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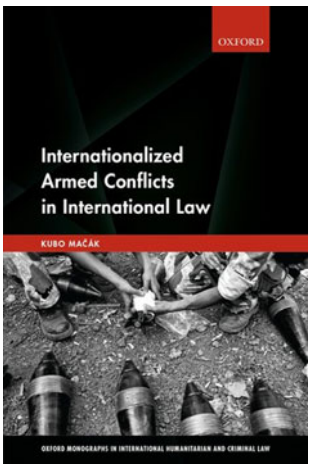
BOOK REVIEW



Internationalized Armed Conflicts in International Law

Kubo Mačák*

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Dr Kubo Mačák's *Internationalized Armed Conflicts in International Law* is a timely and engaging publication that tackles the internationalization of armed conflicts, the phenomenon whereby a non-international armed conflict (NIAC) takes on the characteristics of an international armed conflict (IAC) due to certain acts of third States. Although this issue has been simmering for many decades, it has become increasingly relevant in an era which is "defined by the twin forces of globalization and fragmentation, [where] virtually no armed conflict remains confined to the territory of one state, free from foreign involvement".[1] Recognizing that the internationalization of conflict may have a wide range of humanitarian, political and legal consequences, Dr Mačák focuses on how internationalization impacts the application of international humanitarian law (IHL), and more specifically, on the questions that internationalization raises with respect to (1) conflict classification, (2) combatant status and (3) belligerent occupation.[2]

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In his introduction to the book, Dr Mačák looks at the historical practice of "classifying" conflicts and their rules according to religious principles.[3] This serves as a useful reminder that classification of conflicts is not a novel exercise invented by bored International Committee of the Red Cross (ICRC) lawyers, but rather a logical framing of conflict popularized by legal theorists and historians as early as the thirteenth century.[4] The emergence of the Westphalian era concretized the practice of viewing conflicts through the lens of sovereign versus non-sovereign actors, rather than religion, and it was upon this distinction that modern classification of conflict rules are based.[5] The Geneva Conventions of 1949 first codified this distinction, with States accepting robust and detailed rules for conflicts between themselves, so-called "international armed conflicts" as defined by common Article 2. Conflicts with non-State actors, on the other hand, were relegated to a few paragraphs contained in common Article 3, a visual reminder of the hierarchy of the Westphalian order.

The term "internationalized conflict" or "internationalized internal armed conflict" has not been without controversy. As Dr Mačák notes, the ICRC ultimately abandoned this terminology in light of concerns that it might be misconstrued as a "third category of armed conflict" to which different rules apply. Dr Mačák argues in favour of retaining the term, however, to describe not a third category of conflict as such, but the "*dynamic* idea of conflict transformation" (i.e., of a NIAC becoming an IAC and thereby "render[ing] the law of IAC applicable to such a conflict").[6] If one considers the nature of conflicts today in Ukraine, Syria, Yemen, Afghanistan and elsewhere, Dr Mačák's reasoning is persuasive. The transformation of conflict from NIAC to IAC is increasingly pervasive, and the term "internationalization" is a useful construct for understanding and describing the legal and geopolitical dynamics involved.[7]

Dr Mačák explores a litany of ways in which a NIAC could become an IAC, including both "direct" and "indirect" involvement by States. He dismisses some of the proposed methods of internationalization of a conflict, such as consensual intervention by a third State at the invitation of the territorial State, and the consequent application of IAC as good policy but not the legal norm. Dr Mačák makes the case that the application of IAC rules would be more protective for civilians in these consensual interventions, and thus should always be desired as a matter of policy, but ultimately neither the treaty language nor State practice

1 *Internationalized Armed Conflicts in International Law*, p. 1.
2 *Ibid.*, p. 4.
3 *Ibid.*, pp. 9–23.
4 *Ibid.*, pp. 9–10.
5 *Ibid.*, pp. 11–14.
6 *Ibid.*, p. 27.
7 For an excellent discussion of many of the concepts and arguments found in Dr Mačák's book, please see the Opinio Juris Symposium that took place in January 2019 – see, for example, Kubo Mačák, "Symposium: Internationalized Armed Conflicts – The Wars of Our Age", *Opinio Juris*, 14 January 2019, available at: http://opiniojuris.org/2019/01/14/symposium-internationalized-armed-conflicts-the-wars-of-our-age/ (all internet references were accessed in July 2020).

