Minding the Gap between Scholarly Discourse and State Practice in International Humanitarian Law

Book Review

WILMSHURST, ELIZABETH (ed), *International Law and the Classification of Conflicts* (Oxford University Press, 2012). 568 pages; £85 (hardback).

SIVAKUMARAN, SANDESH, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012). 696 pages; £95 (hardback).

Noam Zamir*

One wishes that the fate of war victims would be as promising as that of the scholarship on the law that ostensibly protects them, international humanitarian law (IHL). The two excellent books under review contribute significantly to the already flourishing academic IHL discourse¹ in a manner that engages rather than discards that scholarship's 'nemesis': state practice. The need to enrich the IHL discourse with state practice has already been suggested by Adam Roberts:

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.²

* PhD Candidate, University of Cambridge.

¹ To name just a few books published in recent years: E Benvenisti, *The International Law of Occupation* (2nd edn, 2012); W H Boothby, *The Law of Targeting* (2012); O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (2011); C Ford & A Cohen (eds), *Rethinking the Law of Armed Conflict in an Age of Terrorism* (2011); E Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (2010); A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010); N Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime* (2010); N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010).

² A Roberts, 'Land Warfare: From Hague to Nuremberg', in M Howard, G J Andreopoulos & M R Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (1994) 117.

Indeed, both books take an even greater step in bridging the gap between discourse and practice by taking account of the positions of states and the increasingly important positions of armed groups involved in the various armed conflicts the authors discuss.

Such contribution is in and of itself a good enough reason for any IHL scholar to read these books. There are more.

The Law of Non-International Armed Conflict is only the second recent book fully dedicated to examining applicable law in non-international armed conflicts (NIACs).³ *International Law and the Classification of Conflicts* is the only book, so far, that offers an in-depth examination of conflict classification under IHL.

The Law of Non-International Armed Conflict offers a critical examination of the content, application and enforcement of the law of NIAC. Incorporating the views of parties to armed conflicts, both states as well as non-state armed groups, strengthens the analysis.

The book is divided into three sections. The first section examines how NIACs have been regulated by international law. The great merit of this section is the novel approach it takes in examining less traditional sources of the law of NIAC such as instructions, codes of conduct, internal regulations and domestic legislation. The second section focuses on the substantive law of NIAC. It examines when a given NIAC can be said to exist; discusses the distinction between NIACs and international armed conflicts (IACs); the notion of transnational armed conflicts; and examines the scope of application of the law, the substantive rules that apply with regard to the protection of civilians and persons *hors de combat* and with regard to the conduct of hostilities. It concludes by examining the implementation and enforcement of the law of NIAC. The third section advances different proposals relative to the development of the law of NIAC in terms of substance, implementation, enforcement, and formation.

This is a rich and lengthy book (696 pages, including index and bibliography). It is also courageous: Sivakumaran does not shy away from discussing some of the most debatable issues in IHL such as the classification of transnational armed conflicts and the internationalisation of NIACs due to involvement of foreign states. Because the richness of sources and variety of arguments do not allow for a comprehensive discussion, I will address only the latter issue, and further relate it to the second book under review.

The concept of internationalisation has been defined as ‘transformation of a *prima facie* NIAC into an IAC, thereby applying to this conflict the more compre-

³ L Moir, *The Law of Internal Armed Conflict* (2002).

hensive IAC legal regime'.⁴ Sivakumaran summarises the leading tests for internationalisation in relation to indirect military intervention, the 'effective control' and the 'overall control' tests established by the ICJ and ICTY respectively,⁵ rejects them,⁶ and advances a novel argument as to what kind of relations the foreign state needs to have with the non-state group in order to internationalise the NIAC between the non-state group and the territorial state. He proposes that it is the 'notion of a proxy that transforms what seems to be a conflict that is fought between a state and an armed group into a conflict that is actually being fought between states'.⁷ This proposition, while intriguing, is not devoid of difficulties. I shall sketch three of them.

First, while Sivakumaran provides important indicators for proxy relations between the foreign state and the non-state group that would generate the internationalisation of the armed conflict between the territorial state and the non-state group (e.g. the sharing of forces and financing, and the shared military objectives and strategies of the outside state and the armed group), these indicators do not really differentiate between close allies and a proxy (i.e. close allies can and in practice do share forces and provide financial support to each other). More importantly, these indications cannot provide a substitute for a clear test. Both the 'effective control' and the 'overall control' tests deserve skepticism but they do provide much needed clarity in an otherwise confusing arena.

Second, the proxy approach shares with the 'effective control' and the 'overall control' tests the 'real time' problem: the list of indications for proxy relation can usually be assessed only *ex post* a given armed conflict. This is particularly troubling because the actors in the battlefield cannot be expected to obey the law of IAC if they still believe they are engaged in a NIAC.

Third, although Sivakumaran successfully combines state practice and opinions of the parties to armed conflicts in most parts of the book, he does not state any relevant state practice in the section on internationalisation due to indirect military intervention.⁸ This lacuna is partially filled in *International Law and the Classification of Conflicts*.

