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International Law and the Classification of Conflicts

Edited by Elizabeth Wilmshurst



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Edited by
ELIZABETH WILMSHURST



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Foreword

This is an important book. It brings an empirical discipline and normative rigour to the examination of an issue that has its roots deeply embedded in the structure of international humanitarian law, the differentiation between international armed conflicts and non-international armed conflicts and the distinction between these and other situations of armed violence. Common Article 2 of the 1949 Geneva Conventions provides that the Conventions shall apply to an 'armed conflict which may arise between two or more of the High Contracting Parties'. Common Article 3 provides that '[i]n the case of armed conflict not of an international character . . . each Party to the conflict shall be bound to apply, as a minimum, the following . . .'. Together, these provisions established a framework for the application of the rules of the Conventions which is almost exclusively focused on traditional inter-state conflicts between two sovereigns across an international boundary. This framework was reinforced by the two Additional Protocols of 1977, with their explicit differentiation between international armed conflicts and non-international armed conflicts and the elaboration of detailed rules in respect of the former but a relative paucity of rules in respect of the latter.

From the perspective of a lawyer advising a government that gives weight to its legal obligations, the issue of classification may be important for many reasons. First, it is relevant to an appreciation of the legal framework applicable to conflicts in which the State is itself engaged. Second, it is the normative yardstick for the evaluation of the legality of the conduct of others, both in the case of conflicts in which the State is itself engaged and those in respect of which it is only an observer, but, as with the United Kingdom, an observer with an interest in wider issues of rule of law and of international peace and security. Third, it engages considerations of normative clarity, not simply across the two strands of international humanitarian law but also across international humanitarian law, international human rights law, international criminal law and any relevant and applicable domestic laws of the States involved in the conflict. Fourth, it goes to the optical credibility of the law in an area that is the subject of close public interest and comment. Is it really credible, for example, that the hostilities in Afghanistan, with upwards of 130,000 International Security Assistance Force (ISAF) troops from fifty States, is classified as a non-international armed conflict? Fifth, in the case of hostilities of a multiparty character, it goes to considerations of a common legal framework relevant to conduct that might be undertaken jointly, in cooperation or under common command. Sixth, it is relevant to considerations of the humanitarian imperative that is at the heart of the law. The law applicable to international armed conflicts is both clearer and more developed than the law applicable to non-international armed conflicts. The imperative is, or should be, to proceed by reference to the highest standards of conduct and protection. Seventh, questions of classification

may be relevant to an appreciation of the status of the domestic authority of the State in whose territory the hostilities are taking place. Eighth, the classification of a conflict may have a bearing on the appreciation of issues in the context of litigation. Each of these elements may in turn have their own longer tail of further issues.

While issues of detention may be the part of international humanitarian law where the divide between the two strands of law is most sharply defined, the divergence, both qualitative and quantitative, goes much wider. Questions of combatant status and civilian immunity fall to be addressed differently depending on whether the conflict is of an international character or a non-international character. The law relating to fundamental rights and the treatment of persons in the custody of a party is considerably more developed in the Geneva Conventions and Additional Protocol I than it is in Common Article 3 and Additional Protocol II. Questions of accountability, including the repression of breaches and grave breaches, are addressed more fully, and with greater clarity and precision, in the law relating to international armed conflict than they are in the law relating to non-international armed conflict. The list goes on.

One consequence of this divergence has been inclinations and attempts to fill the gap in the law relating to non-international armed conflict by the articulation of principles of customary international law that would apply in all conflicts, regardless of classification. In the nature of things, this approach has extrapolated from conventional principles of law applicable to international armed conflict through customary principles of law applicable to international armed conflict to arrive at principles of customary international law applicable in non-international armed conflicts. Another approach has been to adopt and apply rules of international armed conflict in non-international armed conflict situations either as a matter of discretion or by analogy. A third approach has been to look to rules of international human rights law to inform or supplement international humanitarian law.

While each of these techniques has utility and merit, none is ultimately satisfactory as they leave a residue, in some cases quite substantial, of normative uncertainty about what the law is that applies to non-international armed conflicts. And, as in most circumstances, the strength of the law rests heavily on its clarity, visibility, predictability and formality of application. Analytical techniques that address uncertainty, fill in the gaps and respond to debates about formal application are therefore at best a short-term fix.

The concluding chapter of the book is a notable endeavour to bring together strands of analysis across the disparate case studies that make up the second part of the book and the earlier overarching analyses and commentary in the opening chapters that address broader issues of law. Amongst the conclusions that it notes is that none of the authors recommends a major change in the classification system, concluding that the existing categories of international and non-international armed conflict are sufficient to encompass all existing forms of conflict. In a similar vein, there is no support for the creation of new categories of conflict to address the changing character of hostilities. The point is made that 'the division into non-international and international armed conflict is inevitable so long as the post-Westphalian paradigm of sovereign States remains and as long as the Geneva

Conventions and Protocols are the main body of applicable law, whether as treaties or as customary law’.

