Non-international armed conflict: a trigger for the rules on targeting?

Masterproef van de opleiding

‘Master in de rechten’

Ingediend door

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Promotor: An Cliquet

Commissaris: Anemoon Soete
“Hospitals, water and electricity are always the first to be attacked. Once that happens people no longer have services to survive.”

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My Erasmus program in Aarhus played a role that may not be underestimated. In the semester I lived in Denmark, I followed the course ‘The Law of the Armed Conflicts’. It is in this course that my fascination for this topic grew. Therefore, I would like to express my sincere gratitude to the teachers of that course. I would also like to thank my promotor, An Cliquet, for her help and advice.

I would like to thank my parents for giving me their unconditional support in everything I do. Without their help and love, this would not have been possible. The same stands for my sister, Ineke, whose enthusiasm and empathy I really appreciated. Lastly, I would like to thank all my friends who sat by me throughout the process of writing. All these friends have enlightened my hours at the library.

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12 May 2016
### List of abbreviations

<table>
<thead>
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<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AP I</td>
<td>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977</td>
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<tr>
<td>AP II</td>
<td>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977</td>
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<td>CA 3</td>
<td>Common Article 3 to the Geneva Conventions</td>
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<tr>
<td>Committee</td>
<td>Committee for the protection of Cultural Property in the Event of Armed Conflict</td>
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<td>GC</td>
<td>Geneva Conventions</td>
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<td>IAC</td>
<td>International armed conflict</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICTR</td>
<td>International Criminal Tribunal of Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<tr>
<td>ILC Articles</td>
<td>Draft articles on Responsibility of States for Internationally Wrongful Acts</td>
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<td>NIAC</td>
<td>Non-international armed conflict</td>
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<td>R2P</td>
<td>Responsibility to protect</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention of the Law of Treaties</td>
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1. Introduction

On the 27th of March 2016, international newspapers reported that the Syrian government forces, with the support of Russian airstrikes, had recaptured the city of Palmyra from the non-state actor Daesh. With the aim of regaining control over the city, Syrian government used forces on the ground who had the permission to directly target the fighters of the armed group. By using weapons, over 400 fighters died in the battle, which was said to be the biggest defeat for the armed group so far. Several days after the victory of the governmental forces, it became clear that the ruins of Palmyra were damaged during this fight over control.

As the death of the 400 fighters might be unlawful under domestic law, the question arises whether international law renders the above hostilities lawful. But does international law regulate conflicts with a non-state actor as a party to it? Does international law regulates targeting in non-international armed conflicts? International law, in nature, seems to only regulate interaction between two or more states.

Non-state armed groups such as militias, rebel groups, transnational networks, pirates and criminal organizations, often symbolize the social problems within the territory of a state. Political instable states may create an environment in which non-state actors can find an audience to revolt against the local government. In the last decade, these armed groups have been challenging the sovereignty of states more and more. The traditional non-state actors, such as drugs cartels, are no longer the only non-state actors battling with a state. The new generation of contemporary non-state actors uses brutal and merciless violence.

Although states may entitle non-state actors as terrorist or criminals, one cannot simply ignore armed groups. The majority of the conflicts being fought today are mostly conflicts between states and non-state actors. Armed groups are challenging states all over the world. On the territory of Syria, Iraq,

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Nigeria, Brazil, Honduras and Thailand, local governments have been engaging in hostilities against non-state actors.  

This dissertation will firstly analyze the concept ‘non-international armed conflict’. In order to know whether the rules on targeting apply to such conflict, it is necessary to define the concept. However, several difficulties arise when defining these conflicts. The contemporary conflicts are no longer conflicts between one state and one non-state actor. In the above example, Syrian government recaptured Palmyra with the support of a foreign state. Chapter 3 will therefore examine the influences of third parties on the classification of the conflict. Moreover, conflicts may be fought on the territory of several states. As this may affect the classification, chapter 3 will analyze the classification.

Once this thesis has defined non-international armed conflicts, chapter 4 will discuss the general legal framework of non-international armed conflicts. Before analyzing the rules on targeting, it is important to analyze the legal instruments regulating targeting. Chapter 5 will analyze whether these conflicts trigger the rules on targeting. Throughout this thesis, the non-state actor Daesh and its conflicts with the Syrian and Iraqi’ governments will be used to clarify some ambiguities.

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2. Classification

2.1. Introduction

Conflicts seem to be a part of our DNA, as soon as power is at stake, people resort to violence. Throughout the history of humanity, there have been a numerous amount of military conflicts. Ancient Rome, the middle-ages, the great British Empire or the late modern period, each period was known for its conflicts. However, not all these conflicts are identical. Conflicts can not only be fought between two states; it is also imaginable that a state is in warfare with a non-state actor. Moreover, two non-state actors may fight against one another on the territory of a state. Therefore, international law classifies armed conflicts into two groups. On the one hand, conflicts can be international in character; on the other hand, conflicts can be non-international in character. International and non-international conflicts are distinctive and strictly classified. A conflict is either international or non-international.6

This distinction is the result of the rules that formerly applied to armed conflicts throughout the history of conflicts. Before the end of the Second World War, the international laws of war only applied to war between states.7 Since the peace of Westphalia, war was considered to be fought between sovereign nation-states.8 The peace of Westphalia focused on the concept of ‘modern sovereign nation-state.’ Heretofore, religion was the main reason to start a war. Thus, religion distinguished wars fought against those of the same religion from wars fought against those of another religion.9 At the end of the 16th century, it became the predominant view that theologians should rather deal with moral questions than with questions concerning international politics. A quote of the Italian scholar GENTILI clarifies this new view: “Silete theologi in munere alieno.”10

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6 Nonetheless, it has been suggested to create a new category of conflicts. This category would contain the transnational conflicts which are conflicts that have an extraterritorial element. This thesis will analyze this suggestion in chapter 3.6.


10 This phrase can be translated as follows: “let theologians be silent on topics outside their domain”; D. PANIZZA, “Political theory and jurisprudence in Gentili’s De Iure Belli: The great debate between ‘theological’ and ‘humanist’ perspectives from Vitoria to Grotius”, Institute for International Law and Justice Working Papers,
In this atmosphere, states signed the treaty of Westphalia. European states, taking this treaty into consideration, mostly abandoned religion as a reason for war.\textsuperscript{11} Henceforth, more ‘enlightened’ reasons to engage to war came to the fore. According to the author VON PUFFENDORF, states had to respect the rules of war in international conflicts. This author highlighted the need for ‘prudential limits to what one should do in a war’ by underlining that humanity requires that ‘one should limit acts of violence to those that are actually necessary’.\textsuperscript{12} Moreover, he stated that war appears in only two forms: the declared wars and the undeclared wars. Non-international conflicts were covered by the last category.\textsuperscript{13}

In the 18\textsuperscript{th} century, states still followed this distinction.\textsuperscript{14} The author DE VATTEL declared that if an internal conflict challenged the sovereignty of a state, the sovereign did not have to respect the laws of war. On the other hand, if a conflict would escalate into an international war, the laws of war applied. DE VATTEL described this in his work as follows: “When the nation is divided into two absolutely independent parties, who acknowledge no common superior, the State is broken up and war between the two parties falls, in all respects, in the class of public war between two different Nations. […] The obligation upon the two parties to observe towards each other the customary laws of war is therefore absolute and indispensable, and the same which the natural law imposes upon all Nations in contests between State and State. […] [I]t is perfectly clear that the common laws of war, those principles of humanity, forbearance, truthfulness, and honor […] should be observed by both sides in a civil war.”\textsuperscript{15} Thus, if the conflicts reach a certain level of intensity, laws of war would be applicable. The criteria that needed to be fulfilled were very strict. The sovereign state only recognized the belligerent party if it had acquired state-like qualities.\textsuperscript{16}


\textsuperscript{14} It is not without any importance to mention the author OPPENHEIM. In his opinion, internal armed conflicts, or civil wars, may not be considered as real wars \textit{sensu stricto}. The strict sense of the term ‘war in international law’ was reserved for conflicts between states; \textit{See} R. BARTELS, “Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts”, \textit{International Review of the Red Cross} 2009, vol. 91, (35) 47-48.


