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1

The Framework

I. Introduction

A. NIACs and IACs

1. Every armed conflict is either international or non-international in character (see *infra* 71). 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) brewed for long periods of time. In more recent times, NIACs like the American Civil War (1861–5), the Russian Civil War (1917–22) or the Spanish Civil War (1936–9) left scars of self-inflicted wounds not healed for generations.

2. In the past several decades, NIACs have led to genocide and appalling massacres. But even when less calamitous in their effects, they have caused abundant losses of life and tangible damage to property. The incessant ordeals of NIACs (meeting the preconditions set out in Chapter 2) have occurred in scores of countries all over the globe.[1] Some of these NIACs were (or are) exceptionally brutal; others were

[1] The following list of NIACs occurring in the postcolonial period can be compiled in alphabetical order: Afghanistan, Algeria, Angola, Azerbaijan, Bahrain, Bolivia, Bosnia/Herzegovina, Brunei, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Chad, Colombia, Comoros, Congo, Congo-Brazzaville, Cyprus, Djibouti,

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(or are) less harsh. Some are ongoing; others are definitely over; and still others are in danger of re-eruption. Then, there are places of unrest and confrontation (not listed here) – like Venezuela – that have been teetering on the brink of a NIAC.

3. Experience demonstrates that an incumbent Government – averse to being tarnished with the stain of a revolt – is often prone to shy away from an unwelcome truth, clinging to the fiction that internal violence is sporadic and that no genuine rebellion against its writ is underfoot. There are a host of examples of governmental reluctance to concede the existence of a NIAC, even in the face of overwhelming evidence to the contrary.[2] 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. Despite the frequent 'mischaracterization' of NIACs for political and other reasons,[4] the outbreak of a NIAC has to be determined on the basis of objective criteria rather than subjective predilections. In fact, official refusal by an incumbent Government to acknowledge that a NIAC is going on may be a counterproductive stance, inasmuch as the Government may then be held to more stringent international legal standards of behaviour in resorting to ordinary law enforcement measures (for an illustration, see *infra* 140).

5. NIACs are certainly much more pervasive today than international armed conflicts (IACs). They are also liable to leave behind more carnage and devastation. The Syrian NIAC – which has been going on for a whole decade since 2011 – is a prime example: the fighting between the

Dominican Republic, Egypt (Sinai Peninsula), El Salvador, Ethiopia, Fiji, Gambia, Georgia, Guatemala, Guiana, Guinea, Guinea Bissau, India, Indonesia, Iran, Iraq, Ivory Coast, Kyrgyzstan, Laos, Lebanon, Liberia, Libya, Mali, Moldova, Mozambique, Myanmar, Nepal, Nicaragua, Niger, Nigeria, North Macedonia, Oman, Pakistan, Papua New Guinea, Paraguay, Peru, Philippines, Russia (Chechnya), Rwanda, Senegal, Serbia (Kosovo), Sierra Leone, Solomon Islands, Somalia, South Africa, South Sudan, Spain (Basque region), Sri Lanka, Sudan, Suriname, Syria, Tajikistan, Thailand, Turkey, Uganda, UK (Northern Ireland), Ukraine, Western Sahara and Yemen.

[2] See generally E. La Haye, *War Crimes in Internal Armed Conflicts* 42 (2008). For a specific example, 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).

[4] See A. Cullen, 'The Characterization of Armed Conflict in the Jurisprudence of the ICC', *The Law and Practice of the International Criminal Court* 762, 775 (C. Stahn ed., 2015).

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incumbent Government and numerous separate insurgent armed groups[5] (and recurrently among those groups clashing with each other) has been carried out *à outrance*. The NIAC has left in its wake hundreds of thousands of fatalities and countless wounded; it has brought about utter destruction of cities, towns and villages; it has obliterated cultural property; and it has driven away millions of refugees and displaced persons. Fuel has been added to the disastrous conflagration by outsiders:

(i) Russia and Iran – both directly and indirectly (through surrogates, like Hezbollah, and mercenaries) – have militarily intervened in support of the Syrian Government, thereby saving it from collapse.
(ii) Turkey has militarily intervened in support of certain insurgents against the Syrian Government, and other countries have supplied various groups of insurrectionists with arms and supplies.
(iii) A large international coalition has militarily intervened against Da'esh (on the Da'esh phenomenon, see *infra* 189 *et seq.*) without seeking permission from the Syrian Government.
(iv) Tens of thousands of Moslem, non-Syrian, individuals – impelled by religious fanaticism – joined the fighting against the Syrian Government on behalf of Da'esh.

6. 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. Indeed, a NIAC that is ostensibly over can flare up again cyclically, perhaps in a reconfigured manner.

7. 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 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).[6] Yet, for centuries, international law brushed aside the principal issue of streamlining the conduct of hostilities in the course of a NIAC.

[5] On the principal insurgent armed groups, see D. Wallace, A. McCarthy and S.R. Reeves, 'Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict', 25 *Mich.SILR* 555, 562–9 (2017).
[6] See J.H.W. Verzijl, IX *International Law in Historical Perspective* 501–2 (1978).

