CONTENTS

Foreword ix ROBERT HEINSCH AND CARSTEN STAHN Acknowledgements xi Table of Cases xiv *Table of Documents and Resolutions* xvii

Introduction

- I Introduction
- II Scope of the Inquiry 5
- The Importance of Studying Detentions by NSAGs III 9
- IV The Motivation behind This Study 12

1

1

- Methodology 19 V
- VI Structure of the Book 23

Non-State Armed Groups and PART I **International Law** 27

Non-State Armed Groups, Legal Personality 1 and Typology 29 29

- I Introduction
- II The Starting Point: Non-State Armed Groups as Non-State Actors 34
 - A (De)Constructing a Narrative of Control: The 'International Legal Personality' Doctrine 40
 - В The 'Capacity Approach': Extracting the Rights and Obligations of Non-State Actors 45
 - Concluding Ideas: Re-thinking the 'Capacity Approach' С from a 'Functional' Perspective 51
- III Understanding the Organisational 'Functionality' of Non-State Armed Groups 53

v

A Different Perspectives, Same Actor: What Is a 'Non-State Armed Group' for the International Community? 55

CONTENTS

- B Developing a Set of Behavioural Expectations: A Typology of Non-State Armed Groups 61
- IV Concluding Remarks: Setting the Subject of Inquiry 67
- 2 Locating Non-State Armed Groups within the International Legal Architecture 70
 - I Introduction
 - II The Importance of IHL and IHRL When Examining the Detention Activities of NSAGs 73
 - A The Legal Regulation of Detention Activities in IHL and IHRL 74
 - 1 The Right to Liberty and the Prohibition of Arbitrary Deprivation Thereof in IHL and IHRL 75
 - 2 Rules on the Treatment of Detainees 80
 - 3 Fair Trial Guarantees 82

70

- B Identifying Protection Gaps: Governance of NSAGs and the Nexus Requirement 84
 - 1 The First Gap: Governance Activities of NSAGs 85
 - 2 The Second Gap: The *Nexus* Requirement 91
- C The International Community's Responses to NSAGs' Activities in the Light of IHL and IHRL 97
- III The Binding Nature of International Law on NSAGs 105
 - A The Current Legal Landscape: What Is the Place of Non-State Armed Groups? 106
 - B Non-State Armed Groups' International Obligations and the Theory of Sources of International Law 109
 - C Why Are Non-State Armed Groups Bound by IHL? 112
 - D International Human Rights Law and Non-State Armed Groups 121
- IV Concluding Remarks: Locating NSAGs in the International Legal Architecture 130

PART II Non-State Armed Groups, Motives, Legal Basis and Organisation 133

- 3 Detention in Non-international Armed Conflicts: From Prohibitions to Restrictions and Acceptance 135
 - I Introduction 135
 - II The Starting Point of the Legal Basis to Detain in NIACs: What Does IHL Say? 138
 - III NSAGs' Detention Activities and the Tensions of International Law 142
 - A The *Lotus* Principle and Its Possible Application to Detention by NSAGs 145

CONTENTS

- B Identifying a Dichotomy: The *Serdar Mohammed* Decisions and the Position(s) of the ICRC on Detention in NIACs 151
 - 1 The Serdar Mohammed Decisions 152
 - 2 The ICRC and Detention in NIACs 160
 - 3 Summary and Ways Forwards 165
- IV Public Prerogatives by NSAGs and the Value of Their Internal 'Laws' 167
 - A Non-State Armed Groups and the 'Combative Pluralism' of the Legal System 172
 - B Defining Those NSAGs' 'Laws' That May Serve as Legal Basis to Detain 176
 - C Why NSAGs' 'Laws' Are (and Can Be) Useful Tools to Provide a Legal Basis to Detain? 182
- V Concluding Remarks: NSAGs' 'Laws' as a Legal Basis to Protect Individuals 185

4 To Detain, or Not to Detain: An Inquiry into Non-State Armed Groups' Practices in Non-international Armed Conflicts 187

- I Introduction 187
- II Putting the Typology of NSAGs into Practice 191
 - A Case Studies: '*De Facto*' Authorities, 'Armed Opposition Groups' and 'Militias' and Their Detention Activities in Conflict Settings 192
 - Examining a 'De Facto' Authority: The 'Autonomous Administration of North and East Syria' and Its Armed Components 192
 - a Structure of the NSAG and Background to the Conflict 192
 - b Applicable Law 194
 - c Norms and Practices Related to Detention 196
 - d Summary and Conclusions on the 'Autonomous Administration's' Practices 202
 - 2 An 'Armed Opposition Group': The FARC-EP 204 a Structure of the NSAG and Background to
 - the Conflict 204
 - b Applicable Law 208
 - c Norms and Practices Related to Detention 209
 - d Summary and Conclusions on the FARC-EP's Practices 214
 - 3 Assessing the Third Type of NSAG: The APCLS as a 'Militia' 216
 - a Structure of the NSAG and Background to the Conflict 216
 - b Applicable Law 218