The Second World War was a game changer for the international regulation on non-international armed conflicts (hereinafter: NIAC). After the Second World War, international law, as a discipline, began to acknowledge the possibility of extending rights to individuals and non-state actors. In this period, states agreed on the Universal Declaration of Human Rights, which was the first real step in developing human rights. Furthermore, individuals were prosecuted for their war crimes during the Second World War. It is not bewildering that in these circumstances the exemption of the law of war to non-international conflicts was given greater emphasis. The Second World War was not the only conflict that played a particular role; also the Spanish Civil War and other civil wars had a big influence. Regarding the brutal civil wars during the Interbellum, there was a huge demand for international obligations in the event of a NIAC. Before 1949, there was no substantive provision dealing with NIACs, given that war was something international.\textsuperscript{17} The conventions were designed to ‘assist only the victims of wars between States.’\textsuperscript{18}

The adoption of the Geneva Conventions in 1949 established a bifurcation in international humanitarian law (hereinafter: IHL). On the one hand, most of the provisions applied, and still apply, to international armed conflicts (hereinafter: IAC). The conventions regulate ‘all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties.’\textsuperscript{19} In other words, the Conventions apply to inter-state armed conflicts. On the other hand, these conventions govern NIACs. During the process of drafting the Geneva Conventions, the International Committee of the Red Cross (hereinafter: ICRC) proposed to stretch the applicability of the Geneva Conventions in their entireness to NIACs.\textsuperscript{20} Although the majority of the status refused this proposal, they agreed to incorporate one single provision. This Common Article is applicable ‘[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.’\textsuperscript{21}

States confirmed the distinction when they adopted the Protocols Additional to the Geneva Conventions. Whereas Additional Protocol I (hereinafter: AP I) stipulates rules applicable to IACs,

\textsuperscript{19} Art. 2 GC I-IV.
\textsuperscript{21} Art. 3 GC I-IV.
Additional Protocol II (hereinafter: AP II) contains rules relating to the Protection of Victims of Non-International Armed Conflicts.

The importance of the classification cannot be underestimated. Each conflict has its own applicable law. Depending on who is a party to the conflict, other rules will apply. These rules are often called the *jus in bello* which regulate the conduct of the hostilities during a conflict. The rules on targeting will therefore differ depending on which conflict is taking place. Considering the historical distinction, it is questionable whether the legal framework of NIACs govern targeting. As the identification of a conflict is crucial for the application of the law and for answering the main question of this thesis, the following chapter will examine which conflicts can be classified as NIACs.

### 2.2. International armed conflict

#### 2.2.1. Common Article 2 of the Geneva Conventions

Article 2 common to the four Geneva Conventions determines that the treaty law applies to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance […].”

22 The conflict may only be qualified as an IAC if there is conflict between High Contracting Parties. In other words, Common Article 2 to Geneva Conventions only covers conflicts between two states. The protection provided by the Geneva Conventions comes into play when a state directly or indirectly intervenes in another state’s territory.

According to this provision, an international conflict occurs when there is a declaration of war, armed conflict or occupation. In the *Tadić* case the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) stated that “*an armed conflict exists whenever there is a resort to armed force between States.*”

23 In other words, an IAC takes place when one, or even more states, has used armed force against another state. Authors have been suggesting that the conflict must reach a certain level of intensity.

24 The majority of the doctrine interprets the judgment in the *Tadić* case correctly. They plead for a low threshold based on the fact that the ICTY does not refer to a threshold.

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22 Art. 2 GC I-IV.
2.2.2. Applicable law

Once a conflict reaches the threshold of an IAC, various rules will apply. The Geneva Conventions are entirely applicable to an IAC. AP I also applies, just as customary international law. Other treaties and legal sources apply to IACs. However, it is beyond this thesis to examine the applicable law in detail as this dissertation focuses on NIACs.

2.3. Non-international armed conflict

Throughout history, there have been a numerous amount of NIACs. Ancient Rome knew several civil wars, in the Middle Ages cruel civil wars took place, during the interbellum there was a brutal civil war in Spain, etc. NIACs are said to constitute ‘the most frequent and cruelest form of armed conflict’. Violence used by non-state actors may have enormous consequences for climate, biodiversity and citizens. In the 21st century, these conflicts play an important role in modern society. Almost each day a newspaper reports about terrorist attacks around the world or airstrikes in Syria. The conflicts between a state and a non-state actor are no longer a topic that only concerns the state. Everyone is affected by these conflicts; moreover, citizens are often the victims of these conflicts.

As mentioned above, NIACs have long been under-regulated. Common Article 3 (hereinafter: CA 3) to the Geneva Conventions was the first step in the right direction, but this was still too little. In the last decades a lot of initiatives were taken to regulate NIACs. The imbalance in regulations between NIACs and IACs has been partially removed. The applicability of customary rules, for example, closes the existing gap between NIACs and IACs. More and more treaties contain articles, which expand the normative framework concerning NIACs. This thesis will examine the applicable law, while focusing on the rules on targeting, in chapter 4 and 5.

Still, some of the answers on particular questions remain uncertain. Is each conflict between a non-state actor and a state a NIAC? Do the hostilities need to reach a certain level of intensity? Is there another threshold that has to be reached? Furthermore, most of the conflicts are no longer pure interstate or intra-state conflicts as, for example, a state could offer military aid to another state or a state could offer financial aid to a non-state actor. Is it still right to call this a NIAC or does this conflict becomes international in character? Lastly, does a NIAC only exist in case of hostilities between a state

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27 See chapter 2.1, p. 4-5.
and a non-state actor or does CA 3 also apply to conflicts between non-state actors on the territory of a state?

It is difficult to classify a situation of violence within a state as a NIAC. The diversity of the regulation makes it even more challenging. There are three possible situations. In the first situation, the hostilities do not reach a certain threshold. Below the threshold, a conflict will be considered as an internal tension or internal disturbance. Domestic law and human rights law will regulate the conflict. In the second situation, the hostilities reach the lower threshold of CA 3. Lastly, the hostilities can satisfy the higher threshold of AP II. Only the last two situations will be analyzed, as international law does not apply to internal disturbances.

2.3.1. Common Article 3 Geneva Conventions
The Geneva Conventions focused on the regulation of international armed conflicts. Yet the drafters, keeping the Spanish Civil War in mind, provided a minimum of protection in case of a NIAC. Despite the revolutionary character of CA 3, as it was the first step in making IHL directly applicable to a NIAC, it was very minimalistic.

This article stipulates that: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions...”

Thus, a conflict will only be classified as a NIAC if an armed conflict takes place on the territory of a state and this armed conflict is not of an international character. Unfortunately, this ‘negative’ definition is rather vague as it only refers to the fact that there should be at least one non-state actor. This is wide and un-precise, making the definition of CA 3 easy to satisfy.

It remained silent for a long time on this matter. Although several authors had attempted to define a NIAC, none of these definitions where seen as authoritative. In 1995, the Appeals Chamber of the ICTY referred in the Tadić case to a NIAC as “an armed conflict whenever there is a resort to armed force or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” The conflict reaches the threshold each time it can be defined as

29 Art. 3 GC I-IV.
31 ICTY 2 October 1995, Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.
‘protracted armed violence.’ This characterization was innovative in various respects. Firstly, it encompasses a broad variety of conflicts between non-state armed groups and states, as it only requires the satisfaction of a low threshold. Secondly, this interpretation also covers the conflict in which no government is involved, when two or more non-state actors are fighting war against each other.

Two years later, the Trial Chamber added two fundamental criteria according to which this condition should be assessed: “The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”

This judgment implies an obligation for the non-state actor to be organized at a certain degree. Secondly, the level of violence or fighting must reach a certain level of intensity. These two components cannot be described in rather abstract terms and must be tested on a case-by-case study by weighing up a host of indicia. One may not forget that a NIAC must have parties to the conflict. An armed conflict regulated by CA 3 may be a conflict between a state and a non-state armed group or alternately, a NIAC may appear between two non-state actors on the territory of a state.

The Trial Chamber stated that these elements are the keystones of a NIAC. These factors separate a NIAC from an internal strife or civil disturbance. If a situation is regarded as an internal strife, IHL does not apply. Disorderly demonstrations, rallies and protests are examples of internal disturbances. Although these events might cause colossal damage or might be cruel, they do not become a NIAC as

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32 ICTY 2 October 1995, Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.
34 ICTY 7 May 1997, Prosecutor v. Dusko Tadić, Case No. IT-94-1-T, Opinion and Judgment Trial Chamber, para. 562.
35 ICTR 6 December 1999, Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgment Trial Chamber I, para. 93.
36 ICTY 2 October 1995, Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.
37 ICTY 7 May 1997, Prosecutor v. Dusko Tadić, Case No. IT-94-1-T, Opinion and Judgment Trial Chamber, para. 562.
long as they are sporadic and isolated. Only when the internal violence has reached the threshold, the conflict will be classified as a NIAC. The Arabic Spring is a good example on this topic. The protests that brought down the regime of H. Mubarak did not satisfy the conditions, even though it affected the civilian population.

The importance of this interpretation cannot be underestimated. The ICTY repetitively quoted the judgment of the Tadić case. In the Limaj case, the ICTY noted that: “The two determinative elements of an armed conflict, intensity of the conflict and level of organization of the parties, are used “solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and shortlived insurrections, or terrorist activities, which are not subject to international humanitarian law.” Several international criminal courts, like the Special Court for Sierra Leone (hereinafter: SCSL) and the International Criminal Court (hereinafter: ICC), refer to this formula. Moreover, this definition is not only cited by criminal courts. The reasoning of the Tadić case inspired the judgments from nationals courts, the Human Rights Council and the ICRC.