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would suggest any legal obligation to do so.[8] However, according to Dr Mačák, only *non-consensual* intervention by a third State (or possibly an international or regional peacekeeping force) would trigger a legal requirement to apply IAC rules. He also addresses how certain forms of indirect intervention may lead to an internationalization of a NIAC. He takes the position that the "overall control test"[9] is the most appropriate legal test[10] for determining when internationalization has occurred, and that both prongs of the "overall control test" must be met: (1) support to the armed group, and (2) "organizing and co-ordinating rebels within another state's territory".[11] In addition, Dr Mačák argues that the overall control test must be interpreted to require a use of force *through* a non-State group by a State against another State (or State's territory); the provision of weapons, materials or other support not amounting to a use of force is not sufficient to constitute an IAC.[12] The two other avenues for internationalization of an armed conflict described by Dr Mačák, but which will not be discussed in detail here, are (1) self-determination movements as defined by Article 1(4) of Additional Protocol I, and (2) political acts such as a recognition of belligerency or special agreements under common Article 3.

Prior to the publication of Dr Mačák's monograph, internationalization was typically viewed either as creating a "global" conflict in which all parties had to respect the rules of IAC regardless of the parties' status, or as a "mixed" conflict in which IAC would only apply between intervening and territorial States, but NIAC rules would apply to any conflict relationships involving a non-State party to the conflict.[13] Dr Mačák introduces instead a new "hybrid" model, by which he proposes that one must look at the "degree of armed violence used and the extent to which it affects the other conflict pairs" and determine whether the "global" or "mixed" approach is the most appropriate in a given context. Under this hybrid model, when the use of force by the individual parties (i.e., the non-State actor and the State actor) "can no longer be distinguished", the law of IAC must prevail for all parties involved (i.e., the "global" approach), but prior to that threshold, the "mixed" approach may be employed.[14]

Practically speaking, the "hybrid" model would seem to make sense by rejecting the view that conflict is binary in nature and instead adopting a "spectrum" approach, focusing on the ever-evolving nature of the "degree of armed violence used" as well as the relationship between parties which ultimately determines the applicability of a certain legal framework. The question remains,

8 *Internationalized Armed Conflicts in International Law*, pp. 36–37.
9 The "overall control test" is the test used for determining whether a State has become party to a conflict through its control of a non-State armed group that is party to an existing conflict. See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras 120 ff.
10 In contrast to other possible tests, such as the "effective control test" proposed by the International Court of Justice in the *Nicaragua* case. *Internationalized Armed Conflicts in International Law*, pp. 38, 40–46.
11 *Ibid.*, p. 46.
12 *Ibid.*, pp. 39–46.
13 *Ibid.*, p. 89.
14 *Ibid.*, p. 104.

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however, as to what extent States will allow the application of IAC rules to non-State actors. The "global" approach, which is part and parcel of the "hybrid" model, is not well reflected in State practice or *opinio juris* by States, even if the theory is popular amongst academics and international tribunals. The practicality of the "hybrid" model may be challenged if States are unwilling to interpret IHL to require them to grant combatant immunity or prisoner-of-war (PoW) status to non-State actors,[15] or to permit their non-State actor partners to grant PoW status to enemy combatants detained by the non-State actor. Dr Mačák makes a convincing argument for why States should apply IAC rules for combatant status in certain situations, but he does not explain how to overcome the reluctance of States to adopt this approach, and thus the "hybrid" model remains as theoretical as the "global" one (the "mixed" model, by contrast, is generally uncontroversial).

