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### Concluding Remarks on Non-International Armed Conflicts

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**T**his Newport conference has covered a large number of issues pertaining to non-international armed conflicts (NIACs), as compared to international armed conflicts (IACs). In these concluding remarks, I shall focus on six main themes: (i) the proper definition of a NIAC; (ii) the thresholds of armed conflicts; (iii) the application of the *jus in bello* in a NIAC; (iv) the various types of recognition relevant to a NIAC; (v) intervention by a foreign country in a NIAC; and (vi) the interaction between NIACs and IACs.

#### *I. Definition*

A useful definition of a NIAC in international law appears in Article 1(1) of Additional Protocol II (AP II) of 1977: a NIAC must “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups.”<sup>1</sup> (The text goes on to add features that do not configure in the nucleus of the general definition; these will be spelled out below.)<sup>2</sup>

There are two constitutive elements in this definition:

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### ***Concluding Remarks on Non-International Armed Conflicts***

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- (a) A NIAC must take place within the borders of a high contracting party, that is to say, a single State; and
- (b) A NIAC has to be waged between the armed forces of the State (loyal to the central government) on the one hand, and organized armed groups (including dissident armed forces) on the other.

#### **A. NIAC as an Internal Armed Conflict**

The first vital ingredient of NIAC relates to its internal nature, i.e., that it is waged within a State. This characteristic is repeated in other texts, as illustrated in Article 19(1) of the 1954 Hague Convention on Cultural Property, which speaks of “an armed conflict not of an international character, occurring within the territory of one of the High Contracting Parties.”<sup>3</sup> Virtually all commonly used definitions of a NIAC are restrictive in that the armed conflict is circumscribed to a single State<sup>4</sup> (the common locution in the past was “civil war”).

Admittedly, a majority of the Supreme Court of the United States, in the *Hamdan* case of 2006, seems to have arrived at the conclusion that the post-9/11 transnational “war on terrorism” should be deemed a NIAC.<sup>5</sup> However, the idea that a NIAC can be global in nature is oxymoronic: an armed conflict can be a NIAC and it can be global, but it cannot be both. Cross-border action against terrorists, like the SEAL Team Six raid that took out Osama bin Laden in Pakistan, may be carried out as an “extraterritorial law enforcement” operation.<sup>6</sup> Ordinary military operations in Afghanistan, directed at Al-Qaeda terrorists, blend into an IAC waged in that country—against the Taliban—that, in my opinion, is still ongoing.<sup>7</sup> Repeated references have been made in the course of the present conference to the American alignment in Afghanistan against “Al-Qaeda and its associates.” To my mind, the armed conflict in Afghanistan should rather be seen as conducted against “the Taliban and their associates.” And, since the central issue in the legal (and public) debate on the subject is that of detention of captured enemy personnel, I must add that I fail to grasp the rationale behind the decision to incarcerate detainees outside of Afghanistan. Why is Guantanamo Bay preferable to Bagram?

#### **B. Organized Armed Groups**

The second component of the definition of NIAC postulates the existence of a clash of arms between the armed forces of a State (loyal to the central government) and organized armed groups (including dissident armed forces) rebelling against the powers that be. Several comments are called for in this context.

The phrase “organized armed group” is of pivotal significance. The rudiments of organization are immanent in any insurgency amounting to a NIAC. Without

organization, there is no NIAC (as distinct from mere internal disturbances.)<sup>8</sup> The organized armed group may fall into two types. It may consist of (i) dissident (*viz.*, mutinous) units of the State's armed forces; or it may be formed by (ii) improvised groups of civilians who have coalesced in rebelling against the central government. The degree of organization of insurgent groups does not have a fixed pattern. Dissident military forces will naturally possess built-in structure and hierarchy. Other—improvised—organized armed groups are likely to be more loosely knit together (at least at the onset of the insurgency). But the emphasis is on the existence of some minimal organization, so that disconnected acts of violence committed by individuals will be excluded from the definition.

The insistence on insurgent organized groups being “armed” is principally designed to distinguish them from political opposition factions that challenge the central government without resorting to force. For sure, being “armed” does not imply that the armament employed by the insurgents has to be sophisticated.

The central government of the State in which a NIAC is raging is liable to become paralyzed—even to disintegrate and disappear altogether—either as a direct result of the NIAC or for other reasons. In extreme cases, such a phenomenon produces what is commonly called a “failed State.” However, the removal from the scene of the central government does not have to put an end to the NIAC. Frequently, an existing NIAC may continue—or a new NIAC may be triggered—between two or more organized armed groups vying with each other for ascendancy. Strictly speaking, hostilities between sundry organized armed groups—subsequent to the breakdown of governmental control—can no longer be viewed as an insurgency: after all, who is rebelling against whom? But the definition of NIAC must embrace such a state of affairs.

The add-on potential of a clash between two or more organized armed groups coming within the scope of a NIAC has been acknowledged by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case in 1995, which talked about “protracted armed violence between governmental authorities and organized armed groups *or between such groups* within a State” (emphasis added).<sup>9</sup> Article 8(2)(f) of the 1998 Rome Statute of the International Criminal Court follows in the same vein: “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”<sup>10</sup> No doubt, this comprehensive version is the correct definition of a NIAC today.

### C. Motives and Modalities

The motives propelling an organized armed group to an insurgency against the central government (or to a violent confrontation with other organized armed groups)

## *Concluding Remarks on Non-International Armed Conflicts*

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may differ. These motives may be political, social, economic, ideological, religious, ethnic, etc. Whatever the motive, it does not impact on the definition of NIAC.

The modalities of NIACs are multiple; some are national and some regional:

- (a) An organized armed group may have countrywide goals, the ultimate being to overthrow the central government, with the insurgents taking into their hands the helm of State throughout the territorial domain (the best illustration being that of the Franco rebellion in the Spanish Civil War, 1936–39). Alternatively, an organized armed group may have more limited national aims, such as effecting radical constitutional innovations, ensuring greater participation of underrepresented groups in the political process, securing fundamental freedoms or gaining certain specific concessions from the central government.
- (b) The insurgents' aims may be confined to a particular region or locality, e.g., demanding autonomy within a portion of the State. The insurgents may even push for outright secession of a part of the country, with a view to creating a new sovereign State (the best example being that of the Southern Confederacy in the American Civil War, 1861–65) or uniting—on irredentist grounds—with an existing foreign State. There may be a more complex impetus for the insurgents' drive to wrest control over a particular district from the central government. Even criminal incentives (as in the case of narco-traffickers) cannot be ruled out.<sup>11</sup>

The long and short of it is that—irrespective of concrete objectives—when an organized armed group is rebelling against the central government of a State, there is a NIAC in progress.

