

Non-International Armed Conflict (NIAC)

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overview

- About NIAC

1) CLASSIFICATION OF CONFLICT

- NIAC vs. IAC : 'upper threshold'
- Two types of NIACs
- NIAC vs. absence of armed conflict

2) THE LAW OF NIAC

- Sources of NIAC
- Rules of NIAC
- Challenges to IHL of NIAC

NIAC

- NIAC is the legal category of armed conflicts that are "not between two or more States".
- The twin of IAC – armed conflict between two or more States
- Many (non-legal) names : civil war, guerrilla war, insurgency, counter-insurgency, war of secession, war of liberation, transnational war, 'war against terrorism' etc.
- 9 of 10 armed conflicts from 1990-2012 are NIACs
- Body of legal rules is 'rudimentary', 'skeletal' compared with IAC
- → Most conflicts are NIAC, very few rules apply to NIAC

1) CLASSIFICATION :

when does IHL apply ?

- "war" ? NO!
- → "Armed conflict" GC art 2, GC art 3.
 - No definition of armed conflict in treaty law !
 - State-practice: inconclusive. ILA report on the use of force
 - ICRC Commentary to GC (Pictet)
 - International criminal jurisprudence. *Tadic* (factual definition)
- → "international" (API) versus "non-international" (APII)
(IAC) (NIAC)
 - No definition in treaty law !
 - Increasingly seen as inter-state versus non-inter-state.

BASIC FEATURES

- TWO PARTIES : always DYAD – pair of enemy parties
- Several conflicts can exist side by side (ICJ Nicaragua)



Qaddafi regime versus
the Benghazi insurgents (NIAC)



Qaddafi regime (state) versus
international coalition of states (IAC)

- ORGANIZATION

- Q: are there two identifiable entities against each other ?

- STATE : *ipso facto* organization. Armed forces.

- → IAC : "intervention of the armed forces of two or more states"

- NIAC : What type of organization is required for an entity to become 'party to an armed conflict' ?

- HOSTILITIES

- Q : What type of hostilities required ?

- → IAC : from the first shot *if* interchange between State armies

- NIAC : something *else* than the lawful exercise of sovereign right to resort to the use of force on its own territory.

- Certain intensity, protraction

Classification of armed conflict

Q : WHO ARE THE PARTIES ?

IAC:

- **GCart2** « armed conflict between two or more High Contracting parties » (= STATES)
- **Tadic 1995** "resort to armed force between States"
- **STATES ON BOTH SIDES**

NIAC:

- **GCart 3** « armed conflict not of an international character occurring in the territory of one of the High Contracting Parties »
 - occurring in the territory of...
 - not of an international character....
 - → armed conflict
- **Tadic 1995** «...armed violence between governmental authorities and **organized armed groups** or between such groups»
- **NON-STATE ARMED GROUP ON AT LEAST ONE SIDE**

Classification of armed conflict

Q : LEVEL OF HOSTILITIES REQUIRED ?

IAC:

- **GCart2** « armed conflict between two or more High Contracting parties »
- **Tadic 1995** "resort to armed force between States"
- **Commentary GC** : "any intervention by the armed forces of a HCP".

→ **LOW LEVEL**

NIAC:

- **GCart 3** « armed conflict not of an international character occurring in the territory of one of the High Contracting Parties »
 - occurring in the territory of...
 - not of an international character....
 - → armed conflict
- **Tadic 1995** «protracted armed violence between governmental authorities and **organized armed groups** or between such groups»

• **HIGH LEVEL**

IAC or NIAC ?

- Why 'upper threshold' when less hostilities required?
 - IACs have more destructive potentials
 - IAC means full application of IHL
 - States mostly 'underclassify' :
 - If IAC - insist on NIAC, if NIAC - deny 'armed conflict'
 - Not what they say, but what they do that is important...
 - Application is automatic – not dependent on definition
 - Q : what is the legal significance of declaring that ' Syria is now in a civil war' ?

