Introduction

Since the Second World War, civil wars, which are the paradigmatic example of Non-International Armed Conflicts (NIACs), have formed the vast majority of all armed conflicts. These civil wars have often been accompanied by the intervention of foreign states in favour of one or more of the parties. The legal impact of such foreign interventions may result in parallel armed conflicts taking place in the same territory, internationalisation of the NIAC between a territorial state and a non-state group, and a reclassification of hostilities between a territorial state and a foreign state from an International Armed Conflict (IAC) to an NIAC. Moreover, these interventions also raise various general and important questions regarding conflict classification in International Humanitarian Law (IHL). While most of these questions have been individually discussed by scholars and international tribunals, they have not been discussed together in sufficient depth. This book aims to examine these various questions from a broad perspective, providing doctrinal solutions to these and other pressing and unsettled questions pertaining to conflict classification of the intervention of foreign states in civil wars. The issue of conflict classification is not an academic exercise without practical ramifications. On the contrary, the classification of armed conflicts affects the applicable law with regard to aspects such as the conduct of hostilities, the classification of the participants in

1 Themnér and Wallensteen (2012), 568.
2 Harbom and Wallensteen state that of 165 NIACs between the Second World War and 2004, 36 NIACs have involved troops from an external state (see Harbom and Wallensteen (2005), 627). This trend has continued. In 2010, of the 30 active NIACs, 9 involved direct foreign military intervention (Harbom and Wallensteen (2011), 528). In 2011, of 36 NIACs, 9 involved direct foreign military intervention (Themnér and Wallensteen (2012), 566).
3 Indeed, only one book has been published on conflict classification – Wilmshurst (ed), International Law and the Classification of Conflicts (Oxford University Press, 2012). However, even this excellent book does not, and indeed was not intended to, provide a coherent and substantiated analysis of all the various aspects of conflict classification in cases of civil wars with foreign intervention.
the armed conflict, and the treatment of those participants in case of capture by an opposing party. It is therefore not surprising that conflict classification is addressed in almost every report on IHL and is a mandatory topic of most IHL courses in academia and in IHL competitions.

Bearing in mind that the distinction between IAC and NIAC still has important normative ramifications (as demonstrated in Chapter 2), the book provides a comprehensive interpretation of conflict classification in cases of civil wars with foreign intervention that is founded on two main notions, which are elaborated in the first two chapters: (i) classification of conflicts must be based on a factual analysis of the identity of the belligerent parties to the conflict and the existence of hostilities; (ii) classification of conflicts should reflect the willingness of most states to extend humanitarian protection to all types of armed conflict without hampering their right to quell rebellions and to prosecute rebellious non-state group members through their own courts.

In addition, this book aims to enrich the discourse on IHL by providing an in-depth analysis of some of the central issues in the classification of conflicts in cases of civil wars with foreign intervention in a manner that engages with, rather than ignoring or discarding, state practice. This aim deserves further explanation at this stage.

Research into state practice is important not only in IHL, but also in public international law in general. First, when ‘extensive and virtually uniform’ and combined with opinio juris, state practice creates customary rules. Second, state practice is an important factor when interpreting treaty law. Third, state practice is a vital, indeed necessary, indicator of


5 Article 31(3)(b) of the Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 113 (‘There shall be taken into account … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’). See discussion regarding the definition of ‘subsequent practice’, its importance and application by international tribunals in the ILC, ‘First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation’ by G. Nolte, Special Rapporteur, UN Doc. A/CN.4/660 (19 March 2013) and ILC, ‘Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation’ by G. Nolte, Special Rapporteur, UN Doc. A/CN.4/671 (26 March 2014).
how much a legal rule is accepted by states and has practical impact – an indicator even more necessary in IHL given its subject matter.

