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BOOK REVIEWS

E. Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford, Oxford University Press, 2012, 568pp., ISBN 9780199657759, £85.00.
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The international law on the classification of armed conflicts occupies a pivotal, conceptual, and practical place in the international legal system. It reflects the contents, limits, and separation of fundamental international legal categories, such as war and peace, and international personality. Moreover, classification tells us what sets of rules apply and when their application is triggered, and so is critical for the practical application of the substantive rules of the law of armed conflict. Therefore it must be sensitive to both conceptual tensions and practical challenges. Accordingly, change in the legal system, and challenges to these categories, lead to tensions in the law of classification,[1] while the law is also dependent on the vicissitudes of *sui generis* situations. Its application depends on self-interested actors who find themselves threatened. Accordingly, this proximity and sensitivity both to conceptual faultlines and to the intensity of violent facts on the ground entails uncertainty and complexity.

Beyond the complexity generated by the above tensions, there is also a lack of overall consistency and an uneven application of the law. These are characteristics often shared with edited collections, where contributions are of unequal quality and unco-ordinated direction. This is not the case with the book under review. The present edited collection addresses, acknowledges, analyses, and develops the quandaries of the law and does so with impressive coherence and quality throughout, while not trying to paper over existing gaps, uncertainty, and disagreement.

It manages this through a combination of a cohort of eminent contributors and a clear and disciplined structure. The choice of contributors is appropriate: many of them have, elsewhere, published some of the most-cited works on the current challenges to the law of armed conflict.[2]

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1 See, for example, C. Garraway, 'War and Peace: Where Is the Divide?', (2012) 88 *International Law Studies* 93.
2 Some of these will be referred to below.

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The formality of the structure also plays an important role. Both the book as a whole and each chapter are constructed by three themes: historical context/facts, classification, and selected substantive legal consequences. Accordingly, the first part of the book serves as an introduction and epistemological framework. Beyond the editor's clear introduction, it contains a chapter on 'The Nature of War and the Character of Contemporary Armed Conflicts' from a war studies perspective by Steven Haines; an overview of the legal concepts involved in classification by Dapo Akande; and a chapter focusing on important substantive legal consequences of classification, namely the law on detention and the use of force, by Jelena Pejic. The focus points of historical context/facts, classification, and selected substantive legal consequences are then reflected in the structure of each of nine separate and well-chosen case studies: Northern Ireland (1968–98); Democratic Republic of Congo (1993–2010); Colombia; Afghanistan 2001–10; Gaza; South Ossetia (2008); Iraq (2003 onwards); Lebanon (2006); the war (?) against al Qaeda; classification of future conflict.

1. Facts and historical context

Setting facts and historical context as a starting point reflects the consciousness of particular shortcomings of much scholarship in the area, namely the lack of attention to the facts on the ground. In an area of law so dependent on legal characterization of facts, for example with respect to the organization of non-state armed groups, this is necessary. The editor, in her introduction, approvingly quotes Sir Adam Roberts, that

> [t]here is little tradition of disciplined and reasoned assessment of how the laws of war have operated in practice. . . . In short, the study of the law of war needs to be integrated with the study of history; if not, it is inadequate'.[3]

This collection certainly strives to meet this task. Even if it is often plagued by the lack of known facts, especially with respect to current and contentious conflicts,[4] the authors of the case studies meticulously assemble and clearly describe the characteristics of the conflicts, which are relevant to the classification. This is an achievement in itself. Louise Arimatsu's recounting of the different phases of the war in the Democratic Republic of the Congo demonstrates mastery of a complex conflict drawn from a wide array of sources.

'History', of course, can range from the descriptive to the critical and such range can be found, to some extent, in the case studies. Furthermore, the study of historical or factual parameters of conflicts, in a way which enriches legal analysis, can extend and include a wider variety of disciplines. This is reflected in the slightly different role that Steven Haines's excellent chapter plays to that of the historical introductions of the case studies. The chapter discusses the debate initiated by the 'new wars' thesis and the challenge that this poses to the traditional Clausewitzian theory of war.

3 A. Roberts, 'Land Warfare: From Hague to Nuremberg', in M. Howard et al., *The Laws of War: Constraints on Warfare in the Western World* (1994), 117.

4 See Chapter 13 (The War(?) against Al-Qaeda), as well as Chapter 15 (Conclusions), making the general point.

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This debate mirrors that of the currency of the Geneva Conventions' legal regime and the challenges, often malevolent, related to the application of the law of armed conflict to the 'war on terror'.[5] The chapter is particularly useful to international lawyers who realize that legal analysis needs to be informed not only by the facts on the ground, but also by conceptual categories developed in other disciplines, in this case war studies.