- Japan – China – Taiwan.
- Syria : Syrian Army vs. SNC / Syrian Free Army
 - Syrian Army + Iranian army vs SNC / SFA
 - Syrian Army + Iranian army vs SNC and Turkey, Saudi
 - Syrian Army vs. SNC and NATO
 - FORMALITIES decisive

Israel – Hizbullah 2006



- On 12 of July 2006, Hizbullah – a non-state actor with territorial control in Southern Lebanon, fired rockets at Israeli border towns, and attacked a border control on the Israeli side of the fence. Result among Israeli soldiers: 2 wounded, 3 killed, 2 captured and taken to Lebanon. Israeli army followed Hizbullah into Lebanon, another 5 Israeli soldiers killed in planned ambush.
- Israel responded by airstrikes into Lebanon, and asked the Lebanese state to intervene. After a few days, the Lebanese authorities responded that "they would not intervene in the face of such blatant aggression and destruction as the one Israel was showing into Lebanese territory", and that they were "fully supportive of the defensive actions of Hizbullah".

→ **CLASSIFICATION MAY CHANGE DURING THE CONFLICT**

Georgia and South – Ossetia



- On 8 of August 2008 the Georgian army went into South-Ossetia, a Georgian region, to quell insurgents aiming to secede South-Ossetia from Georgia. 4 Russian peace-keepers were killed.
- 9 of August : the Russian army went over the border to South – Ossetia in order to ' protect South-Ossetians and Russian nationals from Georgian aggression' .
- During the war, South- Ossetian irregular forces were fighting against the Georgian forces.



Iraq 2004

- On 20 March 2003, an international coalition attacked Iraq , with the aim of removing the regime of Saddam Hussein. The campaign lasted until May 1, when the coalition forces had control and eventually established an occupation regime.
- During the invasion, local resistance movements (Iraqi insurgents, Peshmergas etc) were fighting alongside coalitions forces.
- On 28 June 2004, the CPA, the occupation-authorities of Iraq, handed the sovereign authority of Iraq over to an Iraqi transitional council, preparing for elections. The foreign military forces would still do the main fighting against insurgents and remnants of the Iraqi army of the former regime.

THRESHOLDS OF NIAC

- There are TWO TYPES OF NIAC in IHL !!
 - GCart3/ ICC 8(2) d) (CA3-situations)
 - APII 1(2), ICC 8(2) e) (APII-situations)
- It is not irrelevant WHICH TYPE OF NIAC a situation qualifies as.

NIAC or Peace ('lower threshold') CA₃

NIAC : GC CA₃ : 'On the territory of a State between State and non-state actor'

- **high** threshold of violence
 - Not police or anti-terror operations
 - Outside IHL : "internal disturbances and tensions" **APII art 1(2), ICC art 8(2)(d) and (f)**
- ONLY AT A **HIGHER LEVEL OF VIOLENCE + ORGANIZATION** → insurgency
- "protracted armed violence", "organization" **ICTY Haradinaj 2001**



NIAC CA3 : The same threshold between State and non-state actor if *outside* the territory of the State ?

- Drone attacks in Pakistan between the CIA and the Pakistani Taleban.



- A part of the NIAC in Afghanistan ? (ESTABLISHED CONFLICT)
- A conflict where the US is acting on behalf of the Pakistani government on Pakistans territory – threshold **as if** the Pakistani government were participating (HIGH)
- A separate conflict between the US and the Pakistani Taleban (HIGH or LOW threshold ? = controversial)

NIAC type II : APII

- **APII art 1(1)** : « armed conflict ...take place in the territory of a High Contracting Party between **its** armed forces and dissident armed forces or other organized armed groups which , under responsible command exercise such control over a part of its territory as **to enable them to** carry out sustained and concerted military operations and to **implement this Protocol** ».
- Must the non-state actor comply with IHL ?
 - ➔ *Ability* to comply, not actual compliance
 - ➔ entry-criteria for IHL **IS NOT THE SAME AS** criteria for continued application

« Upper threshold » : NIAC as IAC

- **When a non-state actor must nevertheless be seen as a « state » for the purpose of classification**

THIS MAY OCCUR WHEN :