But with certain honourable exceptions, it seems that a proper analysis of state practice is almost completely absent from IHL discourse and, more particularly, conflict classification. To some extent, this is understandable. First, states often do not classify their hostilities as IACs/NIACs at all, preferring to use the rather ambiguous language of ‘operations’. Second, states sometimes even invent new legal concepts to describe hostilities instead of using the IAC/NIAC classification. For example, after the start of the second intifada in December 2000, instead of using the classification of IAC/NIAC, Israel stated that it was ‘engaged in an armed conflict short of war’ against the Palestinian militias. Third, when states do actually classify their hostilities as IACs/NIACs, their classification may be based on political motives, rather than legal analysis. Fourth, states are not consistent in their conflict classification. Fifth, researching conflict classification by states is difficult since these classifications are often not published. Sixth, it is often extremely problematic to assess the behaviour of troops on the battlefield and accordingly to understand what norms were actually applied in the conflict.


7 See, e.g., Corn (1999), 2–3 (describing the US policy of referring to hostilities as ‘operations’, citing Operation Urgent Fury, Operation Just Cause, Operation Restore Hope, Operation Deny Flight, Operation Desert Storm, and Operation Allied Force as examples).

8 Only in 2006 did the HCJ classify Israel’s hostilities with Palestinian militias as an IAC (see HCJ 769/02 *Public Committee against Torture in Israel v. Government of Israel* (13 Dec 2006)). For criticism regarding Israel’s classification of the hostilities as an ‘armed conflict short of war’, see Scobbie (2012A), 287–289.

9 See Wilmshurst (2012), 479 (summarising the findings of the different case studies analysed in the book and explaining that participants often failed to clearly classify the armed conflicts they were involved in and that this failure was partly for ‘political reasons’).

10 E.g. Israel’s classification of its armed conflict with the Palestinian militias, supra note 8.

11 The ICRC practice of confidentiality is part of this difficulty as scholars often cannot use ICRC first-hand knowledge of armed conflicts in their research.

12 See also *Prosecutor v. Tadić* (Jurisdiction Appeal) IT-94-1-AR72 (2 October 1995), [99] (stating that ‘when attempting to ascertain State practice
In addition, the importance of state practice should doubtless not be overstated. When it comes to the interpretation of international treaty law, the subsequent practice of states in the application of a treaty is only one of the factors to be taken into account.\textsuperscript{13} Moreover, the official classification of a given armed conflict by a state is not necessary for the application of IHL, as the existence of an armed conflict, with the exception of recognition of belligerency,\textsuperscript{14} is not contingent on the recognition of the belligerent parties.\textsuperscript{15} Finally, the classification of armed conflicts by the belligerent parties should be taken with a grain of salt because, as previously mentioned, they are often guided by political reasons.\textsuperscript{16}

Notwithstanding the difficulties and qualifiers regarding researching state practice in the context of conflict classification, the need to enrich IHL discourse with an examination of state practice has already been highlighted by Adam Roberts who has argued as follows:

The laws of war are strange not only in their subject matter, which to many people seems a contradiction in terms, but also in their methodology. There is little tradition of disciplined and reasoned assessment of how the laws of war have operated in practice ... In short, the study of law needs to be integrated with the study of history: if not, it is inadequate.\textsuperscript{17}

with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments commenting on the difficulty of assessing state practice').

\textsuperscript{13} See Villiger (2009), 429–432. See also Chapter 2, Section 2.1.2.
\textsuperscript{14} See Chapter 1, Section 1.1.3.
\textsuperscript{15} \textit{GCI Commentary}, 32 (stating that the term armed conflict ‘deprives the belligerents of the pretexts they might in theory invoke for evasion of their obligations. There is no longer any need for a formal declaration of war, or for recognition of the state of war, as preliminaries to the application of the Convention. The Convention becomes applicable as from the actual opening of hostilities. The existence of armed conflict between two or more Contracting Parties brings it automatically into operation’).
\textsuperscript{16} \textit{Supra} note 9.
\textsuperscript{17} Roberts (1994), 117.
Indeed, it is essential that the discourse in the area of IHL in general, and conflict classification in particular, engages more with relevant state practice. This engagement is important because neglecting the question of how IHL operates in practice exposes IHL to the risk of being deemed irrelevant or of being detached from how states actually act. Moreover, to the extent that IHL and conflict classification should be developed in a manner that will be accepted and implemented by states during armed conflicts, it is necessary to understand how states actually implement or fail to implement IHL in practice.

