International and Non-International Armed Conflicts (IACs and NIACs)

Slides with thanks to Cecilie Hellestveit, ILPI
Overview of Lecture

• IAC – NIAC
• Major differences
• Combatants and civilians in IAC:
  – Immunity from prosecution for lawful acts of war
  – Immunity from direct targeting in IAC
  – Regime of protection in detention
• Combatants and civilians in NIAC:
  – Immunity from prosecution for lawful acts of war
  – Immunity from direct targeting in NIAC
• Treaty law in NIAC: CoH, Prosecution, Detention
• Summary
Categories of Armed Conflicts in IHL

**IACs (international armed conflicts)**

- 5-10% of all "massive organized violence" 1990-2008
- Entire body of IHL treaty law and IHL customary law applicable
- "...declared war or...any other armed conflict which may arise between two or more of the High Contracting Parties" [GC Common art. 2](#)

**NIACs (non-international armed conflicts)**

- 90-95% of all "massive organized violence" 1990-2008
- only a limited part of IHL treaty law and IHL customary law applicable
- "...armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" [GC Common art. 3](#) (lowest threshold).
# IAC versus NIAC

## IAC:

1. State parties at ‘both sides’

2. State party on one side, the non-state party consisting of (peoples) “…fighting against colonial domination and alien occupation and against racist regimes”
   
   API art 1(4)

3. State party on one side, non-state party’s actions “attributable” to another State

## NIAC:

1. State party(ies) at only one side

2. No State party at any side
DISTINCTION

PARTIES

GC I-IV
API

API art 1(4)

APII + GC CA 3s

IAC

 STATES ON BOTH SIDES
GC art 2:
« between two or more High Contracting Parties »

Q: is there a State – actor on both sides?

STATE VERSUS STATE-ASPIRING ACTOR
API art 1(4)
« peoples » « in right of self-determination »

STATE OR NON-STATE ACTOR VERSUS NON-STATE ACTOR

NIAC

NIAC → IAC
due to ‘cause’

No de jure application
DISTINCTION

PARTIES

GC I-IV
API

IAC

STATES ON BOTH SIDES
GC art 2:
« between two or more High Contracting Parties »

STATE versus STATE-ASPIRING PEOPLE API 1(4)

INTERNATIONALIZED NIAC
State aids insurgents
IF: acts of insurgents ATTRIBUTABLE to State
ICJ: ”effective control”
ICTY: ”overall control”

NIAC

STATE OR NON-STATE ACTOR VERSUS NON-STATE ACTOR

⇒ IAC between the two States involved
Applicability of IHL

- *Ratione materiae* – the notion of armed conflict (IACs and NIACs);
- *Ratione personae* – addresses of IHL, rights and duties of the parties to an armed conflict;
- *Ratione loci* – geographical/spatial scope of application;
- *Ratione temporis* – start and end of hostilities.
On 12 July 2006, Hezbollah – 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 Hezbollah 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 leadership 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 Hezbollah”.

Israel – Hezbollah 2006
• On March 1, 2008, the Colombian army attacked a base of the FARC – a Colombian non-state organization with some territorial control in parts of Colombia, killing over 20 (16 insurgents and 5 civilians). The base was located in Ecuador. A country with a government which is ‘friendly’ towards the FARC. The Colombian authorities did not contact Ecuador prior to the attack.

• Ecuador and Venezuela condemned the attack, cut their diplomatic relations with Colombia, and started to prepare their armies, lining them up along the Colombian border.
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.
Georgia and South – Ossetia

• On 8 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 August 2008: 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.
• IAC → NIAC
  – Iraq
  – Afghanistan
• NIAC → IAC
  – Lebanon
  – Georgia
  – (Colombia)
• Often more than one conflict at a time. Individually assessed.
  – Iraq, Georgia
• Objective assessment
  – Reason for conflict not relevant
  – The opinion of parties not decisive (underlying reality)
  – Formalist approach (Westphalian order)
• NIAC: 3rd state intervention on part of state
• NIAC: ancillary cross border attack of insurgents
• Internationalized NIAC
  – States aid insurgents
    • *ICJ. Nicaragua*: ”effective control”
    • *ICTY. Tadic*: ”overall control”
    → IAC
  – National liberation wars
    • *API art 1(4)*
    → IAC
Threshold for applicability of IHL in NIAC