2.3.1.1. Organization

2.3.1.1.1. General remarks
A non-state armed group must have a certain degree of organization with a command structure in order to be a party to a NIAC. In case of conflict between a state and a non-state actor, the state armed forces are assumed to reach the requisite level of organization. It is only in extreme circumstances, such as state disintegration, that the level of organization needs to be assessed. In case of a conflict between two non-state actors, each party must have this certain level of organization.

The International Criminal Tribunal of Rwanda (hereinafter: ICTR) and the ICTY attempted to implement this particular condition. The ICTY interpreted the minimal requirement in the Boskoski

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40 ICTY 30 November 2005, Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment Trial Chamber II, para. 89.
42 ICC 29 January 2007, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, para. 233.
45 ICTY 3 April 2008, Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Judgment Trial Chamber, para. 60.
case as follows: “While the jurisprudence of the Tribunal requires an armed group to have “some degree of organization”, the warring parties do not necessarily need to be as organized as the armed forces of a State.”\textsuperscript{47} According to this judgment, there is no need to be organized like the armed forces of a state, thus this is a rather minimal requirement. In the \textit{Limaj} case, the ICTY stated that ‘some degree of organization by the parties will suffice.’\textsuperscript{48} On the other hand, the ICTR referred in the \textit{Akayesu} case to ‘armed forces organized to greater or lesser extent’\textsuperscript{49}, implying a threshold that is not stringent.

2.3.1.1.2. Indications
As mentioned before\textsuperscript{50}, this criterion is evaluated on a case-by-case test. The ICTY has worked out different indicia that assist in identifying a NIAC.\textsuperscript{51} The absence of these indications are not decisive as a conflict may still be classified as a NIAC, even without the existence of several indicia. In other words, these are not minimum factors that must be present but rather indications of organization.

The \textit{Boskoski} Trail Chamber categorized these indicators into particular groups.\textsuperscript{52} Some indicate a logistical ability, other indicators are related to the implementation of obligations of IHL. Some indicate a command structure while other suggest that the group can carry out organized military operations. Lastly, some indicia demonstrate the ability to speak with a unified voice and negotiate and conclude agreements such as peace accords.\textsuperscript{53}

In several cases the ICTY points out the existence of these different indications. The relevant factors are as follows: the existence of a command structure\textsuperscript{54} and internal regulations\textsuperscript{55} and disciplinary procedures within the group\textsuperscript{56}; the use of uniforms\textsuperscript{57}; the different modes of used communication\textsuperscript{58}; the existence of headquarters\textsuperscript{59}; the discrete roles and responsibilities of differing entities\textsuperscript{60}; its ability

\textsuperscript{50} See chapter 2.3.1, p. 9.
\textsuperscript{52} ICTY 10 July 2008, \textit{Prosecutor v. Boskoski et al.}, Case No. IT-04-82-T, Judgment Trial Chamber II, paras 199-203.
\textsuperscript{56} ICTY 3 April 2008, \textit{Prosecutor v. Haradinaj et al.}, Case No. IT-04-84-T, Judgment Trial Chamber, para. 60.
to gain access to weapons, other military equipment, recruits\(^61\) and military training\(^62\); the ability of the group to plan, coordinate and carry out military operations\(^63\); the ability to control territory.\(^64\)

Not rarely, a non-state armed group declares in statements that they fall under the jurisdiction of CA 3.\(^65\) These statements are important evidence, which can be very helpfully to classify this conflict as NIAC. Still, the non-state armed group needs to be assessed regarding the facts.\(^66\)

2.3.1.2. Intensity

2.3.1.2.1. General remarks
The threshold of protracted armed violence requires an interpretation based on the specific case. The requirement can be interpreted in different ways. Does the exact number of incidents of violence count? Is the intensity linked with the number of victims? Or is intensity related to the number of persons involved in the fighting? Should the geographic spread of the violence or the duration be considered? Is the choice of military means important? Or should this be assessed considering all the above elements?\(^67\)

2.3.1.2.2. Indications
Intensity is often seen in the jurisprudence as an alternative for protracted armed violence. Although the Tadić case might suggest that the decisive factor is duration\(^68\), duration cannot be the only basis to consider a conflict as a NIAC. The Trial Chamber stated that the requirement of duration is an element of the overall question of intensity.\(^69\) This question can only be answered by looking to a whole host of indicators that are relevant for this determination.\(^70\)

\(^61\) ICTY 30 November 2005, Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment Trial Chamber II, para. 118.
\(^62\) ICTY 3 April 2008, Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Judgment Trial Chamber, para. 60, 86.
\(^63\) ICTY 30 November 2005, Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment Trial Chamber II, para. 108.
\(^64\) ICTY 3 April 2008, Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Judgment Trial Chamber, para. 60, 70-75.
\(^69\) ICTY 7 May 1997, Prosecutor v. Dusko Tadić, Case No. IT-94-1-T, Opinion and Judgment Trial Chamber, para. 562.
Therefore, the international courts have worked out several indicators that assist in determining whether or not the conflict has reached the level of intensity. The absence of these indications are not decisive, even without the existence of several indicia a conflict still can be classified as a NIAC. Thus, these are not conditions that need to exist concurrently.

These objective indicia need to be weighed up against one another to determine the degree of intensity. In the Akayesu case, the Trial Chamber of the ICTR stated that the assessment ought to be done basis of objective criteria: it cannot be left to the subjective judgment of the parties of the conflict.\textsuperscript{71} The Trial Chamber of the ICTY assessed the condition of intensity in the Milosevic case by focusing on the length or protracted nature of the conflict, the seriousness of the armed clashes, the spread of clashed over the territory, the increase in number of governmental forces and the type of weaponry used.\textsuperscript{72} In the Limaj et al. case, the Trial Chamber focused on the seriousness of the armed clashes, the mobilization of troops by the government, the kind of weaponry utilized, the destruction of property, the displacement of local population and the existence of casualties.\textsuperscript{73}

All these factors are summed up in the Boskoski case\textsuperscript{74}: these include the seriousness of attacks and whether there has been an increase in armed clashes\textsuperscript{75}, the spread of clashes over territory and over a period of time\textsuperscript{76}, any increase in the number of government forces and mobilization and the distribution of weapons among both parties to the conflict\textsuperscript{77}, as well as whether the conflict has attracted the attention of the United Nations (hereinafter: UN) Security Council, and whether any resolutions on the matter have been passed.\textsuperscript{78} Trial Chambers also take other indicators into account,

\textsuperscript{74} ICTY 10 July 2008, \textit{Prosecutor v. Boskoski et al.}, Case No. IT-04-82-T, Judgment Trial Chamber II, para. 177.
\textsuperscript{75} ICTY 16 June 2004, \textit{Prosecutor v. Milosevic}, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, para. 28.
\textsuperscript{76} ICTY 7 May 1997, \textit{Prosecutor v. Dusko Tadić}, Case No. IT-94-1-T, Opinion and Judgment Trial Chamber, para. 566.
\textsuperscript{78} ICTY 7 May 1997, \textit{Prosecutor v. Dusko Tadić}, Case No. IT-94-1-T, Opinion and Judgment Trial Chamber, para. 567.
such as the number of civilians forced to flee from the combat zones, the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organizations to broker and enforce cease fire agreements.

The reference to other indicators does not render the role of duration meaningless. In the Boskoski case, the Trial Chamber mentioned that the concept of duration still plays an important role in the assessment of intensity under CA 3. If the violence is of a rather mild level, then the conflict still may become a NIAC when the conflict takes place over an extended duration. On the other hand, if the conflict takes place over a brief duration, then the conflict may still amount to NIAC when other factors indicate a high level of intensity.
2.3.1.3. Case-study: Daesh
For the last few years, the non-state actor Daesh\textsuperscript{96} has been the center of attention in newspapers all over the world. New reports about the conflict between Daesh and the Syrian government or Iraqi government are common. Focusing on the relevance of this conflict, it is key to mention this non-state actor. The analysis of the conflict between the Syrian government and Daesh may help clearing out some ambiguities about the indicators of a NIAC.

A question that might arise is whether CA 3 governs this conflict. CA 3 only regulates the conflict when there is protracted armed violence between the local governments and Daesh. This need to be assessed through two conditions. First of all, Daesh should reach a certain level of organization. Cumulatively, the violence should be of a certain level of intensity.

2.3.1.3.1. Organization
Daesh needs to be organized to a certain degree in order to apply CA 3. As mentioned above\textsuperscript{97}, the international courts have worked out several indicia to determine the level of organization. The organization of Daesh will be assessed through the command structure, the recruiting and military training, the ability to control territory and several other indicia.