Thus, this book aims to enhance the examination of relevant state practice while accepting that state practice is not the only, and indeed not the decisive, factor with regard to conflict classification. The focus on state practice throughout this book is mainly on arguments and issues that are still controversial in conflict classification in order to assess them in light of how states act in practice and to gauge states’ attitudes towards these arguments and issues. However, as state practice is not the only factor that should be taken into account when interpreting open issues in conflict classification, at times some novel arguments are developed in the book which are based on treaty interpretation in light of the basic tenets of IHL.

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The book is structured along the following lines:

Chapter 1 examines the history of the distinction between international and non-international armed conflicts. It shows how states have insisted on the distinction between internal wars and international wars since the origins of IHL. It further argues that the law of NIAC is based on states’ willingness to extend humanitarian protection to internal wars without hampering their right to quell rebellions and to treat rebels as criminals under their domestic law.

Chapter 2 discusses the normative distinction between international and non-international armed conflicts. It analyses in depth different aspects of conflict classification such as the threshold of applicability of IAC and NIAC. It shows that NIAC and IAC are distinct in three aspects: (i) different actors; (ii) different threshold of applicability; (iii) different applicable norms.

Chapter 3 examines different issues of conflict classification in cases where states intervene directly with their own forces in favour of one of the sides in a civil war. Among the various arguments, the chapter advances the following propositions: (i) direct foreign intervention in support of the territorial state against rebellious non-state groups will
Classification of conflicts in international humanitarian law

only be deemed an NIAC if the hostilities between the non-state group and the foreign state meet the threshold of Common Article 3 of the 1949 Geneva Conventions (CA3); (ii) direct foreign military intervention, either in favour of or against the territorial state, does not ipso facto internationalise the ongoing armed conflict between a territorial state and a non-state group.

Chapter 4 analyses various aspects of conflict classification in cases of indirect foreign intervention, such as the supply of training and funds to one of the sides in a civil war. In particular, it advances the following arguments: (i) indirect intervention can lead to an armed conflict only when the intervening state has become involved to the extent that it is using force directly through its own forces or forces acting on its behalf; (ii) indirect interventions can only lead to internationalisation of ongoing civil wars when a non-state group is no longer deemed to be independent but acting on behalf of another state or when the foreign state is involved in an IAC against the territorial state and the non-state group satisfies the requirements of Article 4A(2) of Geneva Convention III (GCIII) (including the requirement of non-allegiance).

Chapter 5 deals with the representation of states and reclassification of ongoing armed foreign interventions due to governmental change. It argues that the test for determining which armed group represents the state for the purposes of conflict classification should be based on the identification of the de facto government. It further argues that this identification should be cemented with a presumption that the established government is the de facto government as long as it asserts authority in the territorial state and offers armed resistance which is not ostensibly hopeless or purely nominal.

Chapter 6 examines foreign states’ armed interventions, which are conducted under the auspices of international organisations (IOs), in civil wars from a general and broad perspective that is not limited to any specific IO. The chapter suggests a two-step approach to attribution for the purposes of conflict classification in order to determine whether the IO or the contributing states (i.e. the states which contribute their armed forces to the IO) are parties to the conflict. In cases where the IO is a party to the conflict, based on the two main notions stated above, it is submitted that the IO should be considered as if it were a state for the purposes of conflict classification and therefore the arguments and rules regarding conflict classification stated in the previous chapters should apply accordingly with regard to the IO.

Chapter 7 examines the armed conflicts taking place in Yemen between the Houthis on the one side, and the governmental forces loyal to the Abd Rabbuh Mansur Hadi, which are supported by the foreign coalition led
by Saudi Arabia, on the other side. The purpose of this short chapter is to clarify and exemplify some of the arguments advanced in the book.

Chapter 8 offers some concluding thoughts.

