

The framework

I. Introduction

A. NIACs and IACs

1. Every armed conflict is either international or non-international in character (see *infra* 70). Non-international armed conflicts (NIACs) – often called internal armed conflicts or, in the past, civil wars – are an older phenomenon than the modern nation-State. The Roman Republic was subverted and ultimately destroyed by enervating civil strife. The late Roman Empire was shaken to its foundations by near-constant bruising fights between rivals who wished to assume the purple. The Islamic Caliphate went through the turmoil of *fitna*; and in the long history of the Chinese Empire regimes and dynasties often succumbed to aggressive warlords. Throughout medieval and early modern Europe, internal conflicts between barons and kings, interspersed by many a *jacquerie* and *fronde*, were commonplace. In a multitude of countries the animosities and fervour of such ruptures (exemplified by the War of the Roses in England) fed them for long periods of time. In the contemporary era, NIACs like the American Civil War (1861–5) or the Spanish Civil War (1936–9) left scars of self-inflicted wounds not healed for generations.

2. In the past half-century alone, NIACs led to genocide and appalling massacres in Cambodia, Congo, Rwanda and the former Yugoslavia. In the same (post-colonial) period, abundant losses of life and tangible damage to property were caused by incessant ordeals of NIACs (meeting the preconditions set out in Chapter 2) in scores of other countries all over the globe.¹ Some of these NIACs were (or are) exceptionally brutal; others were (or are) less harsh. Some are still in progress; others are definitely

¹ The following list can be compiled in alphabetical order: Afghanistan, Algeria, Angola, Azerbaijan, Bahrain, Bolivia, Brunei, Burkina Faso, Burma, Burundi, Central African Republic, Chad, Colombia, Comoros, Congo, Congo-Brazzaville, Cyprus, Djibouti, Dominican Republic, Egypt (Sinai Peninsula), El Salvador, Ethiopia, Fiji, Gambia, Georgia,

over; and still others are in danger of re-eruption. Then, there are places of unrest and confrontation (not listed here) that are teetering on the brink of a NIAC.

3. It frequently happens that an incumbent Government – averse to being tarnished with the stain of a revolt – is prone to shy away from an unwelcome truth, clinging to the fiction that internal violence is sporadic and that no genuine NIAC is underfoot.² Governments may go to some lengths to deny the existence of a NIAC even in the face of overwhelming evidence to the contrary. The international community, too, may recoil at the thought of recognizing what is actually happening. Thus, for a considerable time, there was an indisposition to concede that a NIAC had begun in Syria in 2011.³

4. Official reluctance by an incumbent Government to acknowledge that a NIAC is ongoing may be a counter-productive stance, inasmuch as the Government may then be held to more stringent international legal standards of behaviour (for an illustration, see *infra* 114). But, in any event, the outbreak of a NIAC has to be determined on the basis of objective criteria rather than subjective predilections.

5. NIACs are certainly much more pervasive today than international armed conflicts (IACs). The carnage and devastation that they leave behind are liable to be calamitous. For sure, not every NIAC necessarily ends up in a catastrophe. But the societal tissue may not mend for a long time following outbursts of implacable hatred and enmity among inhabitants of the same national space. Winning domestic peace subsequent to a sanguinary NIAC may be a slow and arduous process. A NIAC that is ostensibly over can flare up again at a different period, perhaps in a reconfigured manner.

6. Although a NIAC is an intra-State – rather than an inter-State – affair, traditional international law could not be entirely oblivious to its external reverberations. In particular, NIACs had to be woven by the international

Guatemala, Guiana, Guinea, Guinea Bissau, India, Indonesia, Iran, Iraq, Ivory Coast, Kyrgyzstan, Laos, Lebanon, Liberia, Libya, Mali, Moldova, Mozambique, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Papua New Guinea, Paraguay, Peru, Philippines, Russia (Chechnya), Senegal, Sierra Leone, Solomon Islands, Somalia, South Africa, South Sudan, Spain (Basque region), Sri Lanka, Sudan, Suriname, Syria, Tajikistan, Thailand, Turkey, Uganda, UK (Northern Ireland), Western Sahara and Yemen.

² There are a host of instances (see E. La Haye, *War Crimes in Internal Armed Conflicts* 42 (2008)). For a recent one, see B. Zawacki, 'Politically Inconvenient, Legally Correct: A Non-International Armed Conflict in Southern Thailand', 18 *JCSL* 151–79 (2013).