- **Geneva Conventions**
  - Common article 3: “armed conflict”
    - Not defined
    - Low threshold
    - Excluded: Riots, unrest, disasters, other causes of state of emergency
    - *Hamdan v. Rumsfeld*: CA3 applies to the armed conflict with al-Qaida

- **AP II**: armed conflict between states and non-state groups with territorial control (AP II art 1)
  - Narrow definition
  - ”take place in the territory”, ”between its armed forces”
  - Traditional civil war
APPLICABILITY OF IHL / TREATIES:

FORMAL DECLARATION

GC I-IV
API

GCart2 « all cases of declared war »

Ex. Finland, Chad
Q: informal? ROE

(NO): GC art 2 « Any other armed conflict between two High Contracting Parties »
Commentary GC: any… intervention
ICJ: « armed attack »
certain intensity of violence (but ad bellum)

What parties claim or admit: irrelevant

APII

NO

(Ex. Spanish govt. declare war on ETA)

APII art 1(2)
Excluded: « internal disturbances and tensions …. riots, isolated and sporadic acts of violence »

GC CA3

NO

(Ex. Bin Ladens declaration of war on the US 1996)

art 3(1) « armed conflict not of an international character »
Elements:
certain organization, State armed forces,

- "protracted"
- Tadic (violence)
- ICC (conflict)
MAJOR DIFFERENCES 1
Ad bellum / in bello

**IAC:**

- *Ius ad bellum*: why you fight does not affect your rights and duties in fighting (*ius in bello*)

- General rule: *ius ad bellum* is kept separate from *ius in bello* in IAC.

**NIAC**

- Why you fight, can influence which rules are applicable. **API art 1(4)**
  "fighting against colonial domination and alien occupation and against racist regimes..."

  ➔ ’converts’ NIAC to IAC

- General rule: there is no *ius ad bellum* in NIAC.
## MAJOR DIFFERENCES 2

### International law / domestic law

<table>
<thead>
<tr>
<th>IAC</th>
<th>NIAC</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>International law</strong></td>
<td><strong>International law</strong></td>
</tr>
<tr>
<td>- Prohibition against the resort to threat or use of armed force in international relations</td>
<td>- No general prohibition against civil war, insurgency or secession</td>
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<td>- Except self-defence and collective action under UN SC.</td>
<td>- <strong>Municipal law</strong></td>
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<tr>
<td>- (Definition of ‘aggression’ in the ICC Statute)</td>
<td>- Normally strictly prohibited to start or to be involved in any way in civil war, insurgency or secession</td>
</tr>
<tr>
<td><strong>Municipal law</strong></td>
<td>- ”High treason” etc. Often subject to capital punishment.</td>
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<tr>
<td>- Normally no prohibition against resort to use of armed force in international relations (provided internal rules are followed)</td>
<td></td>
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<tr>
<td>- No prohibition against participation in IAC.</td>
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</tbody>
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MAJOR DIFFERENCES 3
Structure, default regime

IAC
• Reciprocity
• Equality of belligerents
• Absence of IHL: very little protection
  ➔ IHL gives more protection than default regime (‘no rules’)

NIAC
• Asymmetry
• No equality of belligerents
• Absence of IHL: IHRL is default regime
  ➔ IHL provides ‘less protection’ than default regime (human rights regime)
Applicability of IHL

Absence of armed conflict

BILL OF HUMAN RIGHTS
- UN-Declaration (HR)
- ECHR, ACHR(HR)
- UN- Conventions 66 (HR)

NIAC

GC art 3
APII
Scattered provisions in other treaties
CIHL

IAC

Hague Conventions
Geneva Conventions
Other IHL treaties
CIHL

«Default regime »

Non-derogable human rights

(Non-derogable human rights)
The making of treaty-law in NIACs

- Why difficult to make treaty-rules for NIAC?
- STATE-actors:
  - fear that rules will obstruct States’ abilities to defend themselves internally
  - fear that rules will give ‘legitimacy’ to non-state actors resorting to massive violence, and make State-actors legitimate targets
  - fear that status will deprive the State of right to prosecute insurgents, and effectively undermine the State’s monopoly to the right to resort to the use of armed force.

Difficult to find common interest among groups that would need to cooperate to create comprehensive treaty-rules for NIACs
The making of treaty law in NIAC (cont.)