In terms of methodology, the book relies on the accepted sources of international law as stipulated in Article 38(1) of the International Court of Justice (ICJ) Statute: (i) international Conventions; (ii) international custom; (iii) general principles of law. The book further relies on international and national case law and scholarly writing in order to interpret the law. In order to overcome some of the difficulties of researching state practice related to classification of conflicts, in addition to examining traditional sources of state practice at the national and international level, the book also looks at other sources, such as newspapers and NGO reports, that indicate how states have classified various armed conflicts.

A few words are necessary on some of the terms used throughout the book:

**Civil wars** – traditional civil wars were characterised by a high intensity of violence between governmental forces and a highly organised group. On the other hand, NIACs, according to CA3, do not require the same high intensity of violence and organisation of the non-state group. Moreover, as explained in Chapter 2, NIACs are not limited to armed

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18. The ICRC considered such sources to be ‘military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organisations and at international conferences and government positions taken with respect to resolutions of international organisations’, See *ICRC Study*, Introduction.

19. See *ICRC Study*, Introduction, (‘State practice at the international level is reflected in a variety of sources, including in resolutions adopted in the framework of the United Nations, in particular by the Security Council, General Assembly and Commission on Human Rights, ad hoc investigations conducted by the United Nations, the work of the International Law Commission and comments it elicited from governments, the work of the committees of the UN General Assembly, reports of the UN Secretary-General …’).

20. *Prosecutor v. Tadić* (Jurisdiction Appeal) IT-94-1-AR72 (2 October 1995), [99] (explaining the need to rely on ‘official pronouncements of States, military manuals and judicial decisions’ when attempting to assess state practice for customary law due to the difficulties of ascertaining the real behaviour of the fighting parties on the battlefield).

21. See Chapter 1 for discussion regarding civil wars.

22. Nevertheless, Cullen argues that the *travaux préparatoires* of the 1949 Geneva Conventions show that ‘[t]he delegates involved in drafting the provision
conflict between governmental forces (i.e. territorial states) and rebellious non-state groups; they can also entail cross-border armed conflicts. Thus, although a distinction could be made between civil wars in their traditional legal sense and NIACs regulated by CA3 and Additional Protocol II (APII), the term civil wars is used in this book simply to describe NIACs between governmental forces (i.e. the forces of the territorial state) and rebellious non-state groups and NIACs between different non-state groups that aim to control the territorial state.

**Internationalisation** – the term ‘internationalisation’ or ‘internationalised armed conflicts’ is often used by writers to describe factual situations of civil wars with foreign involvement. In this book, however, the term is used to describe the normative transformation of the applicable legal regime, which regulates the hostilities between the territorial state and the non-state group, from NIAC to IAC.

**De-internationalisation** – conversely this term is used to describe the process of armed conflict transformation from international to non-international. As explained in Chapter 5, this process can happen in cases of foreign intervention against the territorial state when the governmental forces of the territorial state, at some point after the beginning of the IAC with the foreign state, cease to be deemed to represent the territorial state as a result of a governmental change.

**Third states** – this term is used throughout the book interchangeably with the term ‘foreign states’ in order to distinguish between those states and the territorial states that fight against the non-state groups.

Finally, it is important to highlight that this book does not, in general, cover the various aspects of the *jus ad bellum*, including the legitimacy of foreign intervention.\(^{23}\) In addition, the classification of transnational armed conflicts between states and non-state groups that do not involve intervention in ongoing civil wars is only addressed briefly in order to assess issues that also pertain to intervention in civil wars.\(^{24}\) However, the analysis and arguments advanced in this book with regard to conflict classification are equally relevant and valid with regard to any type of stand-alone conflict, which does not involve a civil war – whether it is an IAC between two states or a transnational armed conflict between a state and a non-state group.

understood “armed conflict not of an international character” as having essentially the same meaning as “civil war” (Cullen (2010), 49). See Chapter 2 for the threshold requirement of NIAC according to CA3 and APII.

\(^{23}\) For discussion, see, e.g., Doswald-Beck (1986).

\(^{24}\) For a general discussion of transnational armed conflicts, see Lubell (2010).
Introduction

It should be stated that some of the armed conflicts examined in the book, such as the civil war in Yemen, are constantly developing and changing. Therefore, the examination of the conflicts did not extend beyond January 2016.