In the first place, the command structure will be examined. According to the official reports, Daesh definitely has a certain structure of command. Abu Bakr al-Baghdadi is the supreme political and religious leader in Daesh territory.\textsuperscript{98} Despite having authority, he relies on his adviser and deputies, such as Abu Muslim al-Turkmani, in practice.\textsuperscript{99} In other words, Daesh has a dominant leader but it is also spread over a large territory where the local governors hold significant power.\textsuperscript{100} Furthermore, Daesh has several allegiances, which means accommodation of a decentralized power. Finally, Daesh claims to have direct command over its fighters in Syria and Iraq. In March 2015, IS claimed responsibility for the attack in the Bardo Museum in Tunis.\textsuperscript{101} In November 2015, they also claimed

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\textsuperscript{96} This thesis will use the name ‘Daesh’ instead of ‘ISIS’. As Islamic State is not a real state, the use of this name might cause difficulties.
\textsuperscript{97} See chapter 2.3.1.1.2, p. 11-12.
\textsuperscript{101} H. SAUL & L. DEARDEN, ‘ISIS claims responsibility for Tunisia museum attack and warns deadly shooting is ‘just the first drop of the rain’, The Independent (UK), 19 March 2015, available at:
\end{flushleft}
responsibility for the attacks in Paris in an official statement. Some U.S. officials are nonetheless quite skeptical. In their view, these are isolated attacks that are not coordinated by Daesh. The fact that Daesh claims responsibility for the attacks is also an example for the ability to speak with a unified voice. As the ICTY highlighted the role of the command structure utilized by the Kosovo Liberation Army, one may assume that the chain of command used by Daesh is a decisive indicator to establish the required degree of organization.

Secondly, in the Limaj case, the ability to recruit new members was cited as an indicator through which the level of organization of the non-state armed group may be evidenced. Daesh recruited and attracted approximately 15,000 foreign Islamist radicals from all over the world. Even families travelled from their home countries to the cities controlled by the group in Iraq and Syria. Daesh has also released recruitment videos in the hope that these videos convince people to join their army. Finally, they built up a solid economic base by selling oil from fields under their control. These revenues allow Daesh to provide a proper military training and salary to thousands of their soldiers.

Thirdly, Daesh has control over large parts of territory in the Middle East. In 2014, they seized a third of Iraq’s territory. They seized Mosul, the largest city in the north of Iraq. Almost 2 years later, Daesh still controls the city. They also seized the Iraqi city Kirkuk on the 17th of June 2015. Near this city, Daesh exploits several oil fields. Meanwhile, they seized towns and cities in Syria, such as Palmyra and Idlib. Despite the international counterattack in 2015, Daesh still managed to cling to key territories across Iraq.

Several other indicators can be found as evidence pointing to Daesh being an organized military force. Firstly, Daesh invested in electronic communication, which is used to impress allies and enemies. They


also display their own flag. Thirdly, they secured the formal help of several other Islamist groups in Africa and Asia, such as Boko Haram in Nigeria, Jundallah in Pakistan and the Partisans of the Holy House in Egypt. Lastly, they aided new groups being set up in Algeria.\textsuperscript{108}

Regarding these indicia, Daesh definitely reaches the level of organization. They have the financial and military power to control territory in Syria and Iraq. Despite losing over 40\% of their territory in Iraq in 2015, they still succeed in controlling the more important cities such as Mosul. They do not only have a command structure, there are also other factors which indicate a certain level of organization.

If, purely hypothetical, Abu Bakr al-Baghdadi was charged with crimes against humanity, grave breaches of the Geneva Conventions and violations of the customs of war under articles 2,3 and 5 of the ICTY Statute, the ICC would judge that Daesh reaches the required level of organization. One may not forget that CA 3 only applies if the conflict reaches a certain degree of intensity. The international courts have worked out several indicia to determine the intensity of the conflict.

\textbf{2.3.1.3.2. Intensity}

The spread of clashes over territory and over a period of time is one of the indicators that stands as evidence of the level of intensity. The seriousness of the attacks is another indicator. The presence of these indicators can be evidenced through several examples. In 2014, Daesh captured the second biggest city of Iraq, Mosul. More than 1500 soldiers outnumbered the governmental forces. They even seized six Black Hawk helicopters. These actions were cruel as the Iraqi soldiers were stripped of their uniforms and fled into the streets of Mosul. Finally, they plundered the banks of Mosul and released the prisoners from the jails.\textsuperscript{109} In 2015, they captured the governmental building and seized control over Ramadi. The attempt to take control over Ramadi lasted several months. Not only did Daesh use ground troops, they also used suicide car bombs and mortars.\textsuperscript{110} Iraqi government recaptured Ramadi in January 2016. Their militants retreated from the buildings and streets that were hidden with booby-traps. Most of the streets were mined with explosives so it took more time to rebuild the city.\textsuperscript{111}


Another indicator through which the level of intensity may be evidenced is whether the UN Security Council attaches great importance to the conflict. Several resolutions have been passed by the UN Security Council. On the 20th of November 2015, the Council passed a resolution which called for member states to take all necessary measures on the territory under control of Daesh to prevent terrorist attacks committed by Daesh.\textsuperscript{112} The president of the Council stated that international cooperation is vital in combatting terrorism.\textsuperscript{113}

Lastly, the amount of civilians forced to flee from the combat zones may indicate that the conflict satisfies the condition of intensity. According to the UN, more than 4 million Syrians fled to neighboring countries such as Lebanon, Turkey, Jordan and Egypt.\textsuperscript{114} Due to the rise of Daesh, more than 3.3 million Iraqi fled their homes. In general, the amount of people fled from the combat zones is enormous. This definitely indicates on a high intensity of the violence.\textsuperscript{115}

2.3.1.3.3. Conclusion
The presence of several indicators demonstrates that Daesh reaches the level of organization required by CA 3. The conflicts also satisfy the required level of intensity. The indicators mentioned above are not the only present ones, almost each factor set out by the international courts can be detected. As the conflict fulfills both conditions, CA 3 applies. The question whether this classification triggers the rules on targeting will be analyzed in chapter 5.

\textsuperscript{112} Resolution 2249 of the United Nations Security Council (20 November 2015), \textit{UN Doc. S/RES/2249 (2015)}.
\textsuperscript{113} Statement by the President of the Security Council of the United Nations (19 November 2014), \textit{UN Doc. S/PRST/2014/23}.
2.3.2. Additional Protocol II

CA 3 was the first step in regulating NIACs. Despite the innovating character of the article, it became clear that NIACs were in need of further regulation. Thus, the ICRC drafted a protocol that applied to all armed conflicts not covered by Common Article 2 to the Geneva Conventions. Some states did not agree to this scope of application. France pushed for a definition of the term NIAC.\(^{116}\) Pakistan on the other hand set out a more detailed proposal to amend the scope of application.\(^{117}\) After heavy discussions and multiple adoptions, states approved article 1 of AP II as follows: “This Protocol [...] shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which 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.”\(^{118}\)

The threshold for the application of the Protocol is clearly higher than the one set out in the Geneva Conventions. The applicability of the Protocol is based on several prerequisites. Firstly, governmental forces must be a party to the conflict. Second, the armed groups must be organized under a responsible command. Thirdly, the non-state armed groups need to exercise control over a sizeable part of the territory. Fourthly, the group must have the ability to sustain and concert military operations. Lastly, they must have the ability to implement the Protocol.\(^{119}\) When the conflict does not meet these criteria, the conflict may still be ruled by CA 3, as its threshold is lower. Only if the conditions are fulfilled, AP II will apply to the situation. However, this does not cast aside the applicability of CA 3 as both regulations are compatible.

Just as CA 3, the Protocol does not apply to internal disturbances and the criteria have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict. This dissertation will make a number of precisions about the above criteria.


\(^{118}\) Art. 1 AP II.

\(^{119}\) Art. 1 AP II.
2.3.2.1. State armed forces
The Protocol requires that the armed conflict exists between the armed forces of a High Contracting Party and ‘dissident armed forces or other organized armed groups.’ Government forces need to participate in the hostilities. This narrows the application of the Protocol, as the possibility of armed conflicts between two non-stated actors is not envisaged in this Protocol. In contrast to CA 3, an armed conflict between non-state actors is not encompassed by the Protocol. This requirement is due to the position of Austria during the drafting. They considered that it would be ‘hard to see how Protocol II could be applicable without the presence of a governmental force.’

If an armed group that is fighting against governmental forces could apply the Protocol, there is no reason why it should not be applied to hostilities between two non-state armed groups. It is therefore all the more regrettable that this requirement is stipulated in article 1.

2.3.2.2. Organized armed groups and responsible command
The threshold for the application of AP II is significantly higher than the threshold stipulated in CA 3. AP II does not only require a command structure; it also requires the existence of a responsible command.

In the Hadzihasanovic case, the ICTY interprets this term as follows: “The existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority.” Thus, this implies an organization that is able to impose a discipline in the name of the de facto force.

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120 Art. 1 AP II.
2.3.2.3. Control of territory
The Protocol requires that the non-state armed group must exercise control over a sizeable part of territory. This condition sets the bar high for the application of AP II. It is important to mention that this is not required for the NIAC under CA 3, where control over territory is just an indicator and not a condition. It is not specifically stated how much of the state’s territory must be under control of the non-state armed group. Article 1 only mentions that it must enable the non-state armed group to carry out sustained and concerted military operations and implement the Protocol. In other words, this requirement demonstrates the ability of the armed group. Territorial control can be seen as the proof of the seriousness of the hostilities or as an indicator for the competence of the group to implement IHL. If the armed group can maintain sustained and concerted military operations without controlling a territory, the requirement is still met. The exact total of territory under their control is in this manner irrelevant as it is a rather qualitative issue than a quantitative issue.