³ See L.R. Blank and G.S. Corn, 'Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition', 46 *Van.JTL* 693, 725–30 (2013).

legal system into the fabric of the principle of non-intervention (see Chapter 5), the concept of recognition (see Chapter 6), and the norms of State responsibility (see Chapter 7).⁴ Yet, for centuries, international law brushed aside the principal issue of streamlining the conduct of hostilities in the course of a NIAC.

7. All this changed abruptly in 1949 (see *infra* 20). Since that date, the international regulation of the conduct of hostilities in NIACs has undergone tremendous growth, becoming the fulcrum of contemporary interest. In large measure, the normative corpus apposite to NIACs may be seen as an extrapolation of the more robust *jus in bello* applicable in IACs (a body of law whose genesis had already occurred a century earlier). But, as we shall see (*infra* 701 *et seq.*), the relationship between the two legal regimes of IAC and NIAC law of armed conflict is characterized not only by convergence: close attention must be paid to the built-in divergence between them.

B. LONIAC

8. Throughout the present volume, usage will be made of the acronym LONIAC standing for ‘law of non-international armed conflict’, which must be understood as synonymous with the common expression IHL (‘international humanitarian law’). The locution LONIAC is preferable by virtue of its dispassionate connotations. LONIAC avoids a false impression (implicit in the ‘humanitarian’ limb of IHL) that the rules governing NIAC hostilities are *de rigueur* humanitarian in nature. It is an irrefutable fact that, even though humanitarianism is always a consideration, many of these rules are engendered primarily by military necessity.

9. The operation of LONIAC seems to create a psychological problem for incumbent Governments, which naturally desire to uproot all vestiges of rebellion against their writ. From the inception of LONIAC, the international community has recognized that this set of rules does not question a Government’s right to suppress an insurrection by force.⁵ The sole purpose of LONIAC is to impose meaningful restraints on both the Government and those rising against it: all parties must refrain from employing means or methods of hostilities that are banned by international law.

⁴ See J.H.W. Verzijl, IX *International Law in Historical Perspective* 501–2 (1978).

⁵ See *Commentary, I Geneva Convention* 61 (J.S. Pictet ed., 1952).

10. Additional Protocol II to the Geneva Conventions (AP/II) of 1977 – which is dedicated in its entirety to LONIAC (see *infra* 21) – sets forth in Paragraph (1) of Article 3:⁶

Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

Congruent language is used in Article 8(3) of the 1998 Rome Statute of the International Criminal Court (ICC):

Nothing in paragraph 2(c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.⁷

11. The phrase ‘by all legitimate means’, appearing in both texts, must be underscored. It connotes that, although the beleaguered Government has a right and a responsibility to restore law and order, it is not allowed to utilize means and methods that do not cohere with LONIAC.⁸ There is a delicate balance here. LONIAC ordains restraints in fighting, yet there is no denial of the existence of ‘imperative military reasons’ (*infra* 471) or ‘necessities of the conflict’ (*infra* 572). The incumbent Government is vested with a prerogative of acting vigorously in putting law and order back on track, but it can do so only on condition that its conduct is on the same page as LONIAC.⁹

C. No NIAC *jus ad bellum*

12. LONIAC is the counterpart in intra-State hostilities of IAC *jus in bello*. But there is no NIAC counterpart to the *jus ad bellum*, which determines the legality of an armed conflict between States. A prohibition of relying on force as a mode of settling disputes in international relations

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (AP/II), 1977, *Laws of Armed Conflicts* 459, 461–2.

⁷ Rome Statute of the ICC, 1998, *Laws of Armed Conflicts* 1314, 1321.

⁸ See A. Zimmermann, ‘Article 8(3)’, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 502, 503 (2nd edn, O. Triffterer ed., 2008).

