Israel Law Review **51**(2) 2018, pp 321–335. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2018.
doi:10.1017/S0021223718000067

Book Review Essay

The International Legal Status of Armed Groups: Can One Be Determined Outside the Scope of Armed Conflict?

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In 2016 Daragh Murray published his book Human Rights Obligations of Non-State Armed Groups *(Hart 2016). By way of distinction from many other contributions on this widely discussed topic, Murray tries to provide the reader with a complete overview of the legal framework that enables armed groups to acquire international legal status, and preferably outside the framework of armed conflict. He walks the reader through the path of international legal personality, leading towards the acknowledgement of armed groups as addressees of the law. Murray's attempt is courageous, interesting and innovative, but it has its shortcomings. These include his reliance on international criminal law as a source for defining armed groups, and his insistence on stepping outside international humanitarian law. Nonetheless, his contribution is essential for those who wish to include even more armed groups on the international plane.*

Keywords: armed groups, territorial control, legal personality, international accountability, de facto control

1. Introduction

It is commonly recognised today that armed groups are involved in conflicts as well as other types of unrest and violence. International humanitarian law regulates, and to some extent therefore recognises the actions of armed groups in these conflicts. International human rights law does not. Nonetheless, international bodies, scholars and practitioners apply international human rights law to the activities of armed groups. Daragh Murray, in his book *Human Rights Obligations of Non-State Armed Groups*,[1] tries to provide a general legal framework that defines when such application is legally possible (pp 5–6). His attempt is courageous and interesting. Most of all, Murray's book provides a proper interdisciplinary study of international law and its tools, available to those wishing to regulate the behaviour of armed groups.

As Murray makes clear in the opening sentence (p 1), his book concerns the protection of individuals affected by the activities of armed groups. After decades which saw the addressing of human rights obligations of armed groups by the United Nations (UN) and other international organisations, as well as the constant growth in situations of violence involving armed groups, Murray's book is an interesting and valuable addition to scholarly and academic debate on the matter, providing both an overview of practice and a legal framework to provide better protection for individuals. However, while Murray's contribution is recommended, the following review

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[1] Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart 2016).

will also address some of its shortcomings. These shortcomings, or 'weaknesses', are not related to the basic idea Murray conveys: that non-state armed groups should adhere to human rights law, and human rights law is the appropriate means to fill in most gaps in the law applicable to the conduct of armed groups. Murray justifies his choice of legal framework by explaining that international human rights law 'does not contain any provisions excluding individuals affected by either armed conflict or the activities of non-state armed groups' (pp 6–7). While one could interpret the general and universal applicability of international human rights law[2] as being complementary to other legal frameworks, such as international humanitarian law,[3] it is not the purpose of this review to undermine or address the general debate as to whether international human rights law should be the main tool or merely complementary for the regulation of the activities of armed groups.

In his study Murray suggests a legal framework for the applicability of human rights law to armed groups. His argument is constructed in three layers: (i) defining armed groups; (ii) determining their legal capacity in international law; and (iii) addressing whether and how armed groups can be bound by human rights law. This review will focus on the first two layers of Murray's book. It will critically assess Murray's analysis and suggested approach to establishing the international legal personality of armed groups (referring mainly to Chapter 3 of the book), and his suggestion to apply de facto control theory to establish their legal capacity (Chapter 5). The third layer – that is, the manner in which human rights law will eventually apply to armed groups – will not be addressed in this review. Nonetheless, Murray's realistic and functional approach, an approach that enables the gradual application of the law, is welcomed.

Overall, Murray's approach is refreshing in its practicality, effectivity and functionality. His consistent and structured analysis of the role of armed groups in the international sphere is valuable, especially as it is used to provide greater protection for victims. Even more refreshing is his idea that armed groups bear both rights and obligations in the international arena, an idea that does not and should not, in his view, affect their political legitimacy (pp 36, 39). Lastly, Murray's approach of enabling the gradual application of the law renders it not only practical and realistic, but also capable of ensuring protection of victims while acknowledging the difficulties that armed groups might face.

A preliminary remark should be made. Murray tries to provide the reader with a universally accepted legal definition of 'armed group' – that is, a set of common requirements for *all* armed groups to meet, in order to have them accepted as international entities and, at the same time, ensure the application of human rights to their behaviour. Contrary to Murray, others do not turn to such a search; rather, they concentrate on the accountability of these groups for human rights violations, underlying that whether human rights apply to such groups or not has no

[2] Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011) 5–12.
[3] See, eg, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, [24]–[25].

https://doi.org/10.1017/S0021223718000067 Published online by Cambridge University Press

bearing on their definition and legal status.[4] As will be discussed below, Murray's search for a common definition of armed group has its advantages and disadvantages.