In the Akayesu case, the Trial Chamber judged as follows: “the armed group must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.”

2.3.2.4. Sustained and concerted military operations
The non-state actor should be able to carry out sustained and concerted military operations and this should be made possible by controlling the necessary part of the territory. Several questions arise regarding this condition.

Firstly, it is extremely doubtful which level of intensity is required. Some suggest that AP II does not require a higher level of intensity than CA 3. In this matter, sustained should be seen as the equivalent of protracted armed violence rather than requiring a non-stop military operation. The authors refer to several judgments by the ICC Pre-trial Chamber where the Chamber used the words of AP II in the context of CA 3.

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130 ICC 4 March 2009, Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 59.
This goes against one of the purposes behind AP II. Namely, when a conflict of a higher degree of intensity takes place, this should be regulated by stricter rules. When the conflict does not reach this degree of intensity, one should rely on the simpler rule, set out by the Geneva Conventions. Thus, AP II requires a higher level of intensity of violence. More often, this criterion is described as the most important condition. This view finds support in a judgment by the Trial Chamber in the Boskoski case where the Trial Chamber expressively stated that the threshold of protracted violence is lower than the threshold of sustained military operations.  

Sustained military operations are operations that are more or less continuous, although this does not rule out occasional pauses. To satisfy this condition, the operation also needs to be concerted. This requires an organization and a level of planning throughout the whole operation. Sustained and concerted complies with an objective test of the circumstances. However, they imply the more subjective elements of intensity and continuity.

Secondly, it remains unclear whether the non-state actor should actually carry out military operations. In practice, this doctrinal discussion is not remarkably important. It will be impossible for the armed group to achieve and, more important, to maintain the control without sustained and concerted military operations being carried out.

2.3.2.5. Implementation of IHL
Armed groups must have the capacity to implement AP II in order to reach the threshold of AP II. Control over the territory could support the armed group in implementing this Protocol when it, for example, creates the possibility to construct at least the minimum infrastructure needed to care for the wounded and sick.

It is not clear whether or not the sheer ability to implement is sufficient. In the view of this author, only the ability to implement the Protocol is required. If one says that the implementation must be

131 ICTY 10 July 2008, Prosecutor v. Boskoski et al., Case No. IT-04-82-T, Judgment Trial Chamber II, para. 197.
132 ICTY 30 November 2005, Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment Trial Chamber II, para. 168
effective, this ends up in a vicious circle where the Protocol is only applicable when the armed group implements it. Meanwhile, the armed group will only implement AP II if it is applicable. Therefore, there must be given priority to the ability to implement rather than the actual implementation.\textsuperscript{137} This criterion is fulfilled when it is reasonable to expect that the parties will apply IHL, as they have the required infrastructure.\textsuperscript{138}

2.3.2.6. Case-study: Daesh

Chapter 2.3.1.3.3. concluded that the conflicts between the local governments and Daesh have reached the threshold of CA 3. It now remains the question whether AP II applies to the conflict. The threshold of AP II is stricter than the threshold of CA 3 and therefore it is necessary to examine the facts. AP II will only apply if the five criteria are fulfilled.

It is relevant to mention that Syria and Iraq have not ratified this Protocol. This means that AP II will not apply to the conflict, even when the criteria are fulfilled. However, this assessment is not without any relevance as it clears out some possible obscurities by focusing on a practical example.

First of all, national armed forces need to participate. The Iraqi government forces take direct part in hostilities and the Syrian forces also try to push back Daesh. By using military forces, they try to defeat Daesh.\textsuperscript{139} At the end of March 2016, Syrian government succeeded in recapturing Palmyra after weeks of fighting against Daesh.\textsuperscript{140} In the armed conflict between the Iraqi government and Daesh, AP II could apply if the other conditions are fulfilled. Often, governmental forces get back-up by other states. For example, Iraq is backed by an air support from an international coalition led by USA. Russia supports the Syrian government in pushing back Daesh with airstrikes.\textsuperscript{141} Sometimes, states take the initiative

to use air forces on the headquarters of Daesh, this in a reaction on terrorist attack in their home countries.\textsuperscript{142} It is questionable whether the conflict remains non-international in this context\textsuperscript{143}.

The satisfaction of the above condition is clearly not sufficient to determine whether AP II applies to the conflict. It is also obliged that Daesh has a degree of organization with a responsible command. As mentioned in the analysis of Daesh under CA 3\textsuperscript{144}, it definitely has some degree of organization. Even more, one could notice that the organization has some sort of hierarchical system with a leader at the top. This structure makes it possible to carry out military operations in order to achieve and maintain effective control of territory.

Furthermore, this organization has seized a remarkable part of the territory in Iraq and Syria. It took control over Falluja in 2014 and it seized the Northern city Mosul on the advance to Bagdad. In June 2014, their leader Abu Bakr al-Baghdadi stated that Daesh seized control over large parts of territory in Syria and Iraq.\textsuperscript{145} As oil fields are the key financial sources, they try to capture these fields all over Syria and Iraq. Consonant with the Protocol, the control over the territory enables Daesh to implement the protocol and to enable to carry out sustained and concerted military operations.

The first three conditions are fulfilled but it remains the question whether Daesh has carried out or whether it has the ability to carry out sustain and concerted military operations. The answer is not solely depending on the subjective views of the parties. Moreover, this should be objectively assessed regarding the given circumstances. These criterions imply intensity and continuity. According to the ICRC, military operations do not have this character in the early stage of the hostilities. However, CA 3 may apply at this stage. It is clear that the situations in Iraq and Syria are in a much further stage. The hostilities have been going on for over a year, which definitely indicates on a certain persistence. Not only are the hostilities sustained, they are also concerted. Stating otherwise would mean that it is possible to hold control over big cities such as Mosul without any strategic plan.


\textsuperscript{143} This will be discussed in chapter 3.6.3, p. 42-43.

\textsuperscript{144} See chapter 2.3.1.3.1, p. 17.

Lastly, Daesh should be able to implement IHL. The fact that Daesh violates this Protocol en masse by, for example, targeting civilian objects does not mean that this criterion cannot be fulfilled. It is only required that one could reasonably expect, based on its infrastructure, that Daesh will implement AP II. Although these criteria are fulfilled, this assessment remains purely hypothetical as Syria and Iraq have not ratified the Protocol.

2.3.3. Third type of non-international armed conflict?
Several authors introduced a third type of NIACs based on the ICC Statute dealing with war crimes in a NIAC. Like the above thresholds, the Statute creates a threshold at which other rules of law would apply.\textsuperscript{146} This proposition is based on article 8(2)(f) which deals with war crimes in a NIAC when there is a protracted armed conflict between the government and opposition groups or between such groups.\textsuperscript{147} Indeed, this article refers to the judgment from the \textit{Tadić} case, where the ICTY tried to determine the scope of application of CA 3. This provision emphasizes the importance of the duration of the conflict. However, the ICTY has already mentioned that duration is one of the indicia that should be taken into account when judging intensity. In other words, this article does not create a third threshold, which falls between the two other thresholds, as it simply refers to the intensity test set forward by the ICTY.\textsuperscript{148}

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\textsuperscript{146} S. VITE, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations, \textit{International Review of the Red Cross} March 2009, vol. 91, (69) 80-83.  \\
\textsuperscript{147} Article 8(2)(f) Statute of Rome.  \\
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3. Controversial classification

3.1. Introduction

Some conflicts, in nature non-international, have an extraterritorial element that may affect their classification. One state may intervene directly on the territory of another state to fight against a non-state actor. Is this still a NIAC or does this conflict become an IAC, as it takes place on a larger scale? A state could also assist the non-state actor in seizing control. Does this conflict render international in character?

Not only does this arise questions concerning the applicability of IHL, the lawfulness of the intervention is questionable as well. Taking a closer look to AP II, one can notice that article 3 states: “Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.” Deduced from this article, there is a principle of non-intervention. This principle does not only make part of the legal framework of NIACs, moreover, it is seen as a general principle of international law. In the Nicaragua Judgment the International Court of Justice (hereinafter: ICJ) declared that this principle is part of customary international law. Following from this article and judgment, extraterritorial conflicts seem to be unlawful. Nonetheless, more and more states engage in military intervention in NIACs all over the world. It has almost become common state practice to intervene in civil wars based on the invitation of an incumbent government that the principle of non-intervention ‘may seem to have been stood on its head.’