⁹ See M. Bothe, ‘War Crimes’, I *The Rome Statute of the International Criminal Court: A Commentary* 379, 424 (A. Cassese et al. eds., 2002).

is enshrined in Article 2(4) of the Charter of the United Nations (UN)¹⁰ and is embedded in current customary international law as *jus cogens*.¹¹ However, '[t]he use of force solely within a State is not covered' by that prohibition, so that it is not unlawful either (i) for the population to unleash an insurrection within a State; or (ii) for the incumbent Government to use its extensive resources in furtherance of the suppression of the revolt.¹²

13. The fact that international law is content with a ban on recourse to inter-State force – without a cognate prohibition of resort to intra-State force – may seem surprising, given the frequency, ferocity and far-flung fallout of NIACs. But this is the indisputable, albeit grim, reality. The domestic law of every State is dedicated to the preservation of internal order: it forbids taking violent action designed to topple the powers that be. But international law does not impose on the population of a country any obligation to desist from an insurrection. The flip side of the coin is that there is no international legal right to rebellion, and international law does not deny the entitlement of the incumbent Government to stamp out an insurgency by force.¹³ It has been suggested that international law should at least require the parties to a NIAC to settle their dispute amicably (through negotiation, mediation or arbitration),¹⁴ but even that does not seem to be in the offing.

14. The absence of *jus ad bellum* has far-reaching consequences affecting the whole vista of NIACs. Preeminently, the concept of a right to self-defence as an exception to the prohibition of the use of force – which plays a central role in IACs¹⁵ – has no traction in the context of NIACs.

15. The Security Council's powers under the UN Charter have been exercised in a manner catching NIACs in the Council's net (see *infra* 276). But this speaks more of the towering authority of the Council and less about the ripening of any new general precept in international law concerning the illegality of NIACs. It has been contended that the Council's practice is indicative of 'the possible emergence of *jus ad bellum* norms governing the recourse to violence in internal disputes' (especially

¹⁰ Charter of the United Nations, 1945, 9 *Int.Leg.* 327, 332.

¹¹ See Y. Dinstein, *War, Aggression and Self-Defence* 95–8, 104–5 (5th edn, 2012).

¹² See A. Randelzhofer and O. Dörr, 'Article 2(4)', I *The Charter of the United Nations: A Commentary* 200, 214 (3rd edn, B. Simma *et al.* eds, 2012).

¹³ See A. Bellal and L. Doswald-Beck, 'Evaluating the Use of Force during the Arab Spring', 14 *YIHL* 3, 12 (2011).

¹⁴ See R. Wedgwood, 'The Use of Force in Civil Disputes', 26 *Is. YHR* 239, 248–9 (1996).

¹⁵ See Dinstein, *supra* note 11, at 187–302.

when democratically elected Governments are liquidated by force).¹⁶ But the record of the Council clearly discloses that it does not purport to enlarge the scope of Article 2(4) to NIACs.¹⁷

16. The only faint echo of a NIAC *jus ad bellum* may be detected when a treaty is concluded by a group of States – applicable in their relations *inter se* – designed to leverage their combined military assets, extending mutual support for extinguishing an insurgency against any one of them (see *infra* 254). But such a treaty would be (i) regional rather than global; (ii) contingent on the consent of the affected States at every stage of its adoption and implementation (see *infra* 252–3); and (iii) confined to military assistance granted to the incumbent Government, in contradistinction to those taking up arms against it (see *infra* 238 *et seq.*, 264 *et seq.*).

II. The legal strata of NIAC law

17. LONIAC and other branches of international law establish a solid corpus of juridical norms related to NIACs. These are embodied either in treaties or in customary international law (or in both). Treaties and custom are the principal strata of international law.

18. Treaties and custom are commonly adduced as ‘sources’ of that law, but this popular appellation only complicates the discussion. The term ‘source’ – literally associated with a fountainhead from which a stream of water issues – does not do justice to the role that treaties and custom play within the international legal system. Treaties and custom are not the sources but the very streams of international law, flowing either together or apart from each other. The coinage ‘strata of international law’ articulates the idea that treaties and custom *are* international law.¹⁸

A. Treaty law

19. Under Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties (VCLT) – a treaty ‘means an international agreement concluded

¹⁶ K. Samuels, ‘*Jus ad Bellum* and Civil Conflicts: A Case Study of the International Community’s Approach to Violence in the Conflict of Sierra Leone’, 8 JCSL 315, 338 (2003).

¹⁷ See O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* 132–3 (2010).

¹⁸ For more on this subject, see Y. Dinstein, ‘The Interaction between Customary International Law and Treaties’, 322 RCADI 245, 260–1 (2006).