2. WHAT IS AN ARMED GROUP?

The first part of the book deals with providing a clear and concrete definition for armed groups as legal entities – that is, a set of criteria or elements which endow armed groups with a legal status in international law and with responsibility for their actions (including obligations under international human rights law). This section will address the preliminary elements or limitations that Murray suggests. First, the group is independent (pp 7–8, 42–43); second, the group operates in a non-international armed conflict or a non-conflict situation (p 42). The elements of the definition itself will then be addressed – that is, the capacity to possess rights and obligations, and actual possession of these (p 42).

Others before Murray have tried to provide definitions of armed groups for various purposes: humanitarian engagement,[5] applicability of international humanitarian law,[6] and determining the international accountability of armed groups.[7] For the purpose of Murray's work, the definitions used by Zegveld[8] and Clapham[9] might be useful. In neither, however, is there a requirement of 'independence'. Both Zegveld and Clapham understand that the spectrum on which armed groups are defined is wide and varied.[10] This view of armed groups as existing alongside a spectrum is also reflected in Fortin's recent work.[11] Fortin also does not require independence as such for the applicability of international obligations. Indeed, since Murray limits the scope of his definition to non-international or non-conflict situations from the definitions provided by the above-mentioned authors, the elements he uses may differ. The following analysis examines whether these elements meet his purpose.

According to Murray, in order for an armed group to be legally responsible for its actions, it must be 'independent' (pp 7–8). That is, the group must exist independently and should not be completely dependent on a state.[12] Indeed, there is a grey area between complete independence and complete dependence, and one could think of situations in which the group is partly

[4] Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 153.

[5] See, eg, Pablo Policzer, 'Neither Terrorist nor Freedom Fighters', presented at the International Studies Association Conference, Honolulu (Hawaii), 3–5 March 2005, 1. See also Geneva Centre for the Democratic Control of Armed Forces (DCAF) and Geneva Call, 'Armed Non-State Actors: Current Trends & Future Challenges', DCAF Horizon 2015 Working Paper No. 5, 2012, 7.

[6] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 8.

[7] Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 1.

[8] ibid.

[9] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) Ch 7.

[10] Zegveld (n 7) 1; Clapham, ibid.

[11] Fortin (n 4) 152.

[12] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Serbia and Montenegro)*, Judgment [2007] ICJ Rep 43, [392] (*Genocide* case).

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controlled (even effectively) by a state, but in relation to specific activities the group remains independent and for those activities it bears international responsibility (p 8). For example, a group may receive its military supply from a state, and without the state's assistance it would not have the military capacity it possesses. Nonetheless, the group's military operations and strategy are fully independent from that state and thus the state has no control over them. The criterion of independence implies the absence of an 'exclusive superior authority' (pp 42–43).[13] In other words, partial authority or some kind of delegation of powers from the state to the group is possible. Using the example of Northern Cyprus, Murray explains that the authority or group might not be completely independent and, to some extent, there could be an allocation of powers between the group and the state (ibid).

On the one hand, the preliminary criterion of independence is helpful in clearly determining the scope of Murray's theory as to those groups that have obligations under international human rights law and to differentiate them from those that do not. On the other hand, this criterion excludes more complex situations. As Murray himself argues, many situations involve groups that are not completely independent and have links with states (p 8). This begs the question of how independent the group should really be. Applying the independence requirement *stricto sensu* excludes groups operating in an international armed conflict as such groups are controlled (overall or effectively) by states.[14] Clearly, there are armed conflicts classified as international in which the armed group could be considered independent, such as those falling within the scope of Article 1(4) of Additional Protocol I,[15] or de facto authorities. Moreover, there are several different types of de facto authority. Some are closely linked to a state – for example, by way of occupation, such as in Northern Cyprus; others are not – such as the Hamas regime in Gaza. By using the Northern Cyprus regime as an example for the requirement of independence Murray fails to distinguish between the different types – to identify the de jure armed actor (Turkey, in the case of Northern Cyprus), or to address the fact that at least according to international humanitarian law, occupied territory falls within the scope of international armed conflicts.[16]

In addition to the requirement of independence, Murray limits his study to armed groups operating in non-international armed conflicts or outside situations of conflict (p 42). According to Murray, the latter class of group includes, for example, Boko Haram. One shortcoming appears

[13] ibid 42–43.

