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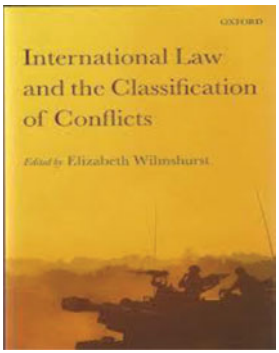

International Law and the Classification of Conflicts

Edited by Elizabeth Wilmshurst*

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Edited by Elizabeth Wilmshurst, who has also authored the introductory and final chapters, this book deals with one of the most complex contemporary issues of the laws of war: the classification of (armed) conflicts. Depending on the outcome, different legal regimes may apply: the situation may be subject to international humanitarian law (IHL) as opposed to international human rights law and domestic law. The book does not discuss the problems related to the lowest threshold of application of IHL, which excludes situations of international disturbances and sporadic acts of violence.

The book is divided into three parts and fifteen chapters. Part I introduces the subject: in chapter 1 ('Introduction'), the editor explains the aims and objectives of the publication. She highlights the fact that each of the authors was asked to adopt the same format – that is, to outline the views of the various actors in the armed violence and of outside parties as to the classification of the situation, and then to undertake his or her own analysis of the classification. In chapter 2 ('The nature of war and the character of contemporary armed conflict'), Steven Haines illustrates the evolution undergone by armed conflicts, while in chapter 3 ('Classification of

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armed conflicts: relevant legal concepts), Dapo Akande discusses the legal concepts that are relevant for classification. Part II, which is divided into ten chapters, is dedicated to different case studies: Northern Ireland (chapter 5, by Steven Haines); the Democratic Republic of the Congo (DRC) (chapter 6, by Louise Arimatsu); Colombia and Ecuador (chapter 7, by Felicity Szenat and Annie Bird); Afghanistan from 2001 onwards (chapter 8, by Francoise Hampson); Gaza (chapter 9, by Iain Scobbie); South Ossetia (chapter 10, by Philip Leach); Iraq from 2003 onwards (chapter 11, by Mike Schmitt); Southern Lebanon from 2006 (chapter 12, by Iain Scobbie); and 'The war (?) against Al-Qaeda' (chapter 13, by Noam Lubell). In chapter 14, Mike Schmitt addresses the challenges raised by classification in future conflicts. In Part III, the editor sets out the volume's conclusions.

In the nine case studies, the contributors consider modern methods of warfare (including cyber warfare[1]) and give the historical background and context of armed violence over different periods of time. They examine how contemporary forms of armed violence are classified in practice and assess the consequences of such classification. The main outcome of their analysis is that, notwithstanding the tendency to expand IHL rules applicable to international armed conflicts (IACs) to non-international ones (NIACs), the distinction between the two still remains relevant (and troublesome).

The case studies[2] show that in practice, classification may not always matter for different reasons: (a) because the parties to the conflict do not observe the law applicable to *any* kind of conflict; (b) because the parties, for policy or clarity reasons, may decide to apply IHL rules governing IACs to their operations; (c) because states may opt for solutions on the ground, allowing them to avoid theoretical difficulties;[3] and (d) because with regard to the legitimate use of force,[4] the applicable rules are similar in both cases.

On the other hand, the case studies demonstrate that classification still matters greatly with regard to the issues of detention and transfer of detainees, as well as for the trial of persons charged with war crimes, particularly in relation to NIACs or mixed conflicts.[5] Akande discusses[6] the difficulties of setting out the proper test for classification under such circumstances, by examining the decisions rendered by the International Court of Justice in the *Nicaragua* and *Bosnian Genocide Convention* cases,[7] and by the International Tribunal for the Former Yugoslavia in the *Tadić* case.[8] He provides a very interesting analysis of the 'overall'

1 See ch. 14 (2), 'Classification in future conflict', by Michael N. Schmitt.
2 In particular, the case studies on the DRC and South Ossetia; see p. 491.
3 E. Wilmshurst, pp. 491–493.
4 In particular on the DRC, Iraq, Lebanon, Gaza, and South Ossetia, see pp. 494–495.
5 See p. 495, and the case studies on Lebanon, the DRC, and South Ossetia.
6 See ch. 3, 'Classification of armed conflicts: relevant legal concepts', by Dapo Akande, pp. 58–62.
7 International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Judgement, ICJ Reports 1986, p. 14, para. 219; ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, ICJ Reports 2007, p. 43, paras. 385–395.
8 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor* v. *Tadić*, Case No. IT-94-1-T, Judgement (Trial Chamber), 7 May 1997 ; *Prosecutor* v. *Tadić*, IT-94-1-A, Judgement (Appeals Chamber),

and 'effective control' tests for purposes of attribution of conduct of non-state parties to a state and for the classification of a conflict, questioning *inter alia* their applicability to United Nations (UN) forces.[9] This reflection is to be welcomed, since the status of the UN Blue Helmets and the rules to which they may be subject is becoming increasingly relevant, in particular for neutral troop-contributing nations, which may be forbidden by their constitutions to get involved in armed conflicts (e.g. Switzerland).