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Excerpt

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between States'.¹⁹ In the words of the Permanent Court of International Justice (PCIJ), in its 1926 Judgment, in the *German Interests in Polish Upper Silesia* case:

A treaty only creates law as between the States which are parties to it.²⁰

States must express their consent to become Contracting Parties to treaties (see *infra* 214).

20. The framers of the four Geneva Conventions for the Protection of War Victims (concluded in 1949 and currently in force for every existing State) ushered in a new era by crafting for the first time an agreed-upon text relating directly to LONIAC. This is Common Article 3 of the four Conventions (*infra* 409). Admittedly, the language chosen by the drafters consists in the main of broad brush strokes rather than specifics (see *infra* 413–14), but it must never be forgotten that it was Common Article 3 which blazed a new trail in the terrain of NIAC law.

21. After the adoption of Common Article 3 in 1949, it took almost three decades before the need to go beyond mere generalities with respect to LONIAC became firmly implanted in the international legal mindset. In 1977, AP/II was appended to the Geneva Conventions, comprising more concrete stipulations and assigned in its entirety to the subject of NIACs. Yet, as will be shown *infra* 118 *et seq.*, the scope of application of AP/II is narrower than that of Common Article 3.

22. AP/II is twinned with Additional Protocol I (AP/I), which is devoted to IACs.²¹ On balance, there is no comparison between the breadth or depth of AP/I and AP/II. AP/II norms (which will be examined in detail in Chapter 8) have been described as 'a debilitated replica'²² or 'a pale shadow'²³ of the AP/I rules curbing IACs. One can belabour the perception that AP/II is 'a sadly flawed document',²⁴ compared to what it might have been in a perfect world. But, no less, one can pinpoint the positive

¹⁹ Vienna Convention on the Law of Treaties (VCLT), [1969] UNJY 140, 141.

²⁰ *Case Concerning Certain German Interests in Polish Upper Silesia* (Merits) (Germany/Poland), I WCR 510, 529.

²¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (AP/I), 1977, *Laws of Armed Conflicts* 711.

²² G.I.A.D. Draper, *Reflections on Law and Armed Conflict: Selected Works* 146 (M.A. Meyer and H. McCoubrey eds., 1998).

²³ L. Condorelli, 'Remarks', 85 *PASIL* 90, 95 (1991).

²⁴ W.J. Fenrick, 'Remarks', 2 *AUJILP* 473, 475 (1987).

achievements of AP/II against the backdrop of the shortfalls of Common Article 3.

23. AP/II does not supplant Common Article 3. Instead (in the words of Paragraph (1) of Article 1 of AP/II; *infra* 118), it ‘develops and supplements’ Common Article 3, ‘without modifying its existing conditions of application’. The provisions of Common Article 3 thus continue to apply to every NIAC, whether or not it is also covered by AP/II with its narrower scope of application.²⁵

24. The great majority of States – albeit not all – are Contracting Parties to AP/II. As far as non-Contracting Parties are concerned, the dominant question is whether relevant stipulations of AP/II are currently viewed as declaratory of customary international law. The answer to the question varies from one section of AP/II to another, and we shall come back to it *infra* 654 *et seq.*

25. Quite a few additional treaties also appertain to LONIAC. Most of them will be cited in context, but it is useful to mention the following instruments at this preliminary juncture:

- (i) Article 19 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (CPCP)²⁶ says, in Paragraph (1), that ‘[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property’. The passage is invigorated by Paragraph (1) of Article 22 of the 1999 Second Protocol to the CPCP.²⁷ Whereas it may be inferred from Article 19 that some (unspecified) provisions of the CPCP do not apply in a NIAC, Article 22 ‘makes it clear that the Protocol applies *in its entirety* in the event of an internal conflict’.²⁸
- (ii) Article 8(2) of the 1998 Rome Statute of the ICC sets out in Paragraphs (c) and (e) (*infra* 559, 572) a detailed roster of war crimes – coming within the jurisdiction of the ICC – committed during NIACs.

²⁵ See D. Schindler, ‘The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols’, 163 *RCADI* 117, 149 (1979).

²⁶ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (CPCP), 1954, *Laws of Armed Conflicts* 999, 1007. The CPCP was sponsored by UNESCO.

²⁷ Second Protocol to the CPCP, 1999, *Laws of Armed Conflicts* 1037, 1045.