### **II. Thresholds**

The overall spectrum of violence is wide—ranging from ordinary crime and internal disturbances to NIACs and IACs—and it is necessary to bear in mind that different tiers of violence are subject to discrete legal regimes.<sup>12</sup> It is therefore useful to refer to three thresholds of armed conflicts—two relating to NIACs and one to IACs—plus a level of violence that is below the first threshold.

#### **A. Below-the-Threshold Situations**

Below-the-threshold violence fits a domestic law enforcement paradigm. Article 1(2) of AP II provides that the Protocol will not apply to “situations of internal

disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”<sup>13</sup> The same formula is reiterated in Article 8(2)(f) of the 1998 Rome Statute of the International Criminal Court,<sup>14</sup> in Article 22(2) of the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property<sup>15</sup> and in a 2001 Amendment to Article 1 of the 1980 Convention on Conventional Weapons (CCW).<sup>16</sup> By now, this uniform treaty definition of below-the-threshold violence seems to be universally accepted. The two signal adjectives are “isolated and sporadic,” and the emblematic noun is “riots.”

Riots, as well as other “isolated and sporadic” disturbances, are ordinarily handled by law enforcement agencies—namely, police forces (regardless of their domestic designation)—rather than by military contingents. Still, the intensity of riot-like disturbances may be such that military units are summoned to lend indispensable assistance to the police in stamping out the violence. This by itself does not alter the operation of the law enforcement paradigm.<sup>17</sup>

Below-the-threshold violence does not call for the application of the *jus in bello* (the law of armed conflict). The conduct of all concerned in below-the-threshold confrontations is governed by the domestic constitutional and criminal legal system of the State afflicted with the violence, subject to the strictures of international human rights law.

As a rule, law enforcement agents enjoy less latitude when it comes to opening fire on rioters during “isolated and sporadic” disturbances compared to the degree of latitude conferred on the armed forces when engaged in an IAC or even in a NIAC. Nevertheless, exceptionally, law enforcement agents—in below-the-threshold scenarios—may have more latitude in the use of certain weapons, when quelling an ordinary disturbance, compared to their counterparts in an armed conflict (either an IAC or a NIAC). Preeminently, in Article I(5) of the 1993 Chemical Weapons Convention contracting parties undertake not to use “riot control agents” (or, in plain language, tear gas) as a method of warfare, whereas Article II(9)(d) explicitly allows the employment of non-lethal chemical agents for law enforcement purposes, including domestic riot control.<sup>18</sup> Moreover, the use of expanding soft-nosed bullets (interdicted in armed conflicts)<sup>19</sup> is common when special weapons and tactics teams engage in counterterrorism activities, particularly when faced with hostage takers or suicide bombers.

### **B. Over the First Threshold**

The first threshold of NIACs is established in Common Article 3 to the four Geneva Conventions of 1949 for the protection of war victims, which refers *tout court* to “armed conflict not of an international character occurring in the territory of one

### *Concluding Remarks on Non-International Armed Conflicts*

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of the High Contracting Parties.”<sup>20</sup> Common Article 3 of the Geneva Conventions paved the way for Article 19(1) of the 1954 Hague Convention for the Protection of Cultural Property, which employs the same formula.<sup>21</sup>

Common Article 3 has acquired a special status, since—in the 1986 *Nicaragua* case—the majority of the International Court of Justice held that it expresses “minimum rules applicable to international and to non-international conflicts”;<sup>22</sup> in other words, that it reflects customary international law (applicable both in IACs and in NIACs). Yet, unfortunately, Common Article 3 does not shed light on the point at which the first threshold is crossed. Article 19(1) of the Hague Convention does not do that either.

The most authoritative attempt to fill the vacuum was made by the Appeals Chamber of the ICTY, which held—in the 1995 *Tadić* case—that there must be “protracted armed violence.”<sup>23</sup> The adjective “protracted” is repeated in Article 8(2)(f) of the Rome Statute of the International Criminal Court.<sup>24</sup>

“Protracted” is obviously the antonym of AP II’s “isolated and sporadic,” but is it enough that the internal violence is prolonged for it to qualify as a NIAC? The ICTY Trial Chamber, in its *Tadić* judgment of 1997, added—as an extrapolation of the notion of “protracted” hostilities—the element of the “intensity” of the armed conflict, thereby “distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities.”<sup>25</sup> Subsequent judgments of the ICTY have come up with “[v]arious indicative factors” in trying to assess the intensity of an armed conflict.<sup>26</sup>

#### **C. Over the Second Threshold**

The second threshold is laid down in Article 1(1) of AP II, which, after stating that a NIAC must “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups,” goes on to refer to organized armed groups that “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.”<sup>27</sup>

The salient element here, in comparison to the first threshold, is the control exercised by the insurgent organized armed group (under responsible command) over a part of the territory. The size of the area under insurgent control is not defined, but it must be sufficient (i) to allow “sustained and concerted military operations” to be carried out; and (ii) to enable the implementation of the Protocol (for example, caring for the wounded and sick).<sup>28</sup> The degree of control exercised by the insurgents in the area in question need not exceed these two conditions. In particular, there is no requirement that “any actual administration in a governmental sense” will take place.<sup>29</sup>

As for the first condition, any (military or quasi-military) operations carried out by insurgents in a NIAC over the second threshold must be “sustained and concerted.” “Sustained” means that the operations are kept up continuously; “concerted” signals that they are carried out according to some plan.<sup>30</sup>

With respect to the second condition, it must be kept in mind that in any armed conflict control over certain areas may pass from one side to the other (possibly more than once). In the ebb and flow of a NIAC, an insurgent organized armed group may lose control over an area earlier seized by it. That by itself is inconsequential. For the second condition to be met, what is indispensable is that the insurgent organized armed group retains control over some territory at any given time.