[14] Based on the definition of the International Criminal Tribunal for the former Yugoslavia (ICTY) in ICTY, *Prosecutor v Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, [196], as well as the definition of the International Court of Justice (ICJ) in the *Genocide* case (n 12) [386]–[394].

[15] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I), art 1(4).

[16] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I), art 2; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II), art 2; Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III), art 2; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 2 (Common Article 2).

at first glance: as the notion of 'armed group' comes from the law of armed conflict,[17] one should clarify how and to what extent this notion is relevant for acquiring a legal personality outside this framework.[18] It is necessary to understand in substance how the group is 'armed' in those non-conflict situations and what it means to be an 'armed' group in a non-conflict situation. That is, the definition Murray seeks for those groups cannot depend solely on international humanitarian law.

2.1. THE CAPACITY AND ABILITY TO POSSESS INTERNATIONAL OBLIGATIONS

Murray differentiates between two preliminary limitations or criteria and the rest of the elements of his definition, but first addresses the fear held by states in legitimising or recognising armed groups (pp 35–38). According to Murray (pp 34–35), this fear is reflected in the 'legal status clause', which determines that the application of the Common Article 3 provision 'shall not affect the legal status of the Parties to the conflict'.[19] Murray explains that the motivation behind this formulation was to avoid two issues: first, legitimising armed groups and their political aims, and thereby delegitimising the ability of the state to use force and repress opposition groups (p 35); second, recognition of belligerency that would elevate the group 'to the level of a *pro tanto* international subject, bringing into effect the application of international law' (p 37).

Despite the varied evidence he provides, and based on statements made by states during the negotiation of Common Article 3, Murray concludes (p 39) that:

> [T]he impact of common Article 3(4) with respect to a group's international legal personality was not explicitly discussed, and the drafting history is unclear on this point … it cannot be concluded that states intended Article 3(4) to preclude the international legal personality of a group.

This conclusion is not fully substantiated. At least to the extent of the application of the Geneva Conventions, states were clear on their motivation to prevent changes in the legal status of armed groups (ibid). However, the explanation Murray further provides is appealing. Murray creates a link between the direct application of international obligations to armed groups and their acquisition of international legal personality. Accordingly, imposing direct obligations on armed groups necessarily results in their acquiring an international legal personality. Thus, according to Murray, referring to the legal personality clause in Common Article 3 as preventing armed groups from acquiring international legal personality status contradicts the very purpose of the Article, namely to regulate the actions of armed groups in a non-international armed conflict (p 40).

Two different questions, however, should be settled in respect of the legal personality clause. First, in light of the concrete purposes of the Geneva Conventions, are this clause and its

[17] See, eg, Fortin (n 4) 90–151, 158.
[18] ibid.
[19] GC I (n 16) art 3; GC II (n 16) art 3; GC III (n 16) art 3; GC IV (n 16) art 3 (Common Article 3).

https://doi.org/10.1017/S0021223718000067 Published online by Cambridge University Press

interpretation suitable and sufficient to decree a general rule on the applicability of international law obligations and the status of armed groups outside armed conflict? Second, is it a dichotomy – that is, do armed groups either have full legal personality or none at all? Perhaps there exists a spectrum whereby they may to a certain level acquire the features of an international legal personality so as to enable the effective application of the law in the concrete framework discussed (for example, the law of armed conflict)?

Once Murray has ascertained that states' motivation in not legitimising or recognising armed groups does not preclude armed groups from acquiring international legal personality, he turns to identify the criteria necessary for obtaining such personality. To the preliminary conditions elaborated above – namely independence and operation in a non-international armed conflict or in the context of a non-conflict – Murray adds two criteria (p 47): (i) the capacity to possess direct international rights and obligations; and (ii) actual possession of those rights and obligations. Murray dismisses the requirement, stipulated in the *Reparations* case,[20] of the entity's capacity to bring international claims as a requisite for acquiring international legal personality, by pointing out that international jurisprudence and scholars have distinguished the capacity to possess rights and duties from the ability to vindicate those rights and duties (p 46).[21]

Let us assume that the criteria suggested by Murray are accepted – that is, the group must be independent, operate in the contexts mentioned, and have both the ability to possess and actual possession of rights and obligations. As Murray himself nonetheless emphasises, there is a difference between international humanitarian law, which addresses armed groups directly and indirectly as holders of international obligations (for example, Common Article 3 and Additional Protocol II[22]), and international human rights law, which does not. In other words, while it is fairly simple to rely on international humanitarian law in discussing the legal personality of armed groups, doing so in the framework of human rights law is more complex as the law itself does not address armed groups per se.