²⁸ A. Gioia, ‘The Development of International Law Relating to the Protection of Cultural Property in the Event of Armed Conflict: The Second Protocol to the 1954 Hague Convention’, 11 *It. YIL* 25, 32 (2001). Emphasis in the original.

B. Customary international law

26. Customary international law, to repeat the well-known formula appearing in Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), is defined as ‘evidence of a general practice accepted as law’.²⁹ Two elements are condensed here: (objective) general practice and (subjective) *opinio juris sive necessitatis* (i.e. ‘a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’).³⁰

27. As the ICJ held in 1985, in the *Libya/Malta Continental Shelf* case: ‘It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States’.³¹ Earlier, in the 1969 *North Sea Continental Shelf* cases, the ICJ pronounced that State practice – ‘including that of States whose interests are specially affected’ – has to be extensive.³² Extensive or ‘general’ does not coincide with universal or unanimous practice.

28. It has been pointed out by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in the landmark *Tadić* Decision of 1995, that the formation of NIAC customary norms must rest primarily on ‘official pronouncements of States, military manuals and judicial decisions’, rather than the conduct of troops in the field (which may be in breach of the law).³³

29. Unlike treaties, general customary international law is binding on all States, irrespective of their consent (unless a State has the status of ‘persistent objector’ at the time of the consolidation of the custom).³⁴ NIAC customary international law has grown side by side with treaty law, and to a large degree thanks to it. A treaty may reflect customary international law at the time of its drafting, but it can also generate custom at a later stage.³⁵ That is to say, the general practice of States (with an emphasis on the practice of non-Contracting Parties) – supported by *opinio juris* – may, in time, adapt itself to the treaty legal regime. If so, the treaty (in whole or in part) becomes declaratory of customary international law.

²⁹ Statute of the International Court of Justice, Annexed to the Charter of the United Nations, 1945, 9 *Int.Leg.* 510, 522.

³⁰ See Dinstein, *supra* note 11, at 266–7.

³¹ *Case Concerning the Continental Shelf (Libya/Malta)*, [1985] *ICJ Rep.* 13, 29.

³² *North Sea Continental Shelf* cases (Germany/Denmark; Germany/Netherlands), [1969] *ICJ Rep.* 3, 43.

³³ *Prosecutor v. Tadić* (Decision on Jurisdiction) (ICTY, Appeals Chamber, 1995), 35 *ILM* 35, 63 (1996).

³⁴ See Dinstein, *supra* note 11, at 282–7. ³⁵ See *ibid.*, 346–76.

30. Over the years, multiple treaty provisions relating to LONIAC have generated customary international law binding on all States. In the 1986 *Nicaragua* case, the ICJ rendered judgment that Common Article 3 expresses ‘minimum rules applicable to international and to non-international conflicts’;³⁶ in other words, it gives vent to customary international law applicable both in IACs and in NIACs. A Trial Chamber of the ICTY, in the *Delalić et al.* case of 1998, clarified the international legal progress in the following way:

While in 1949 the insertion of a provision concerning internal armed conflicts into the Geneva Conventions may have been innovative, there can be no question that the protections and prohibitions enunciated in that provision have come to form part of customary international law.³⁷

Earlier, in the *Tadić* Decision of 1995, the Appeals Chamber of the ICTY went even further:

some treaty rules [governing internal strife] have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (*Nicaragua Case* . . .), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and . . . to the core of Additional Protocol II of 1977.³⁸

31. The fact that Common Article 3 is regarded today as declaratory of customary international law, and that it straddles both IACs and NIACs, is sometimes a source of confusion. To be sure, the substance of Common Article 3 is a minimum standard applicable in any armed conflict. But, contrary to what is occasionally asserted,³⁹ that does not mean that LONIAC *eo nomine* applies irrespective of territorial boundaries (see *infra* 74).

32. The declaratory standing of treaty provisions must be appraised on the basis of their success in presenting a true mirror image of custom. Although a treaty as such is always binding solely on Contracting Parties, non-Contracting Parties are obliged to comply with declaratory

³⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) (*Nicaragua/USA*), [1986] *ICJ Rep.* 14, 114.

³⁷ *Prosecutor v. Delalić et al.* (ICTY, Trial Chamber, 1998), para. 301.

³⁸ *Prosecutor v. Tadić*, *supra* note 33, at 63.

³⁹ See J. Cerone, ‘Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in an Extraterritorial Context’, 40 *Is.LR* 396, 412 (2007).