⁴ On internationalisation in general, see M Milanović & V Hadži-Vidanović, 'A Taxonomy of Armed Conflict', in N White & C Henderson (eds), *Research Handbook on International Conflict and Security Law* (2013) (forthcoming).

⁵ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, ICJ Reports 1986 p 14, 54-5; *Prosecutor v Tadić*, Appeal Judgment, Case IT-94-I-A, 15 July 1999, para 130-7 (*Tadić*).

⁶ S Sivakumaran, *The Law of Non-International Armed Conflict* (2012) 225-8.

⁷ *Ibid*, 227.

⁸ *Ibid*, 225-8 (this section is titled 'State control over an armed group').

International Law and the Classification of Conflicts comprises a collection of chapters divided into three sections: the first deals with basic IHL concepts and legal questions in general and with conflict classifications in particular; the second examines armed conflicts that involve complex legal issues pertaining to classification of armed conflicts; the third synthesizes the findings of the different authors of the second section with the analytical insights contained in the first section.

The editor's choice to initiate readers into the subject matter through Steven Haines' *The Nature of War and the Character of Contemporary Armed Conflict* is commendable. By intentionally excluding the topic of the law that regulates hostilities from the scope of the discussion, Haines introduces us to notable literature from disciplines such as military history and war studies. Such focus is particularly warranted given that every legal text derives meaning from its context and that much IHL scholarship does not otherwise benefit from an interdisciplinary approach to the study of war. Dapo Akande's chapter on the *Classification of Armed Conflicts: Relevant Legal Concepts* examines the distinction between IACs and NIACs and a variety of derivative legal questions and advances novel arguments regarding internationalisation of NIACs and the classification of transnational armed conflicts between states and non-state groups as IAC under particular circumstances. Jelena Pejic's *Conflict Classification and the Law Applicable to Detention and the Use of Force* focuses on the rules governing the deprivation of liberty of persons, the transfer of detainees and the use of force under the law applicable in IAC and NIACs. In addition to an analysis both concise and comprehensive of complicated questions relative to targeting and 'direct participation' in hostilities, this chapter further canvasses the vast literature on the relationship between IHL and international human rights law (IHRL) in the context of internment and the use of force in NIACs. Pejic persuasively highlights the shortcomings of solely relying on IHRL as a legal basis for internment in NIACs, a reliance that ignores the critical differences between war and peace and the legal and practical limits of applicability of IHRL to non-state groups in NIACs.

The second section revolves around case-studies of hostilities that took place in Northern Ireland (1968-1998); The Democratic Republic of the Congo (1993-2010); Colombia (the 1960s onwards); Afghanistan (2001-2010); Gaza (2000-2011); South Ossetia (2008); Iraq (2003 onwards); and Lebanon (2006). In addition, the conflict against Al-Qaeda is also thoroughly analysed. There is also a brief description and analysis of the recent armed conflict in Libya (2011) and

the fighting against organised cartels in Mexico.⁹ The second section contains a notable contribution by Michael N. Schmitt that examines the classification of future battle-fields, including cyber warfare, transnational terrorism and complex battle-spaces.

Each case-study is structured in a similar format: it provides a short historical review of the relevant conflict; an identification of the different actors and their positions regarding the conflict's classification; and a substantive analysis of the classification, which includes an assessment of the impact of the conflict classification on two pertinent issues: application of force and detention of individuals in hostilities.

Understandably, the book could not cover all modern armed conflicts that involved challenging conflict classification questions, but it does an excellent job in raising some of the most interesting and pressing legal questions (e.g. conflict classifications in cases of direct and indirect foreign intervention, classification of NIACs with changing intensity, classification of transnational armed conflict). The concise factual explanation of these conflicts is most helpful and interesting and the substantive analysis of issues relative to conflict classification is excellent. Most notably, the authors include the otherwise neglected area in scholarly writing on classification of armed conflicts, that is the views of the different actors in the conflict relative to its proper classification. It is plausible that such views are hardly ever discussed partly because, with the exception of recognition of belligerency,¹⁰ conflict classification is not contingent on the views of the actors and partly because of practical difficulties in ascertaining these positions.¹¹ These positions are, however, of great importance, not least because they disclose the wide gap between legal discourse and practice. To the extent that the discourse minds the gap, as I think it should, a study of the positions of the relevant actors is a good starting point. In this regard, this book is not only refreshing but further makes an invaluable contribution to the IHL discourse.

The third section summarises the findings of the different case studies from the second section in light of the discussions presented in the first section. It highlights the difficulties different authors encountered studying the different cases, and draws conclusions relative to both the consequences of conflict

⁹ E Wilmschurst (ed), *International Law and the Classification of Conflicts* (2012), chapter 2 and chapter 15.

¹⁰ On the doctrine of belligerency and its applicability in contemporary international law, see D Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Wilmschurst (ed), above n 9, 49–50 and I Scobbie, 'Gaza', *ibid.*, 301–5; See also Sivakumaran, above n 6, 9–20.