The great advantage of the territorial control prerequisite is that it provides an acid test facilitating the ability to tell apart a NIAC from intense violence below the threshold. Thus, when one juxtaposes the settings in Libya and Syria in June 2011, it is noteworthy that the rising in Syria is no less protracted or intense than that in Libya. If Libya is different from Syria (apart from the element of foreign intervention with the *fiat* of the Security Council),<sup>31</sup> it is in the fact that the Libyan insurgents have gained control of large tracts of land, whereas in Syria there has been no similar development. The trouble, of course, is that the insistence on insurgents’ control over territory excludes some cases of protracted and intense violence—e.g., the struggles by and against the Irish Republican Army in Northern Ireland or the Basque separatists in Spain.<sup>32</sup>

Once the second threshold is crossed, the treaty law of AP II comes into play for contracting parties.<sup>33</sup> Several provisions of AP II can currently be viewed as declaratory of customary international law.<sup>34</sup> Regardless, it must be perceived that all NIACs above the second threshold remain subject also to the customary *jus in bello*, which is applicable whenever the first threshold is crossed.

#### **D. Over the Third Threshold**

Whereas the gap between the first and the second thresholds is quantitative (the second threshold providing weightier evidence that a NIAC is actually occurring), the leap over the third threshold is qualitative: it is a move from a NIAC to an IAC. Many people are under the impression that a NIAC is *ipso facto* less intensive than an IAC, although this idea is not empirically corroborated by the historical record. In any event, it does not matter whether the fighting in an IAC is more or less intense than in a NIAC. The sole question is whether the fighting is intra-State (a NIAC) or inter-State (an IAC). The third threshold is crossed automatically once two or more States are taking part in the armed conflict, fighting each other.

### ***Concluding Remarks on Non-International Armed Conflicts***

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Crossing the third threshold means that the *jus in bello* in its plenitude will be applicable to the armed conflict. The *jus in bello* applicable in a NIAC is sketchier,<sup>35</sup> and the entire gamut of the *jus in bello* is in play only when an IAC is going on.

More significantly, perhaps, IACs are subject to a *jus ad bellum*: international law (as entrenched both in the United Nations Charter and in customary international law) forbids the use of force in international relations, with only two exceptions, *viz.*, (i) self-defense, and (ii) enforcement action either mandated or authorized by a binding decision of the Security Council.<sup>36</sup> No parallel *jus ad bellum* exists as regards NIACs. “There is no rule in international law against civil wars.”<sup>37</sup> While the domestic law of every State forbids an insurgency against the established order, international law turns a blind eye to the issue. International law neither prohibits an uprising against the central government nor denies the right of the central government to put down the insurrection by force.

### **III. Jus in Bello**

The *jus in bello* regulating IACs started to develop in the nineteenth century, and has now become strongly anchored in both custom and extensive treaty law. Conversely, the *jus in bello* applicable in NIACs did not begin to develop until the adoption of Common Article 3 of the Geneva Conventions. Indeed, it took several decades for the urge to further develop NIAC *jus in bello* to become firmly implanted in the international legal mind-set.

NIAC *jus in bello* governs armed conflicts above either the first or the second threshold. When it does, it is applicable throughout the territory of the State affected, as long as the NIAC is going on. In the words of the Appeals Chamber of the ICTY, in the 2002 case of *Kunarac*, a violation of the NIAC *jus in bello* may “occur at a time when and in a place where no fighting is actually taking place.”<sup>38</sup>

#### **A. The Trend of Convergence**

Contemporary developments in treaty law display a palpable trend of growing convergence between the *jus in bello* governing IACs and in NIACs. This trend is manifested in the following treaties:

- (a) Article 8(c)–(e) of the 1998 Rome Statute of the International Criminal Court, which elaborates a list of NIAC war crimes (admittedly not as long as the comparable list of IAC war crimes)<sup>39</sup>
- (b) Article 1(3) of the 1996 Amended Protocol II to the CCW, which applies the instrument (dealing with mines and booby traps) to NIACs<sup>40</sup>



- (c) Article 22(1) of the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property, which does the same<sup>41</sup>
- (d) The 2001 amendment to Article 1 of the CCW, which applies to NIACs all the Protocols annexed to the Convention.<sup>42</sup>

No doubt, we are also witnessing the emergence of a new customary law in this regard: some of it is already fully formed,<sup>43</sup> and some is probably in the process of formation.

### **B. The Impossibility of a Full Merger**

Notwithstanding the increasing resemblance between the norms of the *jus in bello* applicable in IACs and in NIACs, it is unlikely that there will ever be a total merger of the law in the two discrete categories of armed conflicts. There have been some academic calls for conflating the law regulating the two types of armed conflicts.<sup>44</sup> Yet, at least three insurmountable obstacles stand in the way of such an amalgamation being effected in the practice of States:

- (a) What might be termed a congenital trait of NIACs is that captured insurgents cannot claim the privileges of prisoners of war (POWs).<sup>45</sup> The rationale is that domestic law always considers insurgents to be criminals, perhaps even traitors.<sup>46</sup> When detained by government forces, insurgents are subject to prosecution and punishment for their criminal conduct by the domestic courts (military or civilian). For that and other reasons, insurgents in NIACs cannot be regarded as “combatants” (in contradistinction to civilians).<sup>47</sup> Accordingly, the 2006 *San Remo Manual on Non-International Armed Conflict* uses the term “fighters” instead.<sup>48</sup> The intrinsic asymmetry between well-organized (trained, disciplined, uniformed, etc.) members of the armed forces loyal to the central government and loosely organized insurgents (especially when they do not belong to dissident forces) creates lots of practical problems in the application of the *jus in bello* in a NIAC.
- (b) The law of neutrality does not apply to NIACs.<sup>49</sup> This is due to the fact that in a NIAC solely one single State is embroiled in the armed conflict.<sup>50</sup> The construct of a neutral as a “third State” does not make sense when the nature of the armed conflict precludes the possibility of a second State being engaged (subject to the extraordinary setting of “recognition of belligerency”).<sup>51</sup>

## *Concluding Remarks on Non-International Armed Conflicts*

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- (c) The whole body of law relating to belligerent occupation is out of tune with NIACs,<sup>52</sup> since neither areas seized by insurgents nor those retained or liberated by the central government can be regarded as occupied territories in the sense of the *jus in bello*.<sup>53</sup>

I shall not dwell upon additional—less compelling—problems relating to the legality of certain means and methods of warfare, which have been raised during this conference.

### **C. Exceptional Situations**

There are two exceptional situations when the *jus in bello* will apply in NIACs as if they were IACs. One—under customary international law—is “recognition of belligerency.”<sup>54</sup> The other is confined to treaty law. Pursuant to Article 1(4) of Additional Protocol I of 1977, which is devoted to IACs, armed conflicts in the exercise of the right of self-determination are subject to the application of the Protocol and the Geneva Conventions, although they do not involve two opposing States.<sup>55</sup> It must be noted, however, that this is an exceedingly controversial provision which does not bind non-contracting parties to the Protocol.