This state practice should be seen in light of the entire Nicaragua Judgment. Although the ICJ confirmed the customary status of the principle, it also provided an exoneration. In this case, the ICJ linked the principle of non-intervention to the sovereign rights of states. The ICJ held that it is the right of every sovereign state to conduct its affairs without outside interference. This implies the ability

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to invite another state to help solving the internal affairs. According to the ICJ, intervention is lawful at the request of the local government.\textsuperscript{154} Rational reasoning forms the basis of this solution, as it is impossible to argue that the invited state denies the sovereign rights of the inviting state whenever a local government of a state asks another state for assistance in restoring law and order.\textsuperscript{155}

This practice was confirmed by the ICJ as it did not question the right of Uganda to send troops to Congo based on the consent of the Congolese government.\textsuperscript{156} Several more recent examples show that this remains the contemporary practice of states. In 2013, the government of Mali asked on the buzzer for military assistance by France when the insurgents were almost victorious.\textsuperscript{157}

Additionally, the growing consciousness of responsibility to protect (hereinafter: R2P) has limited the application of the principle of non-intervention.\textsuperscript{158} A High-Level Panel on Threats, Challenges and Change created this principle of R2P by request of the UN Secretary – General Koffi Annan. R2P was described as follows: "there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."\textsuperscript{159} The first responsibility lies with the individual states who have the responsibility to protect their people from war crimes. It is only when the individual state fails in protecting its population that the Security Council has the power to decide whether collective action will be taken in a timely and decisive manner. This is an exclusive authority for the UN Security Council as individual states, or groups of states, may not intervene militarily against any incumbent government without the consent of the Security Council. The foreign state may still intervene by invitation or consent of the local government. The examination whether international law allows collective or individual self-defense against non-state actors is beyond this thesis and will therefore not be discussed. This dissertation will only focus on the classification of the conflict without examining the legality of the interventions.

\textsuperscript{154} ICJ 27 June 1986, Case Concerning the Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, Judgment, para. 126.  
3.2. Foreign state supporting the local government versus non-state actors

3.2.1. Consent
Not rarely does an assisting state fight alongside the armed forces of the local government against an organized armed group.\textsuperscript{160} The helping state intervenes on the territory of the host, based on a cry for aid by the local government. Although these invitations are in most cases not officially pronounced, one may assure that the intervention is based on the consent of the hosting state. This is a lawful action, following from the judgment in the \textit{Nicaragua} case. However, the ICJ does not mention the validity of the consent. Obviously, a consent may not be given against the rules of the domestic law, nor may it be against the will of the hosting country. The expression of the invitation must be the outcome of intellectual deduction and not the outcome of internal or external pressure. A retroactive consent by an installed government, as a result of the foreign intervention, is flawed.\textsuperscript{161}

This consent sets out the parameters according to which the assisting state may take military actions. The military actions are restricted by the geographic location and objectives described in the consent. Military operations in contravention of these conditions are an act of aggression which constitute a crime under the Rome Statute of the ICC.\textsuperscript{162}

Once the consent is given, the incumbent government always has the right to revoke its consent. For example, even if the consent is given in an \textit{ex-ante} treaty, the state still has the opportunity to revoke the consent at the moment of truth.\textsuperscript{163} After the revocation of the consent, each military action will be illegal and the assisting state must recall all their troops as soon as possible. The process of withdrawing of the troops may take some time, depending on the amount of troops, the weather or the availability of transport.

3.2.2. Classification
There are two approaches to determine whether the intervention of a foreign state in an internal conflict at the invitation of the hosting state affects the classification. The first approach pleads for a change in classification. For example, the ICRC came up with a proposal to transform all conflicts to an IAC whenever there is a foreign intervention.\textsuperscript{164} This proposal has been rejected by the states, mostly

\textsuperscript{162} Article 8bis(2) of the Rome Statute of the ICC.
\textsuperscript{164} ICRC, Protection of Victims of Non-International Armed Conflicts, Document presented at the Conference
because of the fear that opposition groups would call for outside assistance. Some authors still suggest that a foreign intervention, in assistance of the local government, renders the entire armed conflict international in character.\textsuperscript{165} As the intervention changes the conflict fundamentally, the author ALDRICH suggests to transform the conflict into an IAC. His view is based on the Vietnam War, where it was impossible to apply the different rules to IACs and NIACs in a conflict with two different sides.\textsuperscript{166}

There should be given support to the view where the conflict does not transform into an IAC as the conflict remains a conflict between a state and an opposition group. This is based on the theory of pairings, which holds that the conflict should be divided into its separate components.\textsuperscript{167} By dividing the conflict into its component parts, it becomes clear that the conflict remains a conflict between a state and a non-state. Only when two states are fighting against one another, the conflict will be qualified as an IAC. In a more recent case, the ICC held that the conflict in the Central African Republic remained non-international in character even with the presence of foreign military troops in the country supporting the government of the Central African Republic.\textsuperscript{168}

In the situation where the foreign state fights alongside the non-state armed group, but the group seizes control over the majority of the territory and establishes a government, the identification of the ongoing process might be questioned.\textsuperscript{169} Before seizing control over the territory, the conflict had an international character, as the foreign state was giving assistance to a non-state actor.\textsuperscript{170} One could argue that the IAC transforms into a NIAC now that the non-state actor established a new government. The former non-state, which is now the state, could then invite the foreign state to fight against the former government, which is now a non-state actor. The ICRC accepted this reasoning in 2002 when it changed the qualification of the conflict in Afghanistan.\textsuperscript{171} Nonetheless, this approach encourages potential fraud. Therefore, the new government has to have a degree of independence and there should be a certain degree of guarantee that the new government is the real government. In order to

\textsuperscript{168} ICC 15 June 2009, \textit{The Prosecutor v. Jean-Pierre Bemba Gombo}, Case No. ICC-01/05-01/08, Confirmation of Charges Decision (Pre-Trial Chamber), para. 246.
\textsuperscript{170} See chapter 3.3.1, p. 35.
have some assurance, one should look to possible international recognition and to the degree of effectiveness of its control. Only if these conditions are met, one can assure that the local government gave its consent.

As the conflict should be qualified as a non-international conflict, the question may arise on which territory IHL will apply. Does IHL only apply to hostilities on the territory of the hosting state or does it also apply to hostilities on the territory of the assisting state? Only a couple of states have answered this question. According to the Netherlands, IHL only applies on the territory of the hosting state. According to others, IHL applies on both the territories considering that the hosting state as well as the foreign state are parties to the conflict.

Regarding the aim of IHL, namely creating a ‘level playing field between the parties’, where both parties have the same rights and obligations, the intervening state should not be able to protect itself from hostilities on its own territory. Meanwhile, the state has a carte blanche to conduct hostilities against the non-state actor. If one follows the first approach, this would go against the principle of equality of the belligerent parties. In others words, some hostilities on the territory of the ‘foreign’ state are lawful under IHL, while they will be punishable under domestic law and may be qualified as terrorist attacks. If the non-state actor, for example, attacks a military objective in the territory of the foreign state, this is lawful under IHL. ‘Terrorist attacks’ on civilians and civilian objects will still be unlawful as they have protection under IHL. The fact that the hostilities do not take place on the territory of the assisting state does not affect the interpretation. A state become a party to a conflict irrespective of where the conflict is taking place.

In the same context, it is important to mention that if you would read article 1 of AP II literally, you could easily notice that the Protocol does not apply to the interventions of the foreign state. The Protocol only applies on the territory of a Party and between its armed forces and the armed group.

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177 Art. 1 AP II.
This implies that AP II does not apply to the acts of intervening state, as these hostilities do not take place on its territory. However, it is clear that in light of the aim of humanitarian law AP II also applies to the operations of the intervening state. Different interpretations go against the principle of equality of the belligerent parties.\footnote{S. VITE, “Typology of armed conflicts in international humanitarian law: legal concepts and actual situations”, International Review of the Red Cross March 2009, vol. 91, (69) 80.}

Thus, foreign intervention based on the consent or the invitation of the hosting state does not change the qualification of the conflict. Although the conflict takes place in a more international context, the majority of jurisprudence correctly considers this as a NIAC. Foreign intervention might have some consequences on territory of the intervening state, as some conducts will be lawful under IHL. The legality of these conducts will be analyzed in chapter 5.

3.3. Foreign intervention supporting a non-state actor against the local government

A foreign state may also assist the non-state actor. For example, the foreign states may send troops to intervene on the side of the non-state actor. The scenario where the foreign state may offer support to the opposition groups without introducing its forces is another example. Each form of assistance has its own consequences for the classification.

3.3.1. Indirect support by the foreign state without the introduction of troops

It is questionable whether the conflict renders international in character when a foreign state does not send troops to the conflict but only gives support to the non-state actor. At the battlefield, it may seem that the conflict is being fought between a non-state and a state. However, a state may for example offer financial support. Does this affect the classification?

In the \textit{Tadić} decision, the ICTY stated that support affects the classification. If the acts of the non-state actor are attributable to the foreign state, this conflict will internationalize. In other words, only if the acts are attributable, the non-state actor can be identified as a \textit{de facto} organ of the foreign state.\footnote{ICTY 7 May 1997, \textit{Prosecutor v. Dusko Tadić}, Case No. IT-94-1-T, Opinion and Judgment Trial Chamber, para. 584.} When a non-state actor is a \textit{de facto} organ of the foreign state, it acts on behalf of the foreign state. Thus, the question whether or not the conflict renders international depends solely on the rules of attribution under the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ILC Articles).\footnote{Resolution 56/83 of the General Assembly (28 January 2002), \textit{UN Doc. A/RES/56/83} (2002).} These articles determine when a non-state actor can be seen as a \textit{de facto}
organ. If the support is sufficient to categorize the non-state actor as a *de facto* organ, the conflict will render international in character.