Admittedly, Article 5(1) of the International Covenant on Civil and Political Rights[23] reads:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

[20] *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, 179 (*Reparations* case).

[21] Hersch Lauterpacht, 'The Subjects of International Law' in Andrea Bianchi (ed), *Non-State Actors and International Law* (Ashgate 2009) 14; *Reparations* case, ibid 178; *Western Sahara*, Advisory Opinion [1975] ICJ Rep 12, [148].

[22] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II), especially in its threshold, art 1(1).

[23] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 5(1).

However, as explained by Fortin, the words 'group' and 'individual' were used in order to recognise that states are not the only entities able to harm or violate the rights of individuals.[24] This Article was drafted following the Second World War with the aim of providing protection for individuals from other individuals or groups who were trying to abuse the Covenant and exploit this framework.[25]

To overcome this difficulty that international human rights law does not address armed groups, Murray presents and discusses the *functional approach to international legal personality* (pp 48–50). This approach rests upon the idea that international personality is made up of the entity's participation in international life and acceptance or some form of recognition of the group by other entities. Thus, it gives weight to the political will of states when it refers to the direct or indirect recognition of the legal entity. Such recognition can be granted through conventional means of treaty-based obligations, or through practical and indirect means reflecting the intent of states. Indeed, as Murray puts it, this approach 'is reflective of the requirements of international life, and the realities of contemporary international law', and is effective. The purpose is to ensure that participation in international life is not 'exclusively dependent upon state discretion' (p 50).

Some difficulties do arise with regard to the functional approach proposed by Murray. He portrays these requirements or criteria as being legal and objective. However, they rely on a subjective element: whether states have agreed to include or accepted the inclusion of the armed group in international life. Murray refers to the implied powers doctrine (p. 49),[26] which applies primarily to non-state actors such as the UN, to ensure they effectively comply with their mandate.[27] While it is true that this doctrine could (and should) be advanced also to armed groups, it is not automatic. Moreover, based on state practice, this approach may well emphasise that armed groups may be subject to the obligations that states want them to have, but they do not benefit from the rights that would actually enable them to comply with these obligations. Thus, an armed group may be directly or indirectly expected to comply with international obligations, but in practice be prevented from doing so by states.[28]

2.2. THE LEGAL SOURCE FOR DEFINING ARMED GROUPS

Murray's work relies on the elements that an armed group should satisfy in order to acquire international legal personality: the capacity to possess international obligations, and actual possession

[24] Fortin (n 4) 212.
[25] ibid.
[26] *Reparations* case (n 20) 178–90.
[27] ibid.
[28] See, eg, the recommendations referring to humanitarian assistance in sieged areas as well as detention conditions in the latest report of the UN Human Rights Council (HRC) on the human rights situation in Syria: Human Rights Council, Report of the International Commission of Inquiry on the Syrian Arab Republic (6 March 2018), UN Doc A/HRC/37/72, Pt X. On the one hand, the armed groups are expected to meet the same requirements as the state(s); on the other, the state(s) consider them as terrorist and the Commission itself questions its reasons for detention (ibid Pt VII).

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of such obligations. The latter element is addressed in different parts of Murray's work but relates in essence to his functional approach, presented above. However, Murray also wishes to identify when armed groups have the capacity to possess such obligations. As his purpose is to apply the law even outside the framework of armed conflict, it is necessary to identify which features an armed group should have in situations of non-conflict in order to satisfy the capacity requirement. Clearly, Murray's idea is to have a universal definition, applicable in both contexts. Nonetheless, while international humanitarian law provides us with a fairly clear definition, there is a lack of such reference in the context of non-conflict.

First, Murray provides an overview of the elements required for an armed group to be subject to international humanitarian law – the capacity to be subject to international humanitarian law obligations (pp 60–67). While these elements are not fully developed, one can find reference to them in various provisions of the law. Following this, and in order to define the features that armed groups should possess in a non-conflict situation, Murray chooses to rely on the customary prohibition of crimes against humanity. His argument is as follows. The contextual element of crimes against humanity requires an organisational policy or plan.[29] From the manner in which this requirement has been interpreted and applied, one could determine the features that an armed group should possess for it to have a legal personality when operating in a non-conflict situation (p 67). As crimes against humanity can be committed outside an armed conflict, and by individuals belonging to an armed group based on the group's organisational policy, it suggests that the group that meets the contextual element has the capacity to possess international legal obligations (ibid).