## **IV. Recognition**

### **A. “Recognition of Belligerency”**

Sometimes, the central government of a State ravaged by a NIAC is compelled by circumstances to face a dire reality. This happens primarily when, by dint of their military successes in the field, the insurgents manage to capture large numbers of soldiers serving in the armed forces loyal to the central government. If the central government desires to ensure that its captive soldiers will benefit from POW privileges, it has no viable option except to confer on the insurgents “recognition of belligerency,” which means that—on condition of reciprocity—the whole *jus in bello* governing IACs will become applicable to the NIAC.<sup>56</sup>

It is interesting to note that, in a regular IAC, a belligerent party is not required to grant POW status to its own nationals: an enemy soldier (serving in the armed forces of State B) owing allegiance to the captor State (State A)—mostly as a result of the link of nationality—is not regarded by the *jus in bello* as a lawful combatant entitled to POW status.<sup>57</sup> In a NIAC, members of the organized armed group fighting against the central government of State A are ordinarily nationals of that State. Once the central government proclaims a “recognition of belligerency,” however, it is bound to treat insurgent captives as POWs despite their local nationality. What ensues is that the protection afforded to such insurgents in a NIAC—by virtue of

the *jus in bello*—is actually wider in scope than the parallel protection available in an IAC.<sup>58</sup>

When “recognition of belligerency” is granted by the central government of State A, it means that the IAC *jus in bello* is applied to the NIAC not only in the relations between that government and the insurgents but also vis-à-vis all other States. The upshot is that the laws of neutrality will be in effect as far as States B, C, etc., are concerned. These States will then not be allowed to forcibly intervene in the armed conflict: neither in support of the insurgents nor even in support of the central government, notwithstanding the general rule under customary international law that intervention to assist the central government is permitted.<sup>59</sup>

“Recognition of belligerency” may be proclaimed not only by the central government of State A but by State B. Such recognition cannot affect the conduct of hostilities between the central government of State A and the insurgents (these hostilities will continue to be governed by the NIAC *jus in bello*). Nor does “recognition of belligerency” by State B affect the position of States C, D, etc. But “recognition of belligerency” by State B will alter its standing with respect to the NIAC.

The legal effect of “recognition of belligerency” by State B does not denote that that State is thereby entitled to forcibly intervene in the conflict in favor of the insurgents. To the contrary, State B is bound by its “recognition of belligerency” to observe total neutrality in the NIAC. That is to say, following “recognition of belligerency,” State B will have to display impartiality toward both the central government of State A and the insurgents. Whereas—prior to “recognition of belligerency”—State B was allowed to forcibly intervene in the NIAC in favor of the central government of State A<sup>60</sup> and disallowed to do that in aiding and abetting the insurgents,<sup>61</sup> as from the turning point of “recognition of belligerency” State B is forbidden to assist any of the opposing sides. State B thus loses its pre-existing right to militarily assist the central government of State A, without acquiring a new right to militarily support the insurgents.

As a matter of fact, explicit “recognition of belligerency” is largely in “disuse” today.<sup>62</sup> But the basic concept of “recognition of belligerency” is as relevant as ever. There is no need for an express proclamation of “recognition of belligerency,” inasmuch as it may be distilled from the actual conduct or official pronouncements of State B. Thus, “recognition of belligerency” may be tacitly inferred from a promulgation of neutrality issued by State B<sup>63</sup> (so that instead of such neutrality flowing from “recognition of belligerency,” it is the other way around).

“Recognition of belligerency” may also be implied from the conduct of the central government of State A—for example, if it confers on insurgent captives the status of POWs (a clear-cut indication that the IAC *jus in bello* applies). Additionally, if the central government of State A wishes to close a maritime port seized and

### *Concluding Remarks on Non-International Armed Conflicts*

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controlled by the insurgents, the only effective way to do this may be to impose a blockade.<sup>64</sup> The upside, from the central government's viewpoint, is that it can then interfere with freedom of navigation of international shipping on the high seas. The downside is that the imposition of a blockade on a port controlled by the insurgents implies "recognition of belligerency," inasmuch as a blockade is a means of warfare vouchsafed by IAC *jus in bello*—subject to certain conditions (preeminently, that the blockade is effective and does not exist on paper only)<sup>65</sup>—but not by NIAC *jus in bello*. If the central government of State A does not wish to bestow upon the insurgents (by implication) "recognition of belligerency," it has no choice but to avoid a proclamation of blockade as against a port controlled by them.<sup>66</sup>

#### **B. Other Types of Recognition**

"Recognition of belligerency" must not be confused with three other types of recognition: (i) "recognition of insurgency," (ii) recognition of a new government and (iii) recognition of a new State.

"Recognition of insurgency" in State A is issued by State B and has consequences that are less far-reaching than those attendant on "recognition of belligerency." "Recognition of insurgency" will usually come about when an organized armed group fighting the central government of State A gains effective control of some territory. By granting (explicitly or implicitly) "recognition of insurgency," State B merely indicates that it will maintain some de facto relations with the insurgents, in order to safeguard its own interests (and those of its nationals) in the territory actually under the sway of the insurgents.<sup>67</sup> In other words, State B will outflank the central government and deal directly with the insurgents in matters pertaining to the area subject to their control.

Recognition of the insurgents as the new central government of State A may be granted by State B "prior to, in the absence of, concurrently with, or subsequent to recognition of belligerency" by the central government of State A (or by State C).<sup>68</sup> The outcome of a recognition of the insurgents by State B as the new central government of State A is a dramatic *volte-face* in the political constellation. It means that, following the recognition, State B may extend military assistance to the new government (by consent/request) against the forces still loyal to the ancien régime, now looked upon as the insurgents against the reconstructed central authorities. I shall have more to say on this eventuality in the context of intervention.<sup>69</sup> It must be noted, however, that premature recognition of the new government is a breach of international law.<sup>70</sup>

Another possibility is recognition—issued by State B—of the entity created by the insurgents as a new State, X. What such recognition denotes is that State B

regards the armed conflict not as an intra-State NIAC (between the central government and organized armed groups) but as an inter-State IAC (between States A and X). This is an even more radical reshuffle of the political cards. Still, in practice, the result of recognition of State X is similar to “recognition of belligerency” in that State B must then maintain neutrality regarding both belligerent parties.