This should be tested through an overall-control test. In contrast to the ICJ, this is not a test of effective control, since this is too strict, but rather a test of overall-control. A conflict will transform into an IAC when a state has overall-control over a non-state actor. A state has this control whenever it ‘has a role in organizing, coordinating or planning the military actions of military group, in addition to financing, training and equipping or providing operational support to that group.’ If the answer is positive, acts of the non-state actor may be regarded as acts of *de facto* state organs regardless of any specific instruction. The ICC accepted the overall-control test in the *Lubanga* case. The ICTY followed the judgment of the *Tadić* case in consecutive cases.

The proposal of the ICTY is rather artificial, as it does not mention anything concerning the use of proxy. It is only necessary that the acts are attributable to the foreign state to be considered as an international conflict. This attribution should be tested through an overall-control test. Both of these holdings have been widely criticized by several authors. Indeed, this reasoning has some major soft posts, which will be discussed.

Firstly, the ICTY uses a test derived from the ILC Articles. However, the ILC Articles do not contain only one test to attribute acts of armed groups. Through article 4 of the ILC Articles, an armed group will be considered as a state actor when groups or entities act in ‘complete dependence on the State, of which they are not more than an instrument.’ If the answer on the test of ‘complete dependence and control’ is positive, then all the acts will be seen as acts from the foreign state. This test is stricter than the overall-control test suggested by the ICTY. When the answer is negative, the test of effective

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181 ICJ 27 June 1986, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, *ICJ Reports* 1986, Judgment, para. 115. The test of effective-control implies that a state should have directed or enforced the preparation of acts.


control comes into play. Under article 8 of the ILC Articles, concrete acts of a non-state actor will be attributed to the state when the hostilities are carried out under the effective control of the state.\(^{188}\)

Secondly, it is extremely ambiguous whether the classification of the conflict depends on rules of attribution. It is correct that the conflict transforms into an IAC when the non-state actor is a *de facto* organ of the foreign state, but this should not be assessed through the state responsibility. Rather, one should focus on the facts on the ground. If a non-state actor acts on behalf of the state, then states are fighting against each other, which renders the conflict international.\(^{189}\) Thus, the conflict renders international when the armed group acts on clear-cut instructions from a state. It is clear that there is a need for a different test than the one suggested by the ICTY. Instead of referring to state responsibility, it is preferable to refer to the use of force. The ICJ suggests that the overall control test cannot be equally used to determine classification of the conflict as well as to determine whether a state is responsible for acts by non-state actors. It remains possible that the degree and nature of a foreign state’s involvement can differ in the two scenarios. However, the ICJ does not take clear position on this matter, as it was not necessary to solve the case.\(^{190}\)

There are three major approaches on this issue. The first view suggests that the internalization of the conflict indeed depends on the rules of state responsibility. The second approach prefers a more cautious position. The question whether or not the non-state actor acts on behalf of the state remains important, though, this question should not be replied by focusing on the rules of state responsibility but by focusing on the specific rules in IHL. Therefore, the test for the internationalization of the conflict should be dissimilar to the test of control in state responsibility. Instead of using an overall-control test, one should look to the existence of a *de facto* agreement to regard an armed group as belonging to a foreign state.\(^{191}\) This test is looser than the overall-control test as the existence of a

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\(^{188}\) Article 8 of the “Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts”, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, 363-5 (2001): “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”


relationship between the state and the armed group is sufficient. Not only can this relationship be derived from official declarations, it also may be derived from a tacit agreement.

The third approach offers a correct solution for this issue. This view has its origin in the concurring opinion by Judge SHAHABUDDEEN. In his view, the conflict only renders international when the support of the foreign state can be regarded as the use of force against the territorial state. The change in classification depends on whether or not the foreign state has used force against the territorial state. The issue whether there is use of force should be determined by the rules of jus ad bellum. In the Blaskic case, Judge SHAHABUDDEEN stated that the real issue is about ‘the degree of control which is effective in any set of circumstances to enable the impugned state to use force against the other state through the intermediary of the foreign military entity concerned.’

Thus, the test of control comes into play when one needs to make the decision whether or not the foreign state has used force through a proxy against the territorial state. The affiliation between the opposition group and the foreign state could take several forms that would lead to an IAC. The state could carry out military operations through the use of an agent, the non-state actor. A state uses force through an organized group when it is impossible to distinguish the two parties. For example, they share the same strategic key-points.

The armed group could also be financial or strategical dependent on the foreign state. These examples emphasize the theory of Judge SHAHABUDDEEN, which focuses on the question whether or not a state has used force against another state. This depends on the degree of control that the foreign state has on the armed group. The degree could be tested using the overall-control test, but it is preferable to take the relevant facts into account.

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There are several indicators which help in determining the degree of control: the foreign state has appointed individuals at high-level positions\(^{198}\); the payment of wages of members of the armed group by the foreign state\(^{199}\); the armed group has the same structure and ranks as the foreign state\(^{200}\); the armed group has the same military strategies and objectives as the foreign state.\(^{201}\) Only if a certain degree of control is present, one could say that the foreign state uses force against the territorial state, through the non-state actor.

The support of the foreign intervention might change the classification of the conflict. According to the ICTY, this qualification changes when the acts are attributable to the foreign state, which need to be assessed through an overall-control test. This judgment should be ignored as it only refers to the state’s responsibility when determining the classification. Instead, the classification only changes when the foreign state uses force against the territorial state through the non-state actor. Only if the foreign state has a certain degree of control over the armed group, the state uses force through the proxy. This should be assessed regarding several indicators. If the answer is positive, the classification will render international.

### 3.3.2. Introduction of forces by the foreign state

If two states are in a conflict with each other, the threshold of an IAC is reached. It remains questionable whether the conflict renders international in character when the foreign state fights alongside a non-state actor by introducing troops. After the introduction of the foreign troops, there will be two conflicting states involved irrespective of the aim of the introduction.

It is important to mention that the IAC between the two or more states does not automatically changes the qualification of the conflict between the non-state actor and the territorial state. There will be a mixed conflict with on the one hand a NIAC between the non-state actor and the territorial state and on the other hand an IAC between the foreign state and the territorial state.\(^{202}\) Only if the non-state acts on behalf of the foreign state, the conflict between the non-state actor and the territorial state

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will transform into an IAC.\textsuperscript{203} In this situation, it would be impossible to distinguish the two parties as the armed group could be identified with the military troops of the foreign state. This may arise, for example, when both parties share the same key positions.\textsuperscript{204}

Thus, foreign intervention supporting the non-state actor might change the classification. In the situation where the foreign state sends troops, there will be a mixed conflict. An IAC exist between the foreign state and the territorial state. The other conflict is a NIAC between the armed group and the foreign state. Just as the conflict without introduction of troops, this conflict could change into an IAC when the foreign uses force against the territorial state through the armed group. A possible internationalization will have some major consequences as the entire Geneva Conventions apply to IACs.

3.4. Mixed conflicts

Two different conflicts may simultaneously occur on one territory at the same time. For example, it is possible that two IACs take place on the same territory or that a state is fighting against two independent organized armed groups. In the first scenario, there will be two IACs, while in the second scenario both conflicts are non-international. A third scenario is that the local government is in a combat with a foreign state as well as with an armed group. These conflicts can be independent but most of the times they are linked with each other. When a foreign state send troops to assist the armed group, the conflict between the territorial state and the foreign state is of an international character. If the non-state actor does not act on behalf of the state, the conflict between the territorial state and the non-state actor remains non-international in character.\textsuperscript{205} In this factual situation, it requires a determination for each particular case, as the conflict will have international and ‘internal’ characteristics.\textsuperscript{206} The ICJ followed this approach in the Nicaragua case where it held that the conflict between Nicaragua and the United States was international and the conflict between the Contras and the government of Nicaragua was non-international.\textsuperscript{207}


If it is possible to distinguish the two parties from one another, the government has to apply different rules for each conflict. As long as the mixed conflicts reflects the actual affiliation, the parties should be distinct.\textsuperscript{208} The crucial question is whether parallel armed conflicts are being fought, or whether a single armed conflict is taking place. This will be determined through the relevant facts. The ICTY for example stated that the introduction of troops by the foreign state and their ‘significant and continuous military action’ were sufficient to consider this conflict being a single international armed conflict.\textsuperscript{209}

Although the approach of mixed conflicts is strictly logical, it has been the subject of criticism. The author MERON openly criticizes this reasoning, as it would make the application of IHL on these separated conflicts extremely complicated. Different rules will be applicable in the ‘same’ conflict. This author refers to the standards for detention, as the applicable rules are different for a NIAC and an IAC. Only when the prisoner is a member of the foreign state forces, the Third and Fourth Geneva Conventions apply.\textsuperscript{210} However, one could state the opposite. It is often practically impossible to give combatant-immunity to the captured fighters of the non-state actors. If the conflict is considered to be one single international armed conflict, this would be the obligation for the territorial state.\textsuperscript{211}

Considering the above argument, there should be given priority to the theory of mixed conflict. Two conflicts that are independent should be treated different. Their independency should be assessed through the actual facts. Therefore, it is necessary to identify the parties and their relationship in each particular case. If the foreign state and the armed group have a link, this conflict should be considered as one single international conflict. If the foreign state and the armed group have little interaction, the conflict should be divided into two different conflicts.