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8. All this changed radically in 1949 upon the adoption of the four Geneva Conventions for the Protection of War Victims (see *infra* 21). Since that date, the international regulation of the conduct of hostilities in NIACs has undergone exponential growth, becoming a 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* 824 *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

9. 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: it 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 an overarching consideration, many of these rules are engendered primarily by military necessity to prevail in the fighting.

10. LONIAC is a branch of international law. The essence of LONIAC is the imposition of restraints on both the incumbent Government and those rising against it. All parties to the conflict must refrain from employing certain means or methods of hostilities that are banned by LONIAC. But the norms restricting freedom of action in the conduct of hostilities do not imply that the international community questions the fundamental right of the Government to suppress an insurrection by force.[7]

11. Additional Protocol II to the Geneva Conventions (AP/II) of 1977 – which is dedicated in its entirety to LONIAC (see *infra* 22) – sets forth in Article 3(1):

> 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

[7] See *Commentary, I Geneva Convention* 61 (ICRC, J.S. Pictet ed., 1952).

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> 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.[8]

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.[9]

12. 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.[10] There is a delicate balance here. LONIAC ordains restraints in the conduct of hostilities without denying the existence of 'imperative military reasons' (see *infra* 557) or 'necessities of the conflict' (see *infra* 670). The incumbent Government is vested with a prerogative of vigorously putting law and order back on track, but it can do so only on condition that it acts in compliance with LONIAC.[11]

C. *No NIAC* jus ad bellum

13. 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 the use of force in international relations is enshrined in Article 2(4) of the Charter of the United Nations (UN)[12] and is embedded in current customary international law as *jus cogens*.[13] 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

[8] 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.
[9] Rome Statute of the ICC, 1998, *Laws of Armed Conflicts* 1314, 1321.
[10] See A. Zimmermann and R. Geiss, 'Article 8', *Rome Statute of the International Criminal Court: A Commentary* 528, 579 (3rd ed., O. Triffterer and K. Ambos eds., 2016).
[11] See M. Bothe, 'War Crimes', I *The Rome Statute of the International Criminal Court: A Commentary* 379, 424 (A. Cassese *et al.* eds., 2002).
[12] Charter of the United Nations, 1945, 9 *Int.Leg.* 327, 332.
[13] See Y. Dinstein, *War, Aggression and Self-Defence* 100–2, 110 (6th ed., 2017).

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Yoram Dinstein
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State; or (ii) for the incumbent Government to use its extensive resources in furtherance of the suppression of the revolt.[14]

14. The fact that international law is content with a ban on recourse to inter-State force – unaccompanied by a cognate prohibition of resort to intra-State force – may seem surprising, given the frequency, ferocity and far-flung fallout of NIACs. But the indisputable, albeit grim, reality is that international law distances itself from prohibitory injunctions against NIACs. Some scholars would like to create 'a new *jus contra bellum internum*', but they do not deny that this is proposed purely *de lege ferenda*.[15] Of course, the absence of an international *lex lata* banning NIACs does not impede domestic legislation ensuring the preservation of the State's internal order. It is a deeply ingrained characteristic of all domestic legal systems that an insurgency designed to topple the lawfully established Government is a criminal offence, generally categorized as high treason.[16]

15. The posture of international law *vis-à-vis* NIACs is twofold. While the population of a State is not obliged to desist from an insurrection, the flip side of the coin is that international law does not deny the entitlement of the incumbent Government to stamp out an insurgency by force.[17] 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),[18] but even that does not seem to be in the offing.

16. The absence of an international *jus ad bellum internum* has far-reaching consequences affecting the whole vista of NIACs. Pre-eminently, 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 IACs[19] – has no traction in the context of NIACs.

17. The Security Council's powers under the UN Charter have been exercised in a manner catching NIACs in the Council's net. Thus, in

[14] See A. Randelzhofer and O. Dörr, 'Article 2(4)', I *The Charter of the United Nations: A Commentary* 200, 214 (3rd ed., B. Simma *et al.* eds., 2012).
[15] See C. Kress, 'Towards Further Developing the Law of Non-International Armed Conflict: A Proposal for a *Jus in Bello Interno* and a New *Jus contra Bellum Internum*', 893 *IRRC* 29, 39 (2014).
[16] See E. Castrén, *Civil War* 18 (1966).
[17] See A. Bellal and L. Doswald-Beck, 'Evaluating the Use of Force during the Arab Spring', 14 *YIHL* 3, 12 (2011).
[18] See R. Wedgwood, 'The Use of Force in Civil Disputes', 26 *Is.YHR* 239, 248–9 (1996).
[19] See Dinstein, *supra* note 13, at 197–327.