This may be correct, and it is undoubtedly the case, as the concluding chapter also notes, that ‘[i]nternational humanitarian law applicable in the two forms of armed conflict will continue to merge’. The question that remains, however, is whether the time is not right, and ripe, for an initiative to encourage the merger more fully of these two strands into a single body of law that would be applicable in all situations of armed conflict regardless of classification.

The volume concludes with the observation that there is unlikely to be agreement to conclude amending treaties to formalize convergence, whether in a comprehensive treaty or a fusing protocol. It suggests, however, that ‘it may be feasible to encourage the making of unilateral commitments by States participating in hostilities with regard to the law they will apply’. Building on this, it may be not simply that States participating in hostilities may be encouraged to make unilateral commitments, whether alone or with others, about the law that they will apply in a particular conflict. There would be merit in States making unilateral declarations of a more general character, away from any issue of application in a particular conflict, that they will henceforth apply the law relevant to international armed conflicts in all situations of armed conflict, whatever their character, save insofar as may be modulated in the unilateral declaration itself to take account of objective distinctions of a practical nature between conflicts of an international and a non-international character. The issue of the classification of conflicts is a distraction from the humanitarian imperative of international humanitarian law, rooted in the edifice of the 1949 Geneva Conventions and the 1977 Additional Protocols. The humanitarian imperative of these instruments can be readily maintained and enhanced while moving past this distinction.

Whether this appreciation is more widely held will be a matter for debate. This volume, with its empirical detail and analytical enquiry, will contribute greatly to this discussion. This is an important, scholarly and timely work that will inform other enquiries in this area that are just getting started. Its authors are to be congratulated.

Sir Daniel Bethlehem QC

*20 Essex Street
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7 February 2012*

Preface

This book emerged from a series of meetings held at Chatham House with the participation of a group of international lawyers and representatives of the United Kingdom armed forces, to examine problems arising from the classification of armed violence and their impact on the applicable rules of international law. The authors circulated papers in advance of each meeting; the papers were discussed and then revised, with heated debate sometimes playing a prominent part. Although the book is the product of the whole group, there are some matters on which views remained divided; each chapter is the responsibility of its writer alone and does not necessarily represent the views of all the contributors.

While the main purpose of the book is to discuss classification, it also provides a collection of studies of armed violence viewed through the lens of international humanitarian law, giving historical background, context and an examination of relevant legal issues. As such it is hoped that it will be a valuable resource to all readers interested in international humanitarian law and its applicability and implementation in a wide range of situations.

The book attempts to be consistent in the terminology used by its different writers while recognizing that it is not possible always to succeed. It uses synonymously the 'law of armed conflict' and 'international humanitarian law', while usually preferring the latter. Some terms must be explained. We refer to 'armed conflict' as it is used, but not defined, in the Geneva Conventions and their Protocols; the meaning is discussed more fully in Chapters 3 and 4. Many different terms are used in the literature for hostilities which are of a transnational or extraterritorial nature because a non-international armed conflict in one State spills over into another, or because a State targets a non-state actor in another. We refer to these conflicts as 'extraterritorial' in preference to other terms. In discussing situations where military force is used by a State outside its own country, 'territorial State' describes the State where hostilities take place; 'foreign State' is foreign to the territorial State; 'non-state armed groups' are self-explanatory.

The authors wish to thank the British Red Cross for providing funding for the meetings at Chatham House; the Oxford Institute for Ethics, Law and Armed Conflict, who hosted our final meeting; and Jennifer Wilkinson and Lucy Crittenden who helped with the organization of that meeting. The authors are also indebted to the helpful comments made by those members of the group who discussed the papers on which the book is based although they did not themselves contribute a paper: Lt Col Grant Davies, Lt Col Keith Eble, Charles Garraway, Rupert Hollins and David Kretzmer. The work would not have been brought to a conclusion without the invaluable help with editing and more from Monika Hlavkova; thanks go too to Maria Dogaru for her research assistance.

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List of Abbreviations

General

1GW	First Generation Warfare
2GW	Second Generation Warfare
3GW	Third Generation Warfare
4GW	Fourth Generation Warfare
AI	Amnesty International
<i>AJIL</i>	American Journal of International Law
CEDAW	Convention on the Elimination of Discrimination against Women
CIA	Central Intelligence Agency (US)
DCDC	Ministry of Defence Development, Concepts and Doctrine Centre
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
<i>EJIL</i>	European Journal of International Law
FBI	Federal Bureau of Investigation (US)
FRY	Federal Republic of Yugoslavia
GC	Geneva Conventions
HRC	Human Rights Committee (UN)
HRL	Human rights law
HRW	Human Rights Watch
IAC	International armed conflict
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for Former Yugoslavia
IHL	International humanitarian law
ILC	International Law Commission
<i>ILDC</i>	<i>Oxford Reports on International Law in Domestic Courts</i>
LOAC	Law of armed conflict
MOD	UK Ministry of Defence
NATO	North Atlantic Treaty Organization
NIAC	Non-international armed conflict
POW	Prisoner of war
ROE	Rules of engagement
SCSL	Special Court for Sierra Leone
SOFA	Status of Forces Agreement
UK	United Kingdom