- 1) non-state actor *becomes* a state
- 2) non-state actor recognized as state for the purpose of the GC I-IV (API art 1(4). subject to API art 96) NEVER used de jure !
- 3) a State **supports** the insurgents to the point of using them as proxies for its own war against another State
 - → **ATTRIBUTION** for the sake of classification
 - Effective control or overall control ?
 - May be overall control (**ICJ « Armed Activities**)
==> **has to do with the NATURE of the parties to the conflict**
- **NOT enough that the NIAC becomes cross-border or transnational**

	IAC	NIAC GC art3	NIAC APII	NIAC API I(4) /attribution ==> IAC
Parties/ organization	STATES GCart2 « between High Contracting Parties »	ARMED GROUPS GCart3 Haradinaj : organization	ARMED GROUPS WITH TERRITORIAL CONTROL APII (1)/ ICC [8(2)(f)]	ARMED GROUP associated with STATE
Threshold violence / intensity of hostilities	LOW GCart2 « any intervention by the armed forces »	On territory: HIGH [ICC art8(2)(d)] «internal disturbances and tensions »	On territory : HIGH APII art I(2), [ICC art 8(2)(f)] «internal disturbances and tensions »	DEPENDS
		Outside territory: LOWER ? US Supreme Court London		

SUM UP

- IAC or NIAC : state or non-state against each other ?
- IAC : armed forces of States + low level of hostilities
- NIAC: organisation + level of hostilities
- NIAC : two types. CA₃ + APII.

Treaty law and customary law

Treaties of NIAC

(Black letter)

- GC I-IV art 3
- APII
- ICC art 8 (2)(c-f)
- Scattered treaty provisions applicable to NIAC:
 - Hague Convention 1954 art 19
 - Convention on Rights of the Child art
 - Second Protocol to the CRC
- Treaty provisions applicable to **all** armed conflicts (means)
 - Anti-Personnel Mine Convention
 - Cluster Convention
 - CCW (conventional weapons) am. Art I / am. Prot II

Customary law of NIAC

(Practice + opinio juris)

- ICRC Customary Study 148 rules of 161 (partly controversial)
- San Remo Manual on NIAC
- ICRC guidance on DPH (partly controversial)
- Manual on Air-warfare

Expressions of custom :

- ICC art 8 (2)(c-f)
- UN SG Bulletin

Equal or different rules for IAC and NIAC ?

EQUAL

- Humane treatment in the hands of the enemy
GCart3(1) /APII
- Care for the wounded
GCart 3(2) /APIIart 7
- Targeting-rules : distinction, proportionality, precautions in attack
- Most rules on MEANS and METHODS

DIFFERENT

- NIAC less detailed
- No combatant-status (POW)
- No prosecutorial immunity for lawful acts of war
- No nationality requirement

Body of ius in bello interno

- 3 main principles of IHL in NIAC (also in IAC).

1) principle of humane treatment without adverse distinction

GC common art 3 (I) , Rule 87 & 88 of ICRC study

2) principle of "unnecessary suffering" - prohibition of superfluous injury or unnecessary suffering. **API art 35 (2)** (customary nature), **Rule 70 ICRC study**

3) principle of distinction between 'fighters' and civilians and between military objectives and civilian objects. **APII art 13(2)(3), ICC art 8(2) e (i), Rule 1&6,7 ICRC Study, ICRC guidelines on DPH**

WHAT ARE THE RULES OF NIAC?

No status of combatancy

IAC

- Civilians negatively defined from "combatant" **API art50(1) / GC III art4**
- IAC : **status** important in three regards
 - 1) lawful target (Combatant or DPH) **API art 51(2)**
 - 2) treatment in the hands of the enemy (POW)
 - 3) prosecutorial immunity

NIAC

- No « combatant »
- Direct Participation in Hostilities (DPH) **API art 13(3)/ICRC Guidance**
 - NIAC
 - 1) lawful target (Continuous combat function or DPH) **ICRC guidance**
 - 2) no distinction => « must be treated humanely » **GC art 3, APII**
 - 3) no distinction

What about the system of **priviledges in NIAC** ?