Murray's attempt to use the contextual element of crimes against humanity is appealing, but it has shortcomings. First and foremost, the contextual element of crimes against humanity was designed to criminalise *individuals* under international law. The ICJ had already determined in the *Genocide* case that there is a difference between terms used to define individual criminal accountability and that of the state or an entity.[30] Such differentiation may create a gap in responsibility and protection,[31] but it nonetheless exists. Understanding the limits of the criminal prohibition referred to above, Murray refers to corporate liability for international crimes as a source for a definition (p 68). However, this attempt is not without fault. There are differences between corporate liability and the legal personality of armed groups, and it seems far-fetched to justify the existence of one with that of the other. Moreover, the concept of corporate liability can neither be equated with nor justify the definition of armed groups or the existence of their capacity, especially for the purpose of defining when the latter acquires international legal personality. First, corporate liability is a legal concept that addresses the *criminal* liability of corporations and, while it appears in the Statute of the African Court of Justice and Human Rights,[32] it is not

[29] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90, art 7.
[30] *Genocide* case (n 12) [403].
[31] Tom Gal, 'Unexplored Outcomes of *Tadić*: Applicability of the Law of Occupation to War by Proxy' (2014) 12 *Journal of International Criminal Justice* 59, 63–64.
[32] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art 46C.

enshrined in customary international criminal law.[33] Second, the mere analogy between the two is problematic as one addresses primarily corporate entities registered in accordance with domestic legislation, and the other addresses a phenomenon of international law with fluid (at best) definition.[34] Such an analogy would at most concern the possibility of holding armed groups *criminally* responsible for actions committed by their members, rather than serve as a foundation or reference to define when a group meets the requirements of being an international entity. As pointed out by Zegveld, the gap in responsibility does not exist at the individual level of an armed group's membership, but at the group level.[35]

In addition, international criminal courts and tribunals accept the ability of members of armed groups to be perpetrators of crimes against humanity,[36] and customarily no longer require a link between those crimes and an armed conflict. Therefore, they implicitly recognise that armed groups may fulfil the required contextual element of carrying out an organisational policy or plan, be it within or outside an armed conflict. This inclusion is not without controversy, at least from an academic point of view,[37] as Murray himself concedes (p 69). However, these international courts and tribunals do not provide a general, clear, holistic and widely accepted definition of armed groups. As Murray himself states, when addressing matters in their jurisprudence, the various courts and tribunals define what will satisfy the requirement of organisational policy for the purpose of the crime at hand. Clearly, the jurisprudence of international courts and tribunals may be of use in identifying those customary elements required for armed groups to become addressees of the law, especially in defining the term 'organisation' outside the scope of international humanitarian law. However, by themselves, they do not provide a coherent and general definition of these groups for the purpose of acquiring legal personality.

Finally, the requirement of 'organisational policy or plan' and its interpretation are themselves controversial. While the International Criminal Court (ICC) has produced a fairly coherent jurisprudence on the matter, in terms of customary law a universal understanding of the requirement has not been reached.[38] This is probably unnecessary, as the requirement has not been incorporated in the International Law Commission (ILC) Draft Articles on Crimes against

[33] Robert Cryer and others, *An Introduction to International Law and Procedure* (3rd edn, Cambridge University Press 2015) 355–58, 590–92.
[34] As Policzer (n 5) explains, such general and universally accepted definition has not yet been adopted.
[35] Zegveld (n 7) 220–22.
[36] See, eg (and as referred to by Murray (n 1) 69), the International Criminal Tribunal of Rwanda (ICTR) case, ICTR, *Prosecutor v Kayishema*, Judgment, ICTR-95-1-T, Trial Chamber II, 21 May 1999, [126]; ICTY, *Prosecutor v Kupresškić*, Judgment, IT-95-16-T, Trial Chamber, 14 January 2000, [551]; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07, Pre-Trial Chamber, 30 September 2008, [396].
[37] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 152–53.
[38] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 91–92; Cryer and others (n 33) 234–36.

Humanity.[39] In other words, in light of the current position and current developments, relying on this contextual element as a legal source for the definition of an armed group is problematic.

3. The De Facto Control Theory: Effectiveness in the Service of International Law

The previous section reviewed Murray's attempt to provide a set of elements to define armed groups operating in and outside non-international armed conflicts. This section aims to review his search for a legal tool to impose international obligations. One way is to look for a direct application of the law (treaty law), as in the case of international humanitarian law (p 120). However, in the absence of a direct application, such as in a non-conflict context, another legal framework should be found. Murray turns to the de facto control theory (p 120), which refers to the control de facto exercised by an armed group over a territory and its population.