UKMIL	United Kingdom Materials on International Law
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
US	United States

5 (Northern Ireland)

BAOR	British Army of the Rhine
INLA	Irish National Liberation Army
IRA	Irish Republican Army
IRSP	Irish Republican Socialist Party
MACA	Military Aid to Civil Authorities
MACP	Military Aid to the Civilian Power
NICRA	Northern Ireland Civil Rights Association
OIRA	The Officials (IRA faction)
PIRA	Provisional Irish Republican Army
PSNI	Police Service of Northern Ireland
RAF	Royal Air Force
RHC	Red Hand Commando
RUC	Royal Ulster Constabulary
SAS	Special Air Service in Northern Ireland
SDLP	Social Democratic Labour Party
SFNI	Security Forces in Northern Ireland
UDA	Ulster Defence Association
UDR	Ulster Defence Regiment
UVF	Ulster Volunteer Force

6 (DRC)

ADF	Allied Democratic Forces
ADP	Democratic Alliance of Peoples
AFDL	Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre
ALC	Armée de libération du Congo
ANC	Armée nationale congolaise
ANT	Armée nationale tchadienne
AZADHO	Association Zaïroise de Défense de Droits de l'Homme
CADDHOM	Collectif des Associations des droits de l'homme
CNDP	Congrès national pour la défense du peuple
CNRD	National Resistance Council for Democracy
DSP	Division Spéciale Présidentielle
FAA	Forças Armadas Angolanas
FAB	Forces Armées Burundaises
FAC	Forces Armées Congolaises
FAPC	People's Armed Forces of Congo
FAR	Forces Armées Rwandaises
FARDC	Forces Armées de la République Démocratique du Congo

FAZ	Forces Armées Zaïroises
FDLR	Democratic Forces for the Liberation of Rwanda
FNI	Front Nationaliste et Intégrationniste
FPLC	Forces Armées pour la Libération du Congo
FRPI	Force de Résistance Patriotique en Ituri
FUNA	Former Uganda National Army
ICD	Inter-Congolese Dialogue
ICGLR	International Conference on the Great Lakes Region
ICOI	International Commission of Inquiry
JMC	Joint Military Command
MAGRIVI	Mutuelle des Agriculteurs et Eleveurs du Virunga
MLC	Mouvement national pour la libération du Congo
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
MRLZ	Revolutionary Movement for the Liberation of Zaire
NALU	National Army for the Liberation of Uganda
NCDD-FDD	Conseil National Pour la Défense de la Démocratie-Forces pour la Défense de la Démocratie
NDF	Namibia Defence Force
OAU	Organization of African Unity
PRP	People's Revolutionary Party
PUSIC	Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo
RCD	Rassemblement Congolais pour la Démocratie
RCD-Goma	RCD, pro-Rwandan wing
RCD-ML	RCD, pro-Ugandan wing
RPA	Rwandan Patriotic Army
RPF	Rwandan Patriotic Front
SADC	Southern African Development Community
SGIT	Secretary-General's Investigative Team
UNITA	União Nacional para a Independência Total de Angola
UNRFII	Uganda National Rescue Front
UPC	Union des Patriotes Congolais
UPDF	Uganda People's Defence Force
WNBK	West Nile Bank Front
ZDF	Zimbabwe Defence Forces

7 (Colombia)

ACCU	Autodefensas Campesinas de Córdoba y Urabá
AUC	Autodefensas Unidas de Colombia
BE	Black Eagles
CTI	Prosecutor General's Corps of Technical Investigators
ELN	Ejército de Liberación Nacional
FARC	Fuerzas Armadas Revolucionarias de Colombia
FARC-EP	FARC-Ejército del Pueblo

OAS	Organization of American States
ONG	Organización Nueva Generación
UP	Unión Patriótica

8 (Afghanistan)

AIHRC	Afghanistan Independent Human Rights Commission
COIN	US Counter-Insurgency Doctrine
DRB	Detainee Review Board
IED	Improvised explosive device
ISAF	International Security Assistance Force
JSOC	Joint Special Operation Command
OEF	Operation Enduring Freedom
UNAMA	United Nations Assistance Mission in Afghanistan

9 and 12 (Gaza and Lebanon)

EU BAM	European Union Border Assistance Mission
IDF	Israel Defence Forces
OCHA	Office for the Coordination of Humanitarian Affairs (UN)
PA	Palestinian Authority
PLO	Palestine Liberation Organization
UNIFIL	UN Interim Force in Lebanon

10 (South Ossetia)

EUMM	European Union Monitoring Mission
Georgian SSR	Georgian Soviet Socialist Republic
IIFFMCG	Independent International Fact-Finding Mission on the Conflict in Georgia
JCC	Joint Control Commission
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe

11 (Iraq)

CPA	Coalition Provisional Authority
DOD	US Department of Defense
MNF-I	Multinational Force—Iraq
ORHA	Office of Reconstruction and Humanitarian Aid
USF-I	United States Force—Iraq

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