### **V. Intervention**

#### **A. Forcible Intervention against the Central Government**

State B is liable to forcibly intervene in the affairs of State A by fomenting an insurgency against the central government of State A. If State B has effective control over the insurgents, they may be regarded as its de facto organs.<sup>71</sup> There is no need to go here into the controversial issue of the degree of control required in order for it to be effective for this purpose. Suffice it to say that, if State B’s control over the insurgents is effective, the armed conflict is internationalized.<sup>72</sup> In other words, what appears on the face of it to be a NIAC in State A would actually cross the third threshold and qualify as an IAC between States A and B.

Generally speaking, the issue of forcible intervention by State B in State A relates to a less flagrant scenario. The presupposition is that a genuine NIAC is taking place in State A, but State B extends military assistance to the insurgents against the central government of State A. Such military assistance may cross the third threshold and bring about an IAC between State A and B (side by side with the NIAC). However, State B has some elbow room before its action is considered to be crossing the third threshold. Thus, the majority of the International Court of Justice—in the *Nicaragua* case of 1986—did “not believe” that mere “assistance to rebels in the form of the provision of weapons or logistical or other support” rates as an armed attack.<sup>73</sup> Still, the degree of logistical support that can lawfully be extended by State B to insurgents in State A is not free of doubt.<sup>74</sup> At any rate, it is indisputable that—at a certain point—a forcible intervention by State B on behalf of the insurgents against the central government of State A will produce an IAC.

#### **B. Forcible Intervention in Support of the Central Government**

Under customary international law, State B is allowed to forcibly intervene in a NIAC in State A, as long as this is done on behalf of the central government—at its request or, as a minimum, with its consent—and against the insurgents. It is true that, under Article 2 of a 1975 resolution of the Institut de Droit International, “The Principle of Non-Intervention in Civil Wars,” it is forbidden to extend foreign assistance to any party in a “civil war.”<sup>75</sup> But this prohibition is irreconcilable with traditional international law;<sup>76</sup> it runs counter to the statement of the

### *Concluding Remarks on Non-International Armed Conflicts*

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International Court of Justice in the *Nicaragua* case that intervention is “allowable at the request of the government of a State”;<sup>77</sup> and it is equally inconsistent with the more modern practice of States.<sup>78</sup> Contemporary international practice is replete with instances of detachments of armed forces sent by one State to another, at the latter’s request, in order to help in restoring law and order in the face of intractable domestic turmoil.<sup>79</sup>

If State B forcibly intervenes on behalf of the central government of State A against the insurgents, the armed conflict still qualifies as a NIAC—even when State B deploys in State A an expeditionary force engaged in intense hostilities against the insurgents—inasmuch as the troops of State B are not battling another State, but operating jointly with that other State (State A) to quell the insurgency. The legal position remains the same notwithstanding effective control by the insurgents of large areas and despite large-scale casualties that the hostilities entail.

Surely, State B cannot dispatch troops into State A—in order to fight the insurgents within the latter’s territory—against the will of the host government. Any forcible intervention by State B in a NIAC going on within State A must take place with the full consent of the central government of State A.<sup>80</sup> Such consent may be in the form of either (i) an ad hoc request for (or acceptance of) help after the NIAC has started; or (ii) a previous treaty (usually a military alliance or a regional arrangement) in which contracting parties confer on each other the right of intervention in prospective NIACs. (For an example, see the 2002 Durban Protocol of the African Union.)<sup>81</sup>

When consent is granted by State A to entry into its territory of armed forces of State B, in order to carry out military operations against the insurgents, it must be appreciated that—in the language of the International Court of Justice, in its 2005 judgment in the *Armed Activities (Congo v. Uganda)* case—State B is restricted by “the parameters of that consent, in terms of geographic location and objectives.”<sup>82</sup> Moreover, as stressed by the Court, State A’s consent can always be revoked (no formalities being required for revocation, in the absence of a treaty).<sup>83</sup> This is a crucial point. By revoking its consent, State A pulls the rug from under the legality of the presence of the foreign troops and State B must extract them without undue delay.

Any extension of the presence of the armed forces of State B in the territory of State A, beyond the termination of State A’s consent to their presence (plus a reasonable space of time enabling their orderly departure), amounts to aggression,<sup>84</sup> and converts the armed conflict from a NIAC into an IAC between States A and B.

Naturally, there is a problem if the central government of State A disappears (State A thus becoming a “failed State”). In such circumstances, no party to the NIAC can express its consent to foreign intervention in the NIAC, and no

revocation of consent can be issued. This scenario might invite application of the Institut's 1975 resolution concerning non-intervention in "civil wars."<sup>85</sup> The reason is that, should States B and C both intervene militarily in a NIAC in the "failed State" (A)—in support of two opposing organized armed groups<sup>86</sup>—they are likely to clash with each other, with an IAC between States B and C as the outcome.

### **C. Recognition of the Insurgents as the New Government**

Recognition by State B of the leadership of an insurgency as the new central government of State A transforms everything:<sup>87</sup> the newly recognized central government is the one empowered to seek forcible assistance from State B; it is also the one competent to revoke the request for help. Such recognition was extended to the Benghazi authorities by a number of European countries intervening in the Libyan NIAC against the Tripoli government run by Moammar Qaddafi.

Evidently, if State B recognizes the leadership of an organized armed group of insurgents as the new central government of State A, and State C continues to recognize the original central government or recognizes the leadership of another organized armed group as the successor of that government, and if both States B and C militarily intervene in the NIAC in State A, this is likely to develop into an IAC between States B and C.<sup>88</sup>

The Security Council can always adopt a binding decision (under Chapter VII of the United Nations Charter), which will mandate or authorize forcible intervention by other States in a NIAC in progress in State A.<sup>89</sup> Such intervention will certainly be lawful, but (if directed against the central government of State A) it will either turn the NIAC into an IAC or bring about a separate IAC.

## **VI. Interaction**

### **A. Armed Conflict and Criminal Activities**

The outbreak of an armed conflict (whether an IAC or a NIAC) does not entail the cessation of ordinary criminal activities (within the ordinary bounds of the law enforcement paradigm). Indeed, the outbreak of an armed conflict may mean that ordinary crime is on the rise: this is commonly due to (i) psychological reasons linked to times of great tension; (ii) the omnipresence of weapons during an armed conflict; and even (iii) the emergence of numerous new crimes (such as black marketeering or trading with the enemy). In any event, ordinary crimes—even when committed in the course of an armed conflict—are governed not by the *jus in bello* but by the domestic criminal law, subject to the precepts of international human rights.