¹¹ On these practical difficulties, see Wilmschurst (ed), above n 9, 479.

classifications and the law.

It is interesting to note a potential complementarity between the two books under review: *The Law of Non-International Armed Conflict* focuses on the concept of internationalisation but does not include a study of the positions of the relative actors on this issue, while the case-studies in *International Law and the Classification of Conflicts* examine these positions in practice, but do not develop the concept of internationalisation in the light of this practice, settling instead for either the effective control or the overall control tests.¹²

This potential complementarity should be construed as an invitation for future scholarship. Given that conflicts that have been considered internationalised by tribunals, scholars, IGOs and NGOs have rarely been conceived as such by their participants, future scholarship may well narrow the gap between discourse and practice.¹³ Three further points are worth making in this context.

First, the notion of internationalisation generated much judicial and academic excitement. Alas, it has failed to elicit a similar response from states and other relevant actors. This observation is exacerbated by the fact that, unlike other IHL concepts that states involved in armed conflicts also tend to refrain from acknowledging,¹⁴ ‘internationalisation’ does not have any clear treaty or customary law basis. This may undermine its validity as legal doctrine in international law.

Second, even if the notion of internationalisation can be explained as an interpretation of treaty law,¹⁵ it is still questionable whether it is wise to

¹² Even when some scholars offered different tests for internationalisation, they did not try to ground their suggestions in state practice. See Akande above n 10, 57–62 and F Szesnat & A R Bird, ‘Colombia’, in Wilmschurst (ed), above n 9, 223–4.

¹³ For example, the ICTY in the *Tadić* case decided that the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina was internationalised and therefore classified it as IAC (*Tadić*, Case IT-94-I-A, 15 July 1999, para 162). The parties to the conflict at that time, however, perceived it as NIAC (see *Prosecutor v Tadić*, Trial Judgment, Case IT-94-I-T, 7 May 1997, para 583). A more recent example is the armed conflict in Libya (2011). In Libya, the non-state group (NTC) that fought against the Government (led by Gaddafi) was assisted by foreign states. The NTC classified the conflict as NIAC. Similarly, Gaddafi, despite the fact that he accused the NTC as being comprised of foreign agents, did not classify the conflict as IAC. Nevertheless, some scholars argued that this conflict was internationalised. See, for example, K A Johnston, ‘Transformations of Conflict Status in Libya’ (2012) 17 *Journal of Conflict & Security Law* 81. Nevertheless, it should be stressed that classification of conflicts by the belligerent parties should not be accepted uncritically. See I Scobbie, ‘Lebanon’ in Wilmschurst, (ed) above n 9, 400–2.

¹⁴ For example, states are often reluctant to acknowledge situations of internal violence as NIACs. See Wilmschurst (ed), above n 9, 479.

¹⁵ The most convincing explanation would be that at the moment that a non-state group is

interpret the Geneva Conventions without trying to ascertain the position of states to such an important issue. When states needed to express their opinion on a related notion—internationalisation in cases of direct military intervention—they strongly rejected it. They argued that if this notion would become part of international law;

... then as soon as a foreign State sent its troops over the border to help the rebels, thereby trespassing to begin with on the territorial rights of the neighbouring State, the State which suffered such aggression would have to treat its own rebels as prisoners of war and its local population as that of an occupied territory. ... *No government could accept that.*¹⁶

Granted, this position is no longer dominant. Nevertheless, it indicates that the suggestion that a conflict should be considered international just because an outside state assumed a relationship of control or co-ordination with the rebels may not be accepted by governments.

Third, internationalisation has a direct impact on the applicable law (e.g. whether the members of the non-state group may be entitled to POW status). The fact that the notion of internationalisation has rarely been assimilated by belligerent parties means that, at least when it comes to internationalisation, IHL remains a theoretical concept with no bearing on the fighting forces. It is, of course, possible to dismiss this fact and argue that states that are involved in these armed conflicts do not acknowledge internationalisation due to political reasons and that the impact of internationalisation should be assessed *ex post* a given armed conflict via international criminal law. It is equally possible and, to the extent that we would like IHL to impact the behaviour of actors, perhaps even desirable, to develop the concept of internationalisation in a manner that will be accepted and implemented by states during armed conflicts.

The two books under review are an excellent contribution to IHL scholarship, not least because both, in focusing on relevant state practice, highlight the need to bridge word and deed, discourse and practice. In so doing they have paved a

controlled by a foreign state then the non-state group is just an organ of the foreign state and not an independent actor. Therefore the armed conflict between the territorial state and the non-state group should be classified as IAC according to Common Article 2 of the Geneva Conventions that stipulates that conflicts between two or more states are international.

¹⁶ ICRC, 'Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 24 May–12 June 1971: Report on the Work of the Conference' (1971) 51, para 301(l) (emphasis added).

road yet to be taken towards the development of a concept of internationalisation that converses with and therefore carries greater weight over state practice.