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Yoram Dinstein
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Resolution 2216 (2015), the Security Council – in a binding decision adopted under Chapter VII of the Charter – demanded that the Houthi insurgents in Yemen 'immediately and unconditionally: (a) end the use of violence; (b) withdraw their forces from all areas they have seized, including the capital Sana'a'.[20] A study of extensive data relating to Security Council practice suggests to some scholars that 'the Council has at least raised the question of whether a nascent *jus ad bellum* for NIACs is emerging'.[21] But the record of the Council attests more to its towering authority in safeguarding international peace and security, and less to the ripening of any new precept in international law concerning the illegality of NIACs. For sure, nothing in the Council's practice even remotely suggests that it purports to enlarge the scope of Article 2(4) to NIACs.[22]

18. The only faint echo of a *jus ad bellum internum* 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 to Governments for extinguishing an insurgency against any one of them (see *infra* 284). But such a treaty is (i) regional rather than global; (ii) contingent on the consent of the States concerned at every stage of its adoption and implementation (see *infra* 282–3); and (iii) confined to military assistance granted to the incumbent Government, in contradistinction to those taking up arms against it (see *infra* 267 *et seq*., 295 *et seq*.).

II. The Legal Strata of LONIAC

19. 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.

20. Treaties and custom are commonly adduced as 'sources' of international law, but this popular appellation only complicates the

[20] Security Council Resolution 2216 (2015), para. 1.

[21] G.H. Fox, K.E. Boon and I. Jenkins, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law', 67 *AULR* 649, 729 (2018). See also 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).

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

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Yoram Dinstein
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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.[23]

A. Treaty Law

21. Under Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties (VCLT) – a treaty 'means an international agreement concluded between States'.[24] 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.[25]

States must express their consent to become Contracting Parties to treaties (see *infra* 241).

22. 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 treaty text relating directly to LONIAC. This is Common Article 3 of the four Conventions (quoted *infra* 479). Admittedly, the language chosen by the drafters consists in the main of broad brush strokes rather than specifics (see *infra* 482–3), but it must never be forgotten that it was Common Article 3 which blazed a new trail in the terrain of NIAC law.

23. After the adoption of Common Article 3, 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* 144 *et seq*., the scope of application of AP/II is narrower than that of Common Article 3.

[23] For more on this subject, see Y. Dinstein, 'The Interaction between Customary International Law and Treaties', 322 *RCADI* 245, 260–1 (2006).

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

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

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24. AP/II is twinned with Additional Protocol I (AP/I), which is devoted to IACs.[26] Still, 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'[27] or 'a pale shadow'[28] of the AP/I rules curbing IACs. One can indeed belabour the perception that AP/II is 'a sadly flawed document',[29] compared to what it might have been in a perfect world. But, no less, one can pinpoint the positive achievements of AP/II against the backdrop of the shortfalls of Common Article 3. AP/II, in the words of Article 1(1) (quoted *infra* 144), 'develops and supplements' Common Article 3, 'without modifying its existing conditions of application'. For what this denotes in practice, see *infra* 147.

25. 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 viewed as declaratory of customary international law (anchored in the general practice of States and cemented by *opinio juris*). Once it is agreed that an AP/II provision mirrors current custom, even non-Contracting Parties are bound by the same norm owing to its customary character (rather than the treaty form in which it is verbalized). This can be a matter of decisive importance, since multiple AP/II provisions reflect customary international law (either from the time of their adoption in 1977 or in light of subsequent practice). For an evaluation of the customary standing of various clauses of AP/II, see *infra* 765 *et seq*.

26. Quite a few treaties – other than AP/II – appertain as well 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)[30] says, in Paragraph (1), that '[i]n the event of an armed conflict not of an

[26] 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.
[27] G.I.A.D. Draper, *Reflections on Law and Armed Conflict: Selected Works* 146 (M.A. Meyer and H. McCoubrey eds., 1998).
[28] L. Condorelli, 'Remarks', 85 *PASIL* 90, 95 (1991).
[29] W.J. Fenrick, 'Remarks', 2 *AUJILP* 473, 475 (1987).
[30] 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.

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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,[31] according to which '[t]his Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties'. Whereas it appears that some provisions of the CPCP concern only IACs and do not cover NIACs,[32] Article 22 of the Second Protocol 'makes it clear that the Protocol applies *in its entirety* in the event of an internal conflict'.[33] The problem with the letter (although, of course, not the spirit) of Article 22 is that it does not state expressly that the Protocol's obligations apply to non-State insurgent armed groups as much as to the governmental armed forces.[34]

(ii) Article 8(2) of the 1998 Rome Statute of the ICC sets out in Paragraphs (c) and (e) (quoted *infra* 655, 670) a detailed roster of war crimes – coming within the jurisdiction of the ICC – committed during NIACs.

B. Customary International Law

27. 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'.[35] Two elements are condensed here: (objective) general practice and

[31] Second Protocol to the CPCP, 1999, *Laws of Armed Conflicts* 1037, 1045.
[32] See J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict* 214–15 (1996).
[33] 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.
[34] See J.-M. Henckaerts, 'The Protection of Cultural Property in Non-International Armed Conflicts', *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* 81, 83 (N. van Woudenberg and L. Lijnzaad eds., 2010).
[35] Statute of the International Court of Justice, Annexed to the Charter of the United Nations, 1945, 9 *Int.Leg.*510, 522.

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