## *Concluding Remarks on Non-International Armed Conflicts*

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As noted earlier, a NIAC may have criminal motivations.<sup>90</sup> In such cases, it is patently difficult to draw the line between military operations executed against the insurgents in a NIAC and those directed at ordinary criminals. Colombia is a prime example. We heard at this conference that the Colombian armed forces are provided with multicolored cards telling them whether their operations come within the rubric of a NIAC or the law enforcement paradigm (below the threshold).<sup>91</sup> The idea is attractive, but I doubt its efficacy. After all, the two categories of situations are governed by different legal systems, and the training of forces required is by no means the same. The flip of a card may not be sufficient for the government units to adapt themselves instantly to an entirely disparate legal regime.

### **B. Simultaneous NIACs**

More than one NIAC may be going on in a single country at any given time. This transpires when the central government has to contend—usually in distinct parts of a large territory—with assorted organized armed groups having diverse, and perhaps even clashing, aims. (As we heard at this conference, the Philippines presents a vivid illustration.)<sup>92</sup>

A NIAC in one country (State A) may spill over its borders and generate another NIAC within a neighboring country (State B). The situation in the Great Lakes region in Africa (in different time frames) is the most graphic example. In this scenario, insurgents against the central government of State A find temporary shelter within State B and ignite another NIAC, this time against the central government of State B. As long as the two central governments of States A and B (acting separately or in collaboration with each other) wage hostilities only against the insurgents, the two simultaneous conflicts—despite their cross-border effects—remain NIACs. But if the two central governments become embroiled in combat against each other, the armed conflict crosses the third threshold and becomes an IAC.

There is actually a parallel state of affairs in IACs. Two or more IACs between diverse belligerent parties may be going on simultaneously (perhaps in different parts of the world). These separate IACs may spread and even roll into one. Thus, the USSR was part of the Grand Alliance against Nazi Germany from June 1941 on, but it joined the war against Japan only in August 1945.

### **C. Combinations of NIACs and IACs**

There may be multiple combinations of NIACs and IACs, both vertically (along an axis of time) and horizontally (along an axis of space).

Horizontally, the territory of a single State may be ravaged by hostilities that can be categorized as both an IAC (between two or more States opposing one another) and a NIAC (between the central government and an organized armed group or



even between two or more rival organized armed groups vying for power within the State). The dual armed conflicts, international and internal, may commence simultaneously or consecutively (the IAC may be preceded by the NIAC or vice versa). But the point is that—whether synchronized or unsynchronized—the hostilities have separate inter-State and intra-State strands.<sup>93</sup> That is what happened, for instance, in Afghanistan in October 2001: the Taliban regime, having fought a long-standing NIAC with the Northern Alliance, got itself embroiled in a parallel IAC with the United States and its allies as a result of providing shelter and support to the Al-Qaeda terrorists who had launched the notorious attack against the United States on 9/11.<sup>94</sup>

Vertically, armed conflicts may be mixed in two ways. First, an armed conflict may commence as a NIAC but later segue into—or bring about—an IAC. We have already seen how a forcible intervention by State B on the side of insurgents against the central government of State A will trigger an IAC.<sup>95</sup> It should be added that if the central government of State A disappears—and if the insurgents assume control over State A, forming a new central government therein—continuation of the hostilities by State B against the erstwhile insurgents would convert the armed conflict from a NIAC into an IAC, since the armed forces of State B will now be pitted against the new central government of State A.

An alternative vertical scenario arises when an IAC is the outcome of the implosion of a State torn apart by a NIAC and the continuation of the hostilities between the several new sovereign States into which it has fragmented. Such implosion and fragmentation occurred in Yugoslavia in the 1990s. In 1997, the Trial Chamber of the ICTY held in the *Tadić* case that, from the beginning of 1992 until May of the same year, an IAC existed in Bosnia between the forces of the Republic of Bosnia-Herzegovina on the one hand, and those of the Federal Republic of Yugoslavia (Serbia and Montenegro), on the other.<sup>96</sup> Yet, the majority of the Chamber (Judges Stephen and Vohrah) arrived at the conclusion that, as a result of the withdrawal of Yugoslav troops announced in May 1992, the conflict reverted to being a NIAC in nature.<sup>97</sup> The Presiding Judge (McDonald) dissented on the ground that the withdrawal was a fiction and that Yugoslavia remained in effective control of the Serb forces in Bosnia.<sup>98</sup> The majority opinion was reversed by the ICTY Appeals Chamber in 1999.<sup>99</sup> The original Trial Chamber's majority opinion had elicited much criticism from scholars;<sup>100</sup> and even before the delivery of the final judgment on appeal, another Trial Chamber of the ICTY took a divergent view in the *Delalić* case of 1998.<sup>101</sup> Still, the essence of the disagreement must be viewed as factual in nature. Legally speaking, the fundamental character of an armed conflict as an IAC or a NIAC can indeed metamorphose—more than once—from one stretch of time to another.

### *Concluding Remarks on Non-International Armed Conflicts*

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Obviously, as far as fighters in the field are concerned, it may not always be easy to detect at what exact time frame a NIAC has morphed into an IAC: if the ICTY judges—with the advantages of legal expertise and hindsight—could not readily agree on an analysis of the situation in Bosnia in 1992, one can only imagine how much more confusing the position looked from the battlefield perspective. It is therefore easier to wrestle with the situation when a clear-cut interval can be detected between the NIAC and the IAC. The template is Eritrea. This country declared its formal independence from Ethiopia—following a protracted NIAC and a referendum—in 1993. Then, after a period of several years, border disputes between Eritrea and Ethiopia triggered a full-scale IAC in 1998–2000 and reignited further hostilities in 2003. The dividing line here between the NIAC and the IAC (unlike in the former Yugoslav provinces) is easy to delineate.

Just as a NIAC may turn into an IAC, an IAC may turn into a NIAC. Iraq is a good illustration. After the fall of Baghdad in an IAC between the American-led coalition and the Baathist regime, a newly elected government was installed, at which point a NIAC evolved between it and the remnants of the Baathists. The NIAC in Iraq was waged concurrently with the coalition's IAC pursued against the same foe.<sup>102</sup> The IAC came to an end after fierce fighting upon the official termination of American combat operations in Iraq in 2010, but the NIAC does not appear to be over yet.