On the other hand, while the authors of the case studies are obviously aware of these issues and their extent beyond international legal debates, and while these are addressed, in a practical and clear manner, in the chapter dealing with the classification of future conflict, the interdisciplinary cross-pollination stops there. Including further interdisciplinary approaches might have diluted the legal analysis, clearly applied as it is on the specific facts. The reader does, however, feel that Sir Adam Roberts's exhortation now should extend beyond history, as critical insights from other disciplines can enhance the rigour of legal analysis and contribute to our understanding of some of the most powerful tensions within the law.[6]

2. Substantive legal consequences of classification

Another stated aim of the book is the discussion of certain substantive legal consequences of classification. For this purpose, three areas have been selected: the law on the use of force, the law on detention, and the relation between international humanitarian law and human rights law. The analysis of these areas of law is attempted both through an overview chapter and via sections of each case study. The general treatment by Jelena Pejic in Chapter 4 is thorough, clear, and thought-provoking. It manages to both provide a clear overview and to identify areas of particular difficulty. A characteristic example is the discussion of the rules on internment in non-international armed conflicts, which provides an illuminating and sceptical analysis of the interaction between human rights law and the law of armed conflict, while putting forward substantive proposals for the independent development of the latter.

The discussion on the consequences of classification to the application of substantive law in the specific case studies also yields interesting results, such as the reflection of the ambivalence over the existence of an armed conflict on the 'shoot-to-kill' policy in Northern Ireland (at pp. 138–9). However, perhaps the most interesting, if not unexpected, observation is the limited effect that classification had in the application of substantive rules by the parties themselves. This, as summarized in the conclusion (pp. 493–9), is due either to the indifference of the parties in applying any rules or, especially where the distinction between international and non-international armed conflicts is concerned, to the combination of proximity of

5 An important example being the 'Memorandum for the President; Subject: Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban', 25 January 2002, by Alberto Gonzales, Counsel to the US President.

6 One of the contributors has, elsewhere, used insights from the discipline of geography. See L. Arimatsu, 'Territory, Boundaries and the Law of Armed Conflict', (2009) 12 *Yearbook of International Humanitarian Law* 157.

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the rules governing the two types of conflict and the policy choices of the parties. This highlights the shortcomings of (the complexity of) the current system of regulation. Some of these can be seen as inevitable. However, this is another reason why Pejic's analysis of the knottiest of legal issues and her substantive suggestions are useful in moving forward.

3. Classification of conflicts

The core of the book, however, is the law on classification. Here, Dapo Akande's introductory chapter is a marvel of width and depth. The chapter on its own should be included in the reading lists for the benefit of Master's level students, as it is one of the clearest and most thorough treatments of classification as a whole. Moreover, this chapter also offers a good example of creative disagreement. Akande takes the position (at p. 70 et seq.) that an extraterritorial conflict between a state and a non-state armed group, even where force 'is not primarily directed at the territorial State but rather is directed at a non-state armed group based in that State', should be classified as international. 'This will be the case because the use of force by the intervening foreign State on the territory of the territorial State, without the consent of the latter, is a use of force *against* the territorial State.'[7] While he offers a discussion of state practice and the jurisprudence of international courts (at p. 74 et seq.), the underlying rationale (at p. 79) is that 'the sovereignty and state security reasons that are used for limited non-international armed conflict regulation do not apply when state acts outside territory'. This position, as he acknowledges, finds him in disagreement with the majority of contributors in this volume, who argue that classification depends on the nature of the parties, rather than on the consent of the territorial state.[8] This reviewer confesses some ambivalence, and for this reason has found the debate all the more interesting. Moreover, this suggests that discursive, rather than doctrinaire, books can be more engaging and useful for international lawyers.

Individual case studies are of invariably high quality and yield myriad points of analytical interest. Stephen Haines's analysis of the Northern Ireland conflict provides a compelling finding for the existence of a non-international armed conflict over the period from 1971 to 1974 and a particularly interesting discussion of how the organizational mutation of the Provisional IRA into cellular structures signifies the shift from armed conflict to political violence or terrorism (pp. 126–7). This is very relevant in the context of the 'war on terror' or 'the War (?) against Al Qaeda', as Noam Lubell's clear analysis of the phenomenon is entitled. Lubell methodically examines classification options and convincingly concludes (p. 441) that 'the circumstances at hand support the contention that there is no stand-alone armed conflict between the US and all Al-Qaeda manifestations around the globe', while some aspects of the

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7 At 73, emphasis on the original, although it should be noted that the term 'territorial' plays an equally emphatic role in this sentence.

8 See, e.g., Arimatsu at 162 and Lubell at 433. These authors have developed this analysis elsewhere. See Arimatsu, *supra* note 6; and N. Lubell, *Extraterritorial Use of Force against Non-State Actors* (2010).