CONVENTIONAL LAW OF NIACs

- **Geneva Conventions Common art. 3** (1949)
  - Humane treatment
  - Care for sick and wounded
- **Cultural Property Convention art. 19** (1954)
  - Respect for cultural property
- **Additional Protocol II to the Geneva Conventions** (1977)
  - 28 articles – approx. 10 of which have substantive content (protection)

Treaties expanded to NIACs

- Protocol 2. to the Cultural Property Convention (1999)
- Weapons Convention (2001)

Treaties applicable to NIACs from first entry

- Chemical Weapons Convention (1993)
- Landmine Convention (1997)
- ICC art 8 (2) (1998)
- Clusterbomb Convention (2008)
Customary law in NIACs

The particularities of customary law in IHL

• **Opinio juris**
  – Takes little to establish rule that strengthen protection
  – Takes much to prove that a rule of protection has ceased to exist
  – The opinio juris of which countries?

• **Practice**
  – Seldom public
  – Costly in terms of ’political capital’

• **Scholarly writings:**
  – risky to enumerate rules (must be ’complete’)
  E.g. ICRC study, Manual on NIACs.

WHERE DO RULES COME FROM?

• Analogies from IAC (civilians)

• Common sense
  – E.g. **Tadic**: what is inhumane , and consequently proscribed in IACs, cannot but be inhumane and inadmissible in NIACs

• General principles
  – E.g **Martens clause**: "in cases not covered... combatants and civilians remain under the protection and authority of... the principles of humanity and from the dictates of public conscience. ”

• **Case law**
  – ICJ, ICTY, ICTR, ICC
  – IHRL courts
  – National courts , e.g. Israeli High Court of Justice.
IHL norms in NIAC:

- General *scarcity* of treaty rules in NIAC
- General *scarcity* of clear rules of customary law in NIAC
- Tendency of increased *codification*, but largely *fragmented* in specific areas of IHL
- Largely based on *analogies* from IAC
- Problems of *incoherencies*
- Problems of rules taking on a *different function* in NIAC. E.g principle of distinction.
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
Combatants and civilians in IAC

Status requirements & legal repercussion of status
Here: only legal repercussion of status

• IMMUNITY OF COMBATANTS
  – Immunity from prosecution for lawful acts of war
    • (API art 43 (2)) right to participate in hostilities

• IMMUNITY OF CIVILIANS
  – Immunity from direct targeting (API art 51(2))
    • Parties to the conflict must distinguish (API art 48)
    • Combatants obliged to distinguish themselves (API art 44)
    • Prohibition against indiscriminate attacks (API art 51(4))
Combatants

- IMMUNITY OF COMBATANTS
  - Immunity from prosecution for lawful acts of war
    - (API art 43 (2) right to participate in hostilities

Civilians

- IMMUNITY OF CIVILIANS
  - Immunity from direct targeting
    - Parties to the conflict must distinguish (API art 48)
    - Combatants obliged to distinguish themselves API art 44
    - Prohibition against indiscriminate attacks API art 51(4)

Persons directly participating in hostilities
DPH
API 51(3)

Mercenaries
API art 47
Combatants

- IMMUNITY OF COMBATANTS
  - Immunity from prosecution for lawful acts of war
    - (API art 43(2)) right to participate in hostilities

Civilians

- IMMUNITY OF CIVILIANS
  - Immunity from direct targeting API art 51(2)
    - Parties to the conflict must distinguish (API art 48)
    - Combatants obliged to distinguish themselves API art 44
    - Prohibition against indiscriminate attacks API art 51(4)

Regime of Treatment in Detention

POW (GC III)
- Combatant
- ’Non-combatants’ in army
GC art 4A no1
- Accompanying personell
- GC art 4A no4

Minimum protection
API art 75
- DPH, (art 45(3))
- Mercenaries (art 45(3))

Detained civilians
GC IV (section IV), API (section III)
Combatants

- IMMUNITY OF COMBATANTS
  - Immunity from prosecution for lawful acts of war

Civilians

- IMMUNITY OF CIVILIANS
  - Immunity from direct targeting API art 51(2)

PARTICIPATE DIRECTLY IN HOSTILITIES

Combatant who has been captured while breaking the rule of distinction in API 44(3) and (4) – in civilian clothing, not carrying arms openly → loses combatant status

POW (GC III)

Regime of Treatment in Detention

Spying AP 46
"Treated as POW"

Minimum protection API art 75

Detained civilians
Combatants

• IMMUNITY OF COMBATANTS
  – Immunity from prosecution for lawful acts of war

Civilians

• IMMUNITY OF CIVILIANS
  – Immunity from direct targeting API art 51(2)