### *VII. Conclusions*

There is no need to belabor the point that NIACs are taking place all over the world with startling frequency and with alarming intensity. NIACs are certainly more common today than IACs, and the trail of devastation that they leave behind is sometimes colossal. Winning domestic peace subsequent to a sanguinary NIAC may take decades.

These self-evident truths are not always registered in the official gazettes. The reason is that governments are often “in denial,” doing their utmost to ratchet down the applicable threshold of violence. That is to say, when governments are engaged in an IAC, they tend to go one step below, claiming that the armed conflict is under the third threshold. When they are caught in a NIAC, they are reluctant to concede that they are facing an insurgency and are inclined to cling to the fiction that the violence (however protracted and intense) is sporadic and constitutes merely a disturbance below the first threshold.<sup>103</sup> Still, it is the duty of international lawyers to make the right call when IACs or NIACs are taking place, without making concessions to “political correctness” in the eyes of this or that government. We

must constantly bear in mind that correct taxonomy lays the foundation for the application of the right legal regime.

*Notes*

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, reprinted in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 711 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter Additional Protocol II].

2. See *infra* text accompanying note 27.

3. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 19, May 14, 1954, 249 U.N.T.S. 240, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 1, at 999, 1007.

4. See Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts*, 91 *INTERNATIONAL REVIEW OF THE RED CROSS* 35, 39 (2009).

5. *Hamdan v. Rumsfeld*, 548 U.S. 557, 724 (2006), reprinted in 45 *INTERNATIONAL LEGAL MATERIALS* 1130, 1195 (2006).

6. On extraterritorial law enforcement, see YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 268–77 (5th ed. 2011).

7. See Yoram Dinstein, *Terrorism and Afghanistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 43, 51–52 (Michael N. Schmitt ed., 2009) (Vol. 85, U.S. Naval War College International Law Studies).

8. See *infra* Part II.A.

9. *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), reprinted in 35 *INTERNATIONAL LEGAL MATERIALS* 35, 54 (1996) [hereinafter *Tadić Appeals Chamber Decision*].

10. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 1, at 1314, 1320 [hereinafter *Rome Statute*].

11. See Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 *INTERNATIONAL REVIEW OF THE RED CROSS* 69, 78 (2009).

12. See UNITED KINGDOM MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 17 (2004).

13. Additional Protocol II, *supra* note 1, at 777.

14. Rome Statute art. 8(2)(f), *supra* note 10, at 1320.

15. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 *INTERNATIONAL LEGAL MATERIALS* 769 (1999), reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 1, at 1037, 1045.

16. Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Doc. No. CCW/CONF/II/2 (Dec. 21, 2001), reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 1, at 184, 185 n.4 [hereinafter 2001 Amendment].

17. The assumption is that the military units conduct themselves within the ambit of the law enforcement paradigm. If these military units use force in a manner inconsistent with that

### *Concluding Remarks on Non-International Armed Conflicts*

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paradigm, they bring about a crossing of the first threshold. See Arne W. Dahl & Magnus Sandbu, *The Threshold of Armed Conflict*, 45 MILITARY LAW AND LAW OF WAR REVIEW 369, 380 (2006).

18. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 239, 242, 244.

19. See YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 69–70 (2d ed. 2010).

20. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 459, 461–62; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in id.* at 485, 487–88; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in id.* at 507, 512–13; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in id.* at 575, 580–81.

21. See *supra* quotation in text accompanying note 3.

22. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 219 (June 27) [hereinafter *Nicaragua*].

23. See *supra* full quotation in text accompanying note 9.

24. Quoted *supra* in text accompanying note 10.

25. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), *reprinted in* 36 INTERNATIONAL LEGAL MATERIALS 908, 920 (1997) [hereinafter *Tadić Judgment*]. The words “banditry, unorganized and short-lived insurrections” are borrowed from COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 50 (Jean S. Pictet ed., 1952).

26. See especially Prosecutor v. Boškoski & Tarčulovski, Case No. IT-04-82-T, Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

27. Additional Protocol II, *supra* note 1, at 777.

28. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶¶ 4464, 4466 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter *AP COMMENTARY*].

29. LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2d ed. 2000).

30. *AP COMMENTARY*, *supra* note 28, ¶ 4469.

31. See *infra* text accompanying note 89.

32. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 131 (2010).

33. It has been argued that AP II does not apply in the “failed State” scenario where organized armed groups are fighting each other. See A.P.V. ROGERS, LAW ON THE BATTLEFIELD 221 (2d ed. 2004).

34. See Emily Crawford, *Blurring the Lines between International and Non-International Armed Conflicts—The Evolution of Customary International Law Applicable in Internal Armed Conflicts*, 15 AUSTRALIAN INTERNATIONAL LAW JOURNAL 29, 47–48 (2008).

35. See *infra* discussion Part III.

36. See DINSTEIN, *supra* note 6, at 87–91.

37. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 318 (7th ed. 1997).

38. Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 57 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).
39. See Rome Statute, *supra* note 10, at 1319–20.
40. Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), May 3, 1996, S. Treaty Doc. No. 105-1 (1997), reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 196.
41. Second Protocol to the Hague Convention, *supra* note 15, at 1045.
42. 2001 Amendment, *supra* note 16, at 185 n.4.
43. See *supra* text accompanying notes 22 & 34.
44. See Emily Crawford, *Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts*, 20 LEIDEN JOURNAL OF INTERNATIONAL LAW 441, 449–52 (2002).
45. See THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 627 (Dieter Fleck ed., 2d ed. 2008).
46. There is an interesting question relating to the treatment of captured personnel in a NIAC fought between organized armed groups in a “failed State.” Since there is no central government left, and all the organized armed groups in the field are equally shorn of any authority to cloak themselves with the mantle of the State—all of them operating on the same unconstitutional footing vis-à-vis each other—the construct of treason cannot be factored into the equation. Hence, none of the groups can justifiably claim that its opponents are rebelling against the State’s authority. That being the case, why should the diverse groups not apply to the captured personnel of their foes the rules pertaining to the status of prisoners of war?
47. See Jann K. Kleffner, *From “Belligerents” to “Fighters” and Civilians Directly Participating in Hostilities—On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference*, 54 NETHERLANDS INTERNATIONAL LAW REVIEW 315, 321 (2007).
48. MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY ¶ 1.1.2 (2006).
49. HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 305 (2010).
50. See *supra* Part I.A.
51. See discussion *infra* Part IV.A.
52. See ROGER O’KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 98 (2006).
53. See YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 34 (2009).
54. To be examined *infra* Part IV.A.
55. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 715.
56. See STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 258–59 (2005).
57. See the decision of the Privy Council in *Public Prosecutor v. Koi*, [1968] A.C. 829, 856–58 (P.C. 1967).
58. See Richard R. Baxter, *Ius in Bello Interno: The Present and Future Law*, in LAW AND CIVIL WAR IN THE MODERN WORLD 518, 529 (John N. Moore ed., 1974).
59. See *infra* Part V.B.