3.1. The De Facto Control Theory: Who and How?

Murray defines de facto entities as independent entities that may exist in parallel with established authorities (p 121),[40] and exercise exclusive authority and *effective sovereignty* on parts of the territory (ibid). Murray uses the term 'effective sovereignty' by reference to Pictet's commentary to Geneva Convention III.[41] In that work Pictet explains that insurgents can be bound by the Convention if they act as if they represent the country or part of it.[42] Murray adds that most cases of de facto authorities emerge from within the framework of armed conflicts. However, he emphasises that the theory applies regardless of the existence of such a conflict (p 121).

Let us focus on the part of Murray's definition that refers to effective sovereignty, borrowed from or referring to Pictet's commentary. Pictet refers to the aim or claim of the group[43] (which Murray regards as *motivation*). On the one hand, he supports Pictet's definition and notion. On the other, also quoting Sivakumaran, he argues that referring to the motivation of the group does not make sense in determining whether the group is subject to international law (p 128). So, is exercising effective sovereignty a criterion? What does this notion mean if it is not merely the purpose or claim of the group? If it is absurd, then why is it referred to in Murray's work as part of the definition of de facto entities?

Following the definition of a de facto entity, Murray determines that such entities (that is, armed groups) will satisfy the criterion of actual possession of international rights and duties as they are in control of a territory (p 121). The control exercised over a territory replaces the

[39] ILC, Report of the International Law Commission 69th Session (1 May–2 June and 3 July–4 August 2017), UN Doc A/72/10.
[40] Zegveld (n 7) 15.
[41] Jean S Pictet (ed), *Commentary: III Geneva Convention relative to the Treatment of Prisoners of War* (International Committee of the Red Cross 1958) 37.
[42] ibid.
[43] ibid.

https://doi.org/10.1017/S0021223718000067 Published online by Cambridge University Press

requirement of direct application of international treaty law (p 120): the group would have met all the requirements necessary for acquiring legal personality. However, as Murray states, 'as a result of their transient nature … are regarded as provisional subjects of international law' and are not 'equivalent to states' (pp 121–22). The starting point of Murray's argument is that the de facto control theory applies to armed groups 'in the absence of directly applicable international treaty law' (p 120). This statement in itself is confusing as Murray himself acknowledges that direct sources of obligations (treaty law) are not the only sources that enable armed groups to comply with the requirement of actual possession.

Another shortcoming of Murray's use and interpretation of the de facto control theory relates to the similarity he draws between how the theory is applied to de facto regimes of states and how it can be applied to armed groups. The control exercised by entities over state territory has in many situations been used to apply international law to de facto regimes or governments when these were not recognised as lawful (and legitimate) by the international community (such as the German Democratic Republic before 1972 and the TRNC regime in Northern Cyprus).[44] The de facto control theory in these instances leads to the validation of certain acts of the non-recognised government for the benefit of individuals, or to ensure that these regimes are held responsible for violations of international law (pp 124–25).

As Murray underlines, these examples of the application of the theory denote recognition of an entity that is seen as representing the state (p 123). This differs from extending recognition to an entity that exercises control over a territory but is not yet seen as representing that state. However, Murray concludes, based on international practice, that the theory (that is, imposing obligations on armed groups if they exercise exclusive control over a territory) neither requires nor does it result in recognition of the entity (p 125). The present reviewer agrees with Murray's conclusion, that exclusive control of a territory by an armed group is a valid tool for imposing international obligations, regardless of any recognition. Nonetheless, as this theory and ensuing doctrines have been applied mainly to de facto governments of states in a non-conflict context (see the examples given at pp 128–30), the differences as well as the linkage between the two should have been better addressed. As explained by Murray, the theory represents the principles of effectiveness and necessity, and aims to prevent a legal lacuna (p 126) or a vacuum (p 128). However, at least from a political point of view, there are differences between de facto regimes and governments of states and armed groups, and these could have been better explored and bridged.