PARTICIPATE DIRECTLY IN HOSTILITIES

- Combatant in civilian clothing and not carrying arms opely (API 44(3) and (4))

If a civilian endangers the principle of distinction between combatants and civilians by participating in hostilities ➔ loss of privilege of immunity of civilians:
Can be directly targeted (and can be prosecuted for lawful acts of war)

If a combatant endangers the principle of distinction between combatants and civilians by not disguising himself properly ➔ loss of privilege of immunity of combatancy:
Can be prosecuted for lawful acts of war (and can be directly targeted)
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 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel. [IAC]

Rule 4. The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. [IAC]

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]
‘Combatants’ in NIAC

• **COMBATANTS & CIVILIANS**
  – Status requirement:
    – No clear definition of status/groups
  – Line(s) of distinction still exist

• **IMMUNITY**
  – ‘combatant’- immunity from prosecution for lawful acts of war
  – Civilian immunity from direct targeting

• No legal definition of combatant ➔ ‘fighter’ (generic term)
  /belligerent

• NIAC turns it around:
  very different result appears from the principle of distinction:
  ➔ singling out of individuals who are not protected by default regime
### ‘Fighters’

- **IMMUNITY OF COMBATANTS**
  - Immunity from prosecution for lawful acts of war
    - Armed forces right to participate in hostilities (customary rule)

### Civilians

- **IMMUNITY OF CIVILIANS**
  - Immunity from direct targeting
    - APII art 13, ICRC study, basic principle of IHL

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**Target immunity**: Armed forces against DPH: Armed forces targetable as a matter of status, DPH targetable as a matter of activity?

**Combatant immunity**: only State-party has a customary deal, the non-state party has not.

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*State actor*: armed forces (*militias & other organized armed groups?*)

*Non-state actor*: ICRC guidelines: “continuous combat function”
STATUS : Conduct of Hostilities

Belligerents

- **APII**: Prohibited to order that there shall be no survivors (art 4(1) i.f)

- Sick and wounded: shall be collected and cared for art 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 art14

- 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

**BELLIGERENT**
- 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..

- **AP II art 10 (1)**: cannot be punished for medical activities compatible with medical ethics
- **AP II 10 (3) (4)**: can not be penalized for not giving information obtained during care (subject to national law)
- **AP II art 6**: prosecution & punishment of criminal offences related to the armed conflict
  - **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 children
- **6(5)**: endeavour to grant the broadest possible amnesty (to belligerents and civilians whose liberty has been restricted)
STATUS : Detention

• Persons taking no active part in the hostilities *GC art 3(1)*
  – Members of armed forces who have laid down their arms
  – Surrendered persons
  – *Hors de combat* by sickness, wounds, detention, other cause

• All persons who do not take a direct part or who have ceased to take part in hostilities *(APII 4(1)*

• Sick and wounded : shall be collected and cared for *(3(2), APII art 7,* receive medical care and attention « to the fullest extent practicable and with the least possible delay », collected *after* engagement *APII art 8.*
STATUS : Detention cont..

« PERSONS WHOSE LIBERTY HAS BEEN DEPRIVED OR RESTRICTED » (APII art 2(2) ( during or after the conflict for the same reasons)

5(1) persons deprived of their liberty for reasons related to the armed conflict (interned or detained)

⇒ those responsible for internment or detention obliged to do certain things (basic protections) "shall be respected as a minimum" 5(1) (unconditional)

⇒ Those responsible for internment or detention shall- within the limits of their capabilities – respect certain other provisions 5(2) (conditioned on resources: ability, not will)

5(3) persons not covered by 5(1). . .(persons whose liberty restricted, but who are not interned or detained in this way). # under hostilities..
Summary

- NIAC: armed conflict where no more than one side consists of State-party(ies)
- NIAC: scarce treaty law, partly unclear customary rules
- COMBATANT STATUS:
  - Legal repercussions of status: privilege:
    - IMMUNITIES
      - Combatant immunity: no prosecution for lawful acts of war
      - Civilian immunity: no direct targeting
    - To protect distinction: those who endanger the distinction, loose their privilege, without gaining another privilege ➞ unprivileged
- NIAC:
  - Lack of combatant status, but other derived principles exist
  - Relationship with IHRL: some IHL principles take on a different function in NIAC
  - Asymmetry of law between state party fighters ⇔ non-state party fighters