### *Concluding Remarks on Non-International Armed Conflicts*

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60. *Id.*
61. See *infra* Part V.A.
62. See ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 22–23 (2010).
63. See Vernon A. O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 AMERICAN JOURNAL OF INTERNATIONAL LAW 398, 402 (1937).
64. See the Arbitral Award of 1903, between Britain and Venezuela, in the *Compagnie Générale des Asphaltes de France* case. Here the umpire, F. Plumely, stated the law as follows:

To close ports which are in the hands of revolutionists by governmental decree or order is impossible under international law. It may in a proper way and under proper circumstances and conditions in time of peace declare what of its ports shall be open and what of them shall be closed. But when these ports or any of them are in the hands of foreign belligerents or of insurgents, it has no power to close or to open them, for the palpable reason that it is no longer in control of them. It has then the right of blockade alone, which can only be declared to the extent that it has the naval power to make it effective in fact.
- Compagnie Générale des Asphaltes de France (Gr. Brit. v. Venez.), 9 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 389, 394.
65. See INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 176–78 (Louise Doswald-Beck ed., 1995).
66. See L.H. Woolsey, Editorial Comment, *Closure of Ports by the Chinese Nationalist Government*, 44 AMERICAN JOURNAL OF INTERNATIONAL LAW 350, 353–54 (1950).
67. 1 OPPENHEIM'S INTERNATIONAL LAW 166 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).
68. See Norman J. Padelford, *International Law and the Spanish Civil War*, 31 AMERICAN JOURNAL OF INTERNATIONAL LAW 226, 228 (1937).
69. See discussion *infra* Part V.C.
70. See HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 95 (1947).
71. On this issue, and the controversy surrounding it, see DINSTEIN, *supra* note 6, at 221–24.
72. See Christine Byron, *Armed Conflicts: International or Non-International?*, 6 JOURNAL OF CONFLICT AND SECURITY LAW 63, 81 (2001).
73. *Nicaragua*, *supra* note 22, ¶ 195.
74. See dissenting opinions of Judges Schwebel and Jennings, *id.* at 349, 543.
75. Institut de Droit International, Resolution, *The Principle of Non-Intervention in Civil Wars*, 56 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 545, 547 (1975) [hereinafter Institut de Droit International Resolution].
76. See James W. Garner, *Questions of International Law in the Spanish Civil War*, 31 AMERICAN JOURNAL OF INTERNATIONAL LAW 66, 67–69 (1937).
77. *Nicaragua*, *supra* note 22, at 246.
78. Cf. Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRITISH YEAR BOOK OF INTERNATIONAL LAW 189–252 (1985).
79. See 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 67, at 435–36.
80. See DINSTEIN, *supra* note 6, at 119.
81. Protocol Relating to the Establishment of the Peace and Security Council of the African Union (AUPSC), July 9, 2002, reprinted in AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN, AND JUDICIAL ISSUES 161, 163 (Jeremy I. Levitt ed., 2003).

82. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 52 (Dec. 19).
83. *Id.*, ¶ 47.
84. See Article 3(e) of the 1974 General Assembly Definition of Aggression resolution. G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9890 (Dec. 14, 1974), reprinted in 29(1) RESOLUTIONS OF THE GENERAL ASSEMBLY 142, 144 (1974). Such conduct is now a crime. See Article 8 *bis* (2) of the Rome Statute of the International Criminal Court, as amended in Kampala in 2010. Res. RC/Res.6, Annex I ¶ 2, U.N. Doc. RC/Res.6 (June 11, 2010), reprinted in 49 INTERNATIONAL LEGAL MATERIALS 1334, 1335 (2010).
85. Institut de Droit International Resolution, *supra* note 75.
86. For an example, see CHRISTINE D. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 96 (3d ed. 2008).
87. See *supra* text accompanying notes 68 & 70.
88. Cf. with *supra* text accompanying note 86 of circumstances when two States militarily intervene in a NIAC in a “failed State.”
89. For an illustration, see UN Security Council Resolution 1973 concerning the situation in Libya. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).
90. See *supra* text accompanying note 11.
91. Juan Carlos Gomez, *Twenty-First-Century Challenges: The Use of Military Forces to Combat Criminal Threats*, which is Chapter XIII in this volume, at 279.
92. See Raymundo B. Ferrer & Randolph G. Cabangbang, *Non-International Armed Conflicts in the Philippines*, which is Chapter XII in this volume, at 263.
93. See Christopher Greenwood, *The Development of International Humanitarian Law by the International Tribunal for the Former Yugoslavia*, 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 97, 117 (1998).
94. See Christopher Greenwood, *International Law and the ‘War against Terrorism,’* 78 INTERNATIONAL AFFAIRS 301, 309 (2002).
95. See Jelena Pejić, *Status of Armed Conflicts*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 77, 92 (Elizabeth Wilmshurst & Susan Breau eds., 2007).
96. Tadić Judgment, *supra* note 25, ¶ 569.
97. *Id.*, ¶ 607.
98. *Id.*, ¶ 7 (McDonald, J. dissenting).
99. Tadić Appeals Chamber Decision, *supra* note 9, ¶ 157.
100. See, e.g., Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 236–42 (1998).
101. Prosecutor v. Delalić et al., IT-96-21-T, Judgment, ¶¶ 199–234 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), reprinted in 38 INTERNATIONAL LEGAL MATERIALS 57, 58 (1999).
102. See Yoram Dinstein, *Concluding Observations: The Influence of the Conflict in Iraq on International Law*, in THE WAR IN IRAQ: A LEGAL ANALYSIS 479, 482 (Raul “Pete” Pedrozo ed., 2010) (Vol. 86, U.S. Naval War College International Law Studies).
103. For a list of cases in which governments refused to admit that internal violence had crossed the first threshold, see EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 42 (2008).