Having provided a definition of the de facto control theory and de facto entities, Murray explains that this theory results in the recognition of the actions of armed groups as having effect internationally. It follows that the group is a subject of international law (p 130). Hence, according to Murray, the actual possession requirement is satisfied (ibid). It seems that although Murray

[44] For an elaboration of these examples see Jochen A Frowein, 'De Facto Regime' in *Max Planck Encyclopedia of Public International Law*, C, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1395?rskey=t0ybEe&result=1&prd=EPIL; and Hiroshi Taki, 'Effectiveness' in *Max Planck Encyclopedia of Public International Law*, B(1), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e698?rskey=3jok6f&result=1&prd=EPIL. For other examples see Murray (n 1) 124.

https://doi.org/10.1017/S0021223718000067 Published online by Cambridge University Press

differs initially between the requirement of capacity and that of actual possession with regard to de facto entities, the fact that they actually possess international obligations reflects also on their capacity to possess. In other words, they inherently comply with both requirements. Although this can be drawn from Murray's writing, it is not spelled out clearly. Moreover, assuming that an armed group fulfils both requirements, can it be equivalent to a state in its obligations (and rights)? Is this, and especially by referring to the de facto control theory, the purpose and result of Murray's work?

Murray's suggestion of adopting the de facto control theory to bind armed groups directly to international law, or to expand the applicable law, is interesting, creative, realistic and, most of all, effective. Applying this theory shifts the discussion from the political will of the international community to recognise the armed group, or its fear of legitimising it, to a discussion that is practical. Murray's approach to the de facto control theory addresses the vacuum created when an armed group exercises exclusive control over a specific territory (p 128), a situation that may enable the territorial state to escape international responsibility.[45] In practice, acts of the armed group exercising exclusive control over a territory 'are to be recognised as effective … it follows that the entity must be subject to international regulation' (p 130). A recent example of this situation is Daesh (the Islamic State) operating in Iraq.[46] Indeed, the de facto theory is an adequate tool to ensure that armed groups are subjected to international obligations regardless of their recognition or legitimacy. It is not based on an innovative idea; rather, it is well accepted in the law of belligerency and insurgency.[47] Nor is the idea that armed groups with sufficient authority and which exercise public functions should be subjected to such obligations.[48] It is unclear, therefore, what contribution this theory makes to Murray's theory of armed groups acquiring international legal personality, and how it complements it.

3.2. Pushing the Theory Further: Groups below the Threshold

Murray aims to take the de facto control theory a step further and apply it to those situations where armed groups fall short of the theory's threshold requirement – that is, they do not have exclusive territorial control or some form of authority or administration (p 131). Murray argues correctly that the justifications used to apply the theory to entities meeting the threshold is also relevant to those falling short of it (ibid) in order to prevent a legal vacuum, given the reluctance of states to accept responsibility for acts committed by armed groups acting within their territorial jurisdiction (ibid). According to Murray, '[w]hile states may perceive a political interest in leaving unrecognised entities unregulated, this may actually undermine both their own

[45] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) 2 *Yearbook of the International Law Commission* 31, UN Doc A/56/10, Commentary to Draft Articles 9–10.
[46] Human Rights Council, List of Issues in relation to the Fifth Periodic Report of Iraq – Replies of Iraq to the List of Issues (27 August 2015), UN Doc CCPR/C/IRQ/Q/5/Add.1, para 33.
[47] Fortin (n 4) 157–58.
[48] Yaël Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 *Cornell International Law Journal* 21, 31.

https://doi.org/10.1017/S0021223718000067 Published online by Cambridge University Press

position on the international plane, as well as the effectiveness of international law' (p 133). Murray is not mistaken. In its recent response during the periodical review of the Human Rights Committee, Iraq tried to evade responsibility over crimes committed against the Yazidis, as these crimes were committed by Daesh (the Islamic State) and in territories which, according to Iraq, were no longer under its jurisdiction but were exclusively controlled by Daesh.[49] If states are reluctant or truly unable to be held responsible for acts committed by armed groups, then there is a need to subject armed groups directly to international obligations (p 132). Otherwise an imbalance arises in which armed groups that are below the threshold ('unrecognised entities' as Murray puts it (p 133)) are in a superior position as their actions are not regulated and they have greater freedom (ibid). Again, the view that *effective* entities – that is, armed groups with the capacity to exercise public functions and with effective control over a territory – should comply with international obligations regardless of whether they are recognised, is not new and is supported by the practice of the Human Rights Council.[50] In this respect, though, the question that needs to be determined is when does an armed group have exclusive control over a territory and when does it not?

Murray's argument on the need to prevent a legal vacuum and expand the application of the de facto theory is strengthened by referring to the law of state responsibility, which recognises that given a successful insurrection, insurgents will bear responsibility for acts committed by both themselves and the previous government.[51] Article 10 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which addresses this issue, refers to a 'successful' rebellion – that is, insurgents who have successfully *replaced* the former government against which they fought.[52] Article 10 shows some flexibility, as it attaches international responsibility to acts committed prior to legal recognition of the entity.[53] However, the entity bearing such responsibility is no longer an armed group. Moreover, to assume from such flexibility that international obligations can be imposed directly on *any* armed group, regardless of the outcomes of its operations or its motivation, is not intuitive. Nor is the assumption that it can address those armed groups that exist below the threshold of the de facto theory.