The book further acknowledges that most difficulties related to classification are due to the fact that modern conflicts are no longer restricted to inter-state confrontations. Some of the discussed scenarios highlight the emergence, in recent years, of new forms of 'irregular war'. These may be labelled, accordingly, as insurrection, insurgency, (urban) guerrilla, complex, advanced, compound, hybrid or criminal warfare. Steven Haines, in chapter 2, explains these concepts and the elements that characterise them. Of particular interest is his analysis of the emerging integration between criminal gangs and political or military leaders in armed conflict and its impact on classification. The details are then discussed in the case studies on Colombia and Afghanistan (chapters 7 and 8), where significant criminal activity continues alongside other forms of violence; the study shows that classification may, thus, also be important in terms of operational law, since depending on the outcome, violence may be legitimately counteracted with the use of armed force rather than law enforcement mechanisms.

The book also makes for an interesting read in that it provides factual details on conflicts, which facilitate their classification. In fact, often classification is hindered by a lack of access to the relevant information. In many instances, the only organisations having access to such information, such as the International Committee of the Red Cross, will not make the information or its internal classification assessments available to the public; moreover, the parties to the conflict, which have witnessed the facts, may not be a reliable source. As observed by Wilmshurst: 'it is the facts rather than a subjective act of recognition alone [i.e. by a State] which determines the category of armed violence'.[10]

The case studies of Colombia (chapter 7), the DRC (chapter 6) and Northern Ireland (chapter 5) illustrate that the participants to a conflict may also fail to classify it clearly, and that political factors may be the cause of this.[11] States may be reluctant to acknowledge that internal violence has reached the level of armed conflict, in order not to have to regard the opposition as an 'equal' party to a conflict rather than as a group of common criminals. On the other hand, in scenarios such as Afghanistan (chapter 13), there might be the opposite tendency of classifying as an armed conflict a situation that could more appropriately be considered a law enforcement matter.[12] This is well demonstrated in the case study

15 July 1999; *Prosecutor* v. *Tadić*, IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995.

9 E. Wilmshurst, pp. 486–488.

10 *Ibid.*, p. 483.

11 *Ibid.*, p. 479.

12 *Ibid.*, p. 479.

on Afghanistan[13] and the chapter on 'The war (?) against Al-Qaeda', which deal with the controversies raised by the 'war on terror', particularly with regard to the status of 'terrorists' upon capture (prisoners of war or ordinary detainees?) and the legitimate use of force.[14] Thus, beyond the legal difficulties associated with the classification of a conflict, there may be also more practical difficulties related to a lack of knowledge of the relevant facts. The book, by illustrating the background of the armed conflicts it examines, proves to be helpful in this regard.

What the book (intentionally) does *not* do is deal with the impact of classification on the subsequent attempts to bring to justice individual violators of the law. As suggested by Wilmshurst, 'classification in international criminal law is a subject in itself'.[15] This statement is accurate, though worrying, since international criminal law is ultimately an offspring of the laws of war,[16] so that in interpreting it, the nexus to IHL should not be severed. To do otherwise may lead to contradictory or counterproductive results. For instance, in Switzerland, with the introduction on 1 July 2011[17] of the new war crimes provisions in the Criminal Code (Articles 264b–264j), aimed at implementing the Statute of the International Criminal Court, the legislation intentionally distances itself from the traditional IHL dichotomy between IACs and NIACs, with the provisions applicable to all types of armed conflict. In following this trend, much appreciated by international criminal lawyers but not necessarily by conservative humanitarian lawyers, the legislation may have nonetheless gone a little too far. For instance, in Article 264c (2) it is provided that acts proscribed by Article 264c (1) (that is, grave breaches of the Geneva Conventions of 1949), when committed in connection with an NIAC, are to be considered *equivalent* to grave breaches of IHL, as long as they were directed against a person or property protected by IHL.[18] In doing so, the legislation has clearly and intentionally distanced itself from the classical IHL position that grave breaches can only be committed within the framework of an IAC.[19] The question then arises as to how the judicial authorities will proceed when called to assess the conduct of a foreign national suspected of having committed 'grave breaches' within