Take combatancy status, for example. Dr Mačák spends an entire chapter explaining why non-State actors should face no legal obstacle in being assimilated to the status of a combatant should a conflict become internationalized, yet as he notes, modern instances of States granting PoW status to non-State actors have been explicitly caveated as policy decisions rather than legal obligations.[16] Most State practice that would support some informal or formal recognition of combatant status occurs post-conflict, in the form of amnesties, and not during a conflict, when PoW status and other benefits of combatant status would be most germane.[17] Despite this obstacle, Dr Mačák is correct to assert that non-State actors should be *capable* of abiding by the IAC rules relevant to combatant status, either because these rules are "regulatory" in nature (i.e., prohibitions against engaging in criminal conduct) or because the resources required – for example, in order to properly detain PoWs – might also be a challenge for some States to provide. In any case, there is a strong argument that the partner State would have certain obligations under common Article 1 to make sure that IHL norms were respected by its non-State partners in this regard.

Dr Mačák makes a similar argument with respect to the rules controlling belligerent occupation. Analyzing the various obstacles to non-State actors "occupying" territory in the context of an internationalized armed conflict, he likewise finds that occupation does not require the occupier to be a formally "sovereign" State, and that the IAC obligations themselves are "chiefly negative in nature," thus requiring the non-State actor "simply to refrain from conduct amounting to international crimes or from otherwise infringing on individual rights".[18] The most controversial aspect of this view is that occupation law would require non-State actors to engage in governing – including possibly administering courts or passing legislation – and many States would reject this as unlawful or illegitimate.[19]

15 Anne Quintin, "Symposium: Reflections on Conflict Classification", *Opinio Juris*, 16 January 2019, available at: http://opiniojuris.org/2019/01/16/symposium-reflections-on-conflict-classification/.
16 *Internationalized Armed Conflicts in International Law*, p. 152.
17 *Ibid.*, p. 155.
18 *Ibid.*, p. 209.
19 *Ibid.*, pp. 211–212.

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While combatant status and belligerent occupation may pose some of the more perplexing legal arguments with respect to the internationalization of armed conflicts, perhaps the more pressing humanitarian issue in these situations is what happens to the civilians in the territory of a newly internationalized armed conflict. In a traditional IAC, those civilians would be protected persons and would be entitled to all the benefits set out in Geneva Convention IV, but while legally speaking this should not change with respect to an internationalized armed conflict, in practice it is not clear that this is the case. The recent examples of Syria and Ukraine, in which large segments of the population have been subject to the "occupation" of non-State armed groups that are arguably under the overall control of a third State, provide stark evidence of the impact of the failure of parties to an armed conflict to treat civilians as protected persons. From a humanitarian and protection point of view, it would have been useful for Dr Mačák to apply his superb analytical skills to these issues as well.

Conclusion

While Dr Mačák's book delves into one of the more intricate and controversial legal issues facing IHL scholars and practitioners today, it's important not to lose sight of the underlying premise of the book – that classifying a conflict efficiently and correctly is essential for ensuring the proper application of international law. Classification issues are often dismissed by parties to a conflict as abstract and irrelevant, but Dr Mačák adeptly demonstrates why such exercises are in fact both meaningful and necessary, and his proposal of a "hybrid" model for determining when to apply the rules of IAC is intriguing yet practical. The real-world application of such a test will be challenging in view of a notable lack of State practice of using even the existing approaches to classify such conflicts, but courts and other international bodies will likely find Dr Mačák's "hybrid" model a welcome paradigm in which to analyze the multifaceted and multifarious conflicts facing the world today. This book uniquely provides a comprehensive overview of the history of classification of conflict, the legal criteria for determining when a NIAC has transformed into an IAC, and an intriguing proposal for how these "internationalized" armed conflicts could be approached in the future. It will not only be of great use to students of IHL wishing to better understand the complexities of conflict classification, but will also benefit practitioners attempting to establish appropriate legal frameworks on the battlefield.

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