After reviewing the various justifications for the expansion of the de facto theory, Murray turns to frame the threshold for such expansion. In the case of armed groups that exist below the traditional threshold of the de facto control theory (by not exercising exclusive authority or control) the groups should fulfil two criteria: (i) the capacity to possess international obligations, and (ii) independence (p 133) – that is, the exact same requirements as presented earlier in his work. According to Murray, in these cases in particular the independence requirement is of

[49] Human Rights Council (n 46) para 33.
[50] See, in particular, UN Commission on Human Rights, Report of the Special Rapporteur, Philip Alston, on Extrajudicial, Summary or Arbitrary Executions (22 December 2004), UN Doc E/CN.4/2005/7, para 76; UNGA, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (12 February 2014), UN Doc A/HRC/25/65.
[51] ILC (n 45) Commentary to Draft Article 10, paras 1–7.
[52] ibid.
[53] Beate Rudolf, 'Non-State Actors in Areas of Limited Statehood as Addressees of Public International Law on Governance' (2010) 4 *Human Rights and International Legal Discourse* 127.

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special importance as it is the factor that eventually causes the legal vacuum (ibid). This readdressing of both criteria (independence and capacity) here for the application of the de facto control theory on armed groups that fall short of exclusive authority is confusing. Does it mean that armed groups that fulfil the higher threshold do not need to be independent? Or can we assume that they are simply by meeting the higher threshold of the theory? Does it mean that the elements presented by Murray regarding legal entities and armed groups earlier in the book differ from those that are relevant in a situation of de facto control?

Murray himself concludes by saying that the application of the de facto control theory to groups both above and below the threshold of exclusive authority fulfils the requirement of actual possession (p 151). As this theory centres mainly on the group's control over territory, and as this feature, while not being a *sine qua non* is a common feature of armed groups (at least in an armed conflict),[54] it is difficult to understand what the actual difference between the groups will be in meeting the different threshold or how the application of the theory should be assessed in these different cases. Indeed, applying the de facto control theory provides Murray with another source of obligation. Nonetheless, this point is not clear and, to some extent, is circular. Moreover, its application to the various scenarios presented by Murray is still unclear, as is its contribution beyond being a direct source of obligation.

4. CONCLUDING REMARKS

Murray's contribution is a recommended read for practitioners and scholars in search of a theory linking effectiveness, reality and legality that enables the regulation of the behaviour of armed groups. It is indeed stimulating to read a theory with the purpose of addressing the legal status of armed groups and offering clear criteria. It focuses on the law of international legal personality; it provides for solid practice, jurisprudence and examples, searching for the correct framework to hold armed groups bound by international obligations outside armed conflicts.

Notwithstanding these clear and explicit advantages of Murray's work, it has several challenges to resolve. On the one hand, aiming to advance the law, it tries to disconnect armed groups from their roots: the law of armed conflict. Indeed, and as Murray justly explains, in many instances violations of international law were committed prior to the situation being qualified as an armed conflict, or after such conflict was resolved (p 132). Thus, Murray's search to expand the responsibility of armed groups beyond the paradigm of armed conflict is welcomed. Nevertheless, most armed groups generally were, are or will be involved in an armed conflict, and usually the state will try to resolve such conflict with its military forces or extended force that exceeds its regular law enforcement capacity. Moreover, in most situations, and in order to exercise effective and exclusive territorial control, the use of military force by the group is required. As Murray notes frequently, most examples are related to armed conflicts.

[54] See, eg, Sivakumaran (n 6) 185–88; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 40. The idea that control over territory is an element for regulating armed groups in the international system is not new, as explained by Fortin (n 4) 157–58.

Murray's reference to the de facto control theory – which provides for a practical tool that renders international law effective and realistic, ensuring that no legal vacuum occurs, is useful and appreciated. Although its application needs some fine-tuning, using an armed group's control and authority over a territory as a source of international obligation is interesting and well founded in other branches of international law (such as belligerency and insurgency). As a final note, the author of this review is of the opinion that armed groups are actors who operate on the international plane, and are subjects of international law. It is only by including them in the international legal framework that provides a realistic approach and widens the protection of victims.

https://doi.org/10.1017/S0021223718000067 Published online by Cambridge University Press