowland: (i) contestation of the rules that govern their behaviours and activities from 'within' the international legal architecture; (ii) rejection of international and domestic legal regimes, adopting instead their own rules and regulations; and (iii) silence with respect to the legal system in general. According to Jo and Appeldorn, the variety of strategies has implications for how the international community engages with these entities.

C. Armed Groups: Governed or Governors

The third part of the book focuses on armed groups as entities that undertake governance activities that go beyond their military nature. It includes five chapters that pay attention to how armed groups are structured and their relations with the civilian population living under their control. It engages with social and political science literature on rebel governance, civilian agency and bring legal perspectives to these debates.

Fortin sets the scene by investigating the relevance of 'armed non-State actors' civilian and political wings under IHL. Her piece offers insights into how these entities and their non-military activities should be dealt with by international courts and tribunals seeking to establish the 'threshold' of non-international armed conflicts.

Spadaro's chapter flows naturally on, as she examines the notion of 'rebel governance' under international law, which may include the establishment of a police force, to the delivery of health care and education. Importantly, Spadaro acknowledges the divergent views and tensions that exist within the international and domestic legal realms. While these activities are often treated as hostile or criminal (mostly by the territorial States), she comments that the European Court of Human Rights has considered its benefits for the population. Spadaro argues that this approach should be preferred given that it places the needs of individuals before those of States.

The third chapter in this part deals with armed groups' law-making processes. Although it is often believed that States' existence provides a certain order, and their absence is ruled by chaos and disorder, Heffes notes that armed groups often adopt rules that regulate the behaviour of their own members and those individuals living under their control. Grounded on a legal pluralistic perspective of international law, he examines armed groups' law-making and law-adapting activities in light of what the prohibition of arbitrary deprivation of liberty as enshrined in IHL demands from these actors.

Building on this discussion, Furlan examines how a specific type of groups (those with an Islamist nature) exercise governance on issues related to healthcare, an issue that has received comparatively little attention in legal literature on Islamic law, IHL, IHRL and rebel governance. She does so by focusing on two cases of 'Islamist rebel rulers': Hayat Tahrir al-Sham (Syria) and the Taliban. Based on this analysis, Furlan notes that Islamist groups may actually follow certain rules of international law. This, however, seems to occur only when there is congruence between these norms and Islamic law as interpreted by the groups themselves.

Duffy's chapter is the last one of this part and explores the practice of armed groups in the realm of the administration of justice. At the heart of her chapter is an enquiry into the extent to which diverse international legal actors can and should engage with and shape the lawfulness of *de facto* justice delivered by armed groups under current international law. Duffy claims that armed groups and '*de facto*' justice processes are vastly diverse in their conduct and impact, which makes generalization about these activities problematic. Yet, she concludes by confirming that there is a need to engage more fully with these processes to effectively apply the objective standards that international law brings, and to ensure that this legal regime is correctly implemented.

D. Armed Groups and *Jus Post Bellum*: Legal Standing and Amnesties

The final part of the book examines the tensions that can be observed regarding the standing of armed groups under domestic and international laws, when reflecting on possible *post bellum* scenarios. The chapters in this part address these, particularly in the context of the adoption of amnesty laws and the conclusion of peace agreements.

Bellal focuses on the application of the amnesty clause enshrined in the 1977 Additional Protocol II. This provision encourages the authorities 'in power' at the end of hostilities 'to grant the broadest possible amnesty to persons who have participated in the conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'. Bellal questions the clarity of this rule, pointing out that it seems to address, at least indirectly, the absence of a combatant immunity for armed groups in NIACs, while at the same time it does not create an absolute obligation to actually grant amnesties. She also assesses its relevance in contemporary NIACs and its possible application by certain armed groups.

In the final chapter, Dam-de Jong analyses an under-explored issue: the legal standing of armed groups in peace agreements including power-sharing provisions. Her examination includes two broad categories of arrangements, namely inclusive and diffusive ones. She claims that, although the purpose of

both categories of power-sharing is to provide armed groups incentives to end armed violence, their effects on their legal standing are quite different. Dam-de Jong concludes by noting that, in any case, these agreements 'lift' armed groups out of the shadowland between legality and illegality. In her view, however, this results in the demise of the armed groups themselves.

IV. ARMED GROUPS AND THE FUTURE OF (INTER) NATIONAL LAW: SUMMING UP AND LOOKING TO THE FUTURE

The contributions in this volume shine a light on the cross-cutting tensions that we identified at the start of this project, analysing them from a range of disciplinary perspectives and relying on different methods. By exploring these issues, this volume does not intend to be an exhaustive study of armed groups and international law and the legal shadowland in which they reside. In fact, at many points in the making of this volume, it occurred to us that the 'shadowland' theme is rich enough for us to have invited many more contributions, dealing with issues such as the role of armed groups in the making of customary IHL, humanitarian assistance, sanctions, cyber and citizenship. We could have also had chapters employing different critical lens, such as TWAIL, critical race, post-colonial or feminist approaches to international law. In other words, we conceive it as the start of a conversation, rather than an attempt to present a complete review of the topic. In a similar vein, our aim was never to present hard and fast solutions, but to explore difficult topics in a way that introduces granularity to the debate. While we appreciate that welcoming in messiness is not the usual task of the international lawyer, we feel that it is only by highlighting the contestation in this area of law that we can provoke helpful reflection and discussion on these issues.

In their various chapters, the contributors in this volume have suggested many novel ways in which armed groups could be better positioned in the international legal framework, so that some of the tensions between legality and illegality are resolved, or at least identified. It has been pointed out that States deliberately failed to properly address armed groups in their drafting of treaty law, have been reluctant to grant them equal rights under *jus in bello*, and are often unwilling to see armed groups as more than just military (and terrorist) entities. Emphasis has been put on the idea that armed groups are engaged in governance projects, providing health care, education, courts and detention. Several authors commented on the importance of moving away from the State-based perspective of international law, so that there is more room for perspective of the armed group or individuals living under their control. While expressing our support for many of these arguments and being transparent that one of our goals is to invite the reader to see 'armed groups',

'non-state armed groups' or 'armed non-state actors' as more than parties to armed conflict, terrorist or military entities, we also find it important to state something obvious: the goal of this book is not to romanticise armed groups and their activities or to imply that they are forces of good in the world. On the contrary, the humanitarian consequences of armed groups' actions can be evidenced on a daily basis. Instead, we argue that the conditions of life experienced by the 60 million civilians living under their control around the globe demand more thorough debates within academic and policy circles, in particular about whether and to what extent the highly State-based wiring of international law is able to offer perspectives to alleviate them. Indeed, while this volume posits that armed groups live in a shadowland of legality and illegality, it has been put together in the belief that the real inhabitants of this shadowland are the civilians living in these spaces.