System of incentives to comply with the laws of war

THE SITUATION IN NIACs:

Principle of distinction between 'fighters' and civilians and between military objectives and civilian objects.

APII art 13(2)(3), ICC art 8(2) e (i), Rule 1&6,7 ICRC Study

Distinction between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between **civilians** and **combatants**. Attacks may only be directed against combatants. Attacks must not be directed against civilians. **[IAC/NIAC]**

Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. **[IAC/NIAC]**

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. **[IAC/NIAC]**

Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities. **[IAC/NIAC]**

STATUS : Conduct of Hostilities

Belligerents/fighters

- Prohibited to order that there shall be no survivors (**APII art 4(1) i.f**)
- Sick and wounded : shall be collected and cared for **GC 3(2) , APII art 7** (collected *after* engagement **art 8**)

Civilians/Target immunity

- CIVILIANS : Unless and for such time as they take a direct part in hostilities (**13(3) i.f.**)
- The civilian population and individual civilians enjoy general protection against the dangers arising from military operations (**APII 13(1)**)
- They shall not be the object of attack **APII 13(2)**
- Violence the primary purpose of which is to spread terror among the civilian population is prohibited (**APII 13(2)**)
- Starvation of civilians prohibited as a method of combat (for this purpose) **APII art 14**
- Works and installations shall not be attacked (even if military objectives) if attack may cause release and severe losses among civilian population (**art 15**)
- Medical units and transports shall not be the object of attack **APII art 11(1)**
 - Exception : if used to commit hostile acts outside their humanitarian function, and then only after warning (**11(2)**)

STATUS : Prosecution

BELLIGERENTS/Fighters

S

- Armed forces = prosecutorial immunity (customary law)
- Non-State actors and/or DPH
no prosecutorial immunity
(APII art 6)
BUT : *may* be given amnesty for lawful acts of war :
« subsequent immunity » eg.
APII 6 (5)

CIVILIAN

- IHL : May be interned
- Domestic law: May be held accountable for subversive activities..... (but breach of IHRL)

STATUS : Prosecution cont..

- cannot be punished for medical activities compatible with medical ethics **APII art 10 (1)**
- can not be penalized for not giving information obtained during care (subject to national law) **APII 10 (3) (4)**
- prosecution & punishment of criminal offences related to the armed conflict **APII art 6**
 - **6 (2) (3)**Basic fair trial standards
- **6 (4)** : who cannot be sentenced to death
 - Persons under the age of 18 at the time of offence
- **6(4)** : who shall not be put to death :
 - Pregnant women and mothers of young childre
- **6(5)** : endeavour to grant the boradest possible amnesty (to belligerents and civilians whose liberty has been restricted)

NIAC : SUM UP

- Partly different focus for application of IHL (organization and nature of non-state actor + intensity of hostilities)
- Two different types of NIACs :
 - 1) GC art3
 - 2) APII / ICC 8(2) (e-f)
- Structural differences IAC ⇔ NIAC :
 - no COMBATANT status in NIAC. Large implications (targeting-rules, POW, prosecutorial immunity)
- Very rudimentary treaty rules
 - GC art 3/ICC : rules on protection (of enemies in the hands of)
 - APII / ICC : rules on protection (APII), rules on protection and conduct of hostilities (ICC 8(2)(e-f))
- Customary law :
 - Less clear, more controversial.
 - **Core body of rules** of IHL applicable to NIAC

Challenges

- **States do not want to recognize armed conflict**
 - On their own territory
 - WHY?
 - Implicitly questioning the ability of the State to maintain order
 - Often enemies competing for power
 - « criminals » and « terrorists » instead of « fighters » (or combatants)
- **States are overeager to engage in armed conflict**
 - Against non-state actors outside their territory
 - Against non-state actors in certain upheated situations (eg. Chechnya 2000, Israel 2000, Chile 1973-4)
 - WHY ?
 - May use military might and power
 - The option of « kill instead of capture »
- **→ best protection is achieved with the PROPER application of IHL (not too narrow, not too extensive)**
- **Who decides what applies ?**