13 See chs 8 and 13.

14 See ch. 13, 'The war (?) against Al-Qaeda', by Noam Lubell; see also ch. 4, 'Conflict classification and the law applicable to detention and the use of force', by Jelena Pejic; ch. 5, 'Northern Ireland 1968–1998', by Steven Haines; and ch. 8, 'Afghanistan 2001–2010', by Françoise Hampson.

15 E. Wilmshurst, p. 8.

16 One may consider the Charter of the International Military Tribunal of Nuremberg of 8 August 1945 as the first international attempt to define war crimes and crimes against humanity. The text is available in 'The Charter and Judgement of the Nuremberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', UN Doc. A/CN.4/5, International Law Commission, Lake Success, New York, 1949.

17 Swiss Criminal Code of 21 December 1937, SR 311.0, available in English at: http://www.admin.ch/ch/e/rs/311_0/index.html (last visited March 2013).

18 E.g. a combatant *hors de combat*. See the message of the Federal Council of 23 April 2008 on the modification of the federal legislation for the implementation of the Rome Statute for an International Criminal Court ('Botschaft über die Änderung von Bundesgesetzen zur Umsetzung des Römer Statuts des Internationalen Strafgerichtshofs'), Bbl 2008, 3863, 3938, available at: http://www.admin.ch/ch/d/ff/2008/3863.pdf (last visited July 2013).

19 Art. 50, GC I (sick and wounded in the field); Art. 51, GC II (sick and wounded at sea); Art. 130, GC III (prisoners of war); Art. 147, GC IV (civilians); Art. 85, AP I (protected persons).

the framework of an NIAC under Article 264c (2), when this position has yet to be recognised as amounting to customary international law.

Another aspect of the legislation that may lead to difficulties is the interpretation of the concept of 'protected status' and the applicability to NIACs of the 'protected persons' definition under the rules applicable to IACs.[20] Conduct amounting to a grave breach of the Third Geneva Convention, for instance, may not necessarily be equated to a war crime carried out in an NIAC, considering that there is no recognised prisoner of war status under Common Article 3 or Additional Protocol II. A translation of IAC war crimes to NIACs can only be made upon interpretation of the underlying IHL provisions. Therefore, classification for purposes of international criminal law shall consider also classification methods for IHL purposes, since these may have a severe impact on issues such as detention[21] and the use of force.[22]

In conclusion, the book gives a comprehensive and very detailed analysis of how classification is undertaken in practice, assessing its impact on the applicable legal regime and proposing in particular three solutions: (a) first, due to 'legal complexities about the distinctions between categories of hostilities'[23] and the fact that qualification may vary over time and sometimes will only be assessed in the aftermath of a conflict, an independent authority should be established to give guidance as to which law is applicable; (b) where controversies as to classification remain, unilateral commitments with regard to the applicable law by states participating in the hostilities may be encouraged; and (c) given the frequent problems of classification due to the gaps in the law applicable to NIACs and the interplay between IHL and human rights law, it is suggested that supplementing the insufficient substantive law may be a solution.

In sum, the book seems to suggest that classification has to be taken more seriously not only by states engaged in conflict, but also by courts and other authorities enforcing international law[24] – a position fully shared by this reviewer.

20 For instance, Art. 4, GC IV provides that only civilians who find themselves in the hands of a party to the conflict or occupying power of which they are not nationals can invoke the safeguards of GC IV. This proved to be a major problem for the prosecution of war crimes committed by the Nazi regime against German nationals. For more details, see Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism*, Transnational Publishers, Ardsley, 2004, p. 207.

21 In this regard, another important aspect is the border line between IHL and international human rights law. On detention, see D. Akande, pp. 495–496, with reference to the case studies of Lebanon in 2008, the Second Congo War in the DRC, and the South Ossetian conflict; and ch. 4.

22 Depending on classification and the question of whether IHL applies at all, different rules may apply to the use of force. This holds particularly true with regard to the use of force in law enforcement operations. On this, see D. Akande, p. 495, who refers to the case studies of Iraq and Afghanistan; and chs 4 and 13.

23 E. Wilmshurst, p. 500.

24 *Ibid.*, pp. 501–503.