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operations in Afghanistan, Pakistan, and Iraq can be said to 'occur as part of existing armed conflicts'. This chapter is another example of a clear and focused treatment of an impossibly complex factual situation, yielding a barely manageable multitude of legal issues. It also reflects the fact that the authors of the case studies have had to make difficult and overall successful choices on their points of focus. Having said this, in this case it might have been beneficial to include some more discussion on how the (non-)ending of an armed conflict affects the application of the rules on detention.

Interestingly, examination of what are perceived to be relatively recent legal issues and challenges is often combined with the use and analysis of legal categories dating before the Geneva Convention's legal regime and associated with 19th century classical international law. An example is Iain Scobbie's discussion of recognition of belligerency and blockade in the context of the Gaza conflict (pp. 301–5). This analysis, in combination with the same chapter's analysis of the issues of 'continuing control' and the (non-)termination of Israeli occupation, is an instance of brilliant scholarship. The use of pre-Geneva (and pre-UN Charter) legal categories also yields interesting arguments in Michael Schmitt's discussion of ceasefire and *debellatio* (at pp. 358–67) in the context of the Iraq conflict and reveals some tension and interrelation between *jus ad bellum* and *jus in bello* analysis.

The examples above indicate that there is overlap between legal issues discussed in different case studies. This is acknowledged by the contributors and usefully cross-referenced. In some cases, as the one on the classification of extraterritorial conflicts against non-state armed groups, this leads to constructive debate. In some other cases, the overlap can lead to some repetition. For example, while the short summary of classification law in Chapter 4 on detention and the use of force is useful for a stand-alone chapter or for a reader seeking an outline of the law, it is not entirely necessary when following Akande's expansive treatment in Chapter 3. Similarly, while Chapter 14 on 'Classification in Future Conflict' usefully takes the United Kingdom's Ministry of Defence 'vision of future warfare'[9] as structure and starting point, the discussion of 'transnational terrorism' does not add much to Lubell's preceding chapter. A clearer focus on cyberwarfare[10] and 'complex battlespaces' (parts 2 and 4 of the chapter) would have been more apposite.

In conclusion, the case studies are well selected and thoroughly discussed. The book does acknowledge that further cases could enhance the analysis of some of the themes. For example, Mexico's 'drug war', discussed briefly by Steven Haines (at pp. 25–6), is highly relevant on the issue of (the legitimacy of political) motivation of the parties and the consequences that this has in classification, an issue also discussed in the chapter on Colombia (at pp. 225 et seq.) The situation in Somalia would have been an addition of appropriate factual complexity and conceptual tension.

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9 As set out in Ministry of Defence (Development, Concepts and Doctrine Centre), 'Global Strategic Trends – Out to 2040' (2010).

10 An area in which the author of the chapter is an eminent authority. See especially M. Schmitt (general editor), *Tallinn Manual on the International Law applicable to Cyber Warfare* (2013).

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In any case, the above will have clearly shown that this is a book to be acquired and used. It is very successful in presenting a high-level analysis of the underlying conceptual issues, while thoroughly, informatively, and usefully focusing on challenging and controversial case studies. It offers a discursive, inductive, and multifaceted guide to the factual and conceptual complexities of this area of law. It will be of interest and use to anyone working on the various aspects in which law and armed conflict uneasily coexist and should find its place in the libraries of research institutions.

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Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, Beijing, Torkel Opsahl Academic EPublisher, 2012, 452pp., ISBN 9788293081319, £15.00.
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How best to prosecute international sex crimes has been a crucially important, but also relatively niche, area of academic and policy discussion, and one that has largely focused upon the activities of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Increasingly, the International Criminal Court (ICC) has been creating its own jurisprudential output on international sex crimes, which has not been engaged with to the same extent, largely because it is more recent. Additionally, the ICC's activities are conducted differently from those of the ICTR and ICTY because of the ICC's judicial oversight, in conjunction with the relatively limited resources available to deal with the number of (ongoing) conflict situations under its purview. (The ICTY and ICTR benefited from being able to concentrate all their resources and expertise upon a specific conflict.) It is a pitfall commonly seen for writers on this subject to leap from the ICTY and/or the ICTR to the ICC without taking proper heed of the significant differences between the two that are pertinent to the policy construction for, and difficulties in dealing with, prosecutions of international sex crimes. Also, other avenues for prosecution, such as national courts, are often neglected.

New and specific policy problems confront international law on sex crimes. The ICC's prosecutorial activities on sex crimes have mandated and legitimized the policy of thematic prosecution. Benefits and problems associated with thematic prosecutions are the basis of exploration for *Thematic Prosecution of International Sex Crimes*. This is the first anthology of its kind that directly and systematically engages with these new policy problems, providing itself with the objective of assisting those acting within the modern-day criminal-justice sphere to better bring about prosecutions. Importantly, the ICTR and ICTY are not dwelt upon, but rather deployed as examples where appropriate. Great effort is made to outline the distinctions between

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