\textsuperscript{209} ICTY 31 March 2003, Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34-T, Judgment Trial Chamber, paras 191 & 194.
3.5. Transnational conflicts

Both CA 3 and AP II refer to the territory of a state party. However, most of the conflicts between a government and a non-state armed group are fought on the territory of multiple states. These conflicts are often called transnational conflicts or extra-state conflicts. Should this be seen as a completely new type of conflict or is this covered by the two classical conflicts?²¹²

Frequently, a foreign state utilizes force against a non-state actor on the territory of another state. This force is not directed at the territorial state, which would render the conflict international, but is rather directed to the armed group based in the territorial state.²¹³ In the last decade, a lot of this cross-border conflicts took place.²¹⁴ In the majority of conflicts, there is an ongoing conflict on the territory of the foreign state. The fight continues on the territory, and with its consent, of a neighboring state.²¹⁵ These conflicts are also known as ‘exported’ conflicts. On the other hand, it occurs that the armed group has assaulted the foreign state with cross-border attacks.²¹⁶ In a reaction to secure its country, the foreign state uses force against the armed group on the territory of the territorial state. The cross-border use of force by an adjacent state will be analyzed in the second part. Afterwards, the war on terror, will be examined.

3.5.1. Exported conflicts

States may use force against a non-state actor on the territory of a neighboring state. The Colombian forces, for example, fought with the FARC on the territory of Ecuador, as their base was at border of Colombia and Ecuador.²¹⁷ In these exported conflicts, the battle has its origin within the territory of the foreign state. The fighting then spills over to the territory of an adjacent state with the consent of the latter state.²¹⁸

At first sight, this conflict is not international in character as this is not a conflict two states. But CA 3 and AP II refer to the territory of ‘one’ of the High Contracting Parties. Does this imply that the conflict

²¹⁴ For example; Israel in Lebanon against the Hezbollah, Columbia in Ecuador against the FAC, US targeting persons connected with Al Qaeda in Somalia, etc.
²¹⁶ These cross-border attacks take place on the territory of the “foreign State”, the so called terrorist attacks.
cannot occur on the territory of two High Contracting Parties? One could also argue that the belligerencies between the foreign state and the armed group are not internal to the neighboring state.219 Therefore, it has been proposed to classify this sort of conflicts as a new form of armed conflict.220

However, this proposal should not be supported. A separate category for transnational conflicts cannot be derived from the treaty rules of IHL.221 Although the wordings of CA 3 refer to the territory of one state, it was not the intention to limit the application to situations where battling purely occurs on the territory of one state. This reference was just a reminder that the article only applies on the territory of at least one Party to the Convention. It is self-evident that these conflicts are non-international in character. This classification does not only include the purely internal conflicts, but it also includes those with a more “international” character.222 After all, the geographical location is not decisive for the classification, though, the identity of the parties is.223

In order to classify this conflict, it is only necessary to analyze whether the used violence is an armed conflict. Afterwards, one must try to fit this conflict into the classical categories.224 If the spilled-over conflict reaches the threshold itself, this will be a separate NIAC. When the spilled-over conflict does not satisfies the threshold, IHL still regulates this conflict.225 The ICTY held that it is sufficient to prove that the hostilities ‘were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict’ to include the spilled-over conflict under the ongoing NIAC.226

If there is a nexus between the military operations on the territory of a neighboring state and the


222 However, author AKANDE suggest to classify these conflicts as international armed conflicts. In his view the foreign state uses forces against the territorial state by attacking the non-state armed group. The conflict between the foreign state and the territorial state will be so bound up that it would be impossible to separate the two conflicts. This means that each act of targeting must comply with the rules of IACs; See D. AKANDE, “Classification of Armed Conflicts: Relevant Legal Concepts”, in E. WILMSHURST (ed.), International Law and the Classification of Conflicts, Oxford, Oxford University Press, 2012, 73-79.


224 This means that the conflict is only international in character or non-international in character. If the threshold for a non-international conflict is not reached, the conflict will be qualified as an internal disturbance on which domestic law applies.


226 ICTY 2 October 1995, Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.
hostilities on the territory where the conflict normally takes place, these military operations are part of the ongoing conflict. When there is not a nexus between both military operations, the spilled-over hostilities need to satisfy the ‘protracted armed violence’ threshold itself. Thus, the application of IHL might be extended to hostilities that spill over to the territory of a neighboring state. 

3.5.2. Cross-border conflicts

If the parties to a NIAC continue their battle on the territory of another state, this conflict remains non-international if the “hosting” state gave its explicit or tacit consent. In cross-border conflicts, there is no spill-over of a pre-existing conflict. The organized armed group is located in the territory of a neighboring state and the hostilities take place on a cross-border basis.

If the neighboring state uses force through the organized armed group, this conflict will be international in character. If the armed group acts on its own initiative, the conflict will be non-international in character. As mentioned in the chapter concerning the ‘exported’ conflicts, it not necessary that the conflict takes place on the territory of the fighting state. Therefore, if the conflict reaches a threshold, IHL will apply to the cross-border NIAC.

3.5.3. War on terror

The question arises whether a possible conflict renders international if the force is not used on the territory of neighboring state but for example on the territory of a state located in another continent. For example, the US Government under Bush declared that the war against terror fell into a gap between the two standard classifications. However, it is important to mention that ‘war against terror’ does not have any legal implications under international law. When armed force is used, it is only relevant to determine the classification. If the thresholds are reached, IHL could apply in this situation. This should be tested by a case-by-case approach. Given that IHL might apply, it is important to mention that terrorist attacks do not automatically amount to an armed conflict.

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230 This was a reaction after the destruction of the WTC towers on 9/11.
231 US Department of Justice Office of Legal Counsel, Memorandum for Alberto Gonzales, 81.
Like the cross-border conflicts on the territory of an adjacent state, this conflict is non-international in character if the force is directed to the armed groups. Although the conflict might be of a different degree of geographical adjacency, this does not affect the classification.\textsuperscript{234} The US Supreme Court accepted the applicability of CA 3\textsuperscript{235}, in contrast with US government, in the ‘war on terror\textsuperscript{236}’ in the \textit{Hamdan v Rumsfeld} case.\textsuperscript{237}

In order to be a NIAC the violence must reach a certain level and the armed group should be organized in a certain degree. If the threshold is reached and the conflict can be qualified as non-international, on which IHL will apply, some “terrorist” acts may be lawful under IHL. Attacks targeting lawful targets\textsuperscript{238} are not prohibited by IHL and therefore should not be called terrorist attacks.\textsuperscript{239} This is one of the main principles of IHL and will be analyzed in chapter 5.

3.6. Case-study: Daesh

3.6.1. Global non-international armed conflict?
Although conflicts can spill over from one state to another state, they remain non-international in character to which IHL will apply. However, does it matter whether the non-state actor potentially has bases in different states? In fact, it is questionable whether Daesh constitutes out of different groups on various locations or whether all these groups are part of an universal group.\textsuperscript{240} If all these groups belong to the same group, the conflicts will be one single conflict. Then could, hypothetical, a foreign State be in a single armed conflict with Daesh. All the different acts of the groups can be taken into account to assess to level of intensity, even if they took place on various locations. If Daesh is not a unitary state, there will be multiple conflicts between the governments and the separated groups. Each conflict would have to reach the thresholds.\textsuperscript{241}

\textsuperscript{235} The applicability of AP II was not discussed, as the USA did not ratify the Protocol.
\textsuperscript{236} However, the reasoning behind this decision should not be followed. The Supreme Court of the United States confirmed that the conflict between the USA and Al Qaeda was a non-international conflict because there were no states involved. Although this focuses correctly on the identity of the Parties, the relevant assessment need to be satisfied. Therefore, the armed group needs to have a certain level of organization and the violence must reach a certain level of intensity.
\textsuperscript{238} This will be discussed in chapter 5.
\textsuperscript{239} Report on the International humanitarian law and the challenges of contemporary armed conflicts, ICRC, 32nd International Conference of the Red Cross and Red Crescent, 2005, 18.
The ICRC does not share the view that a global NIAC is taking place. In the opinion of the ICRC, Daesh is not a unitary state opposing the states. It still considers the core group of Daesh and its affiliates as different groups\textsuperscript{242}, based on several facts.\textsuperscript{243} This means that it is impossible to consider the conflict with Daesh as a global international conflict. Thus, each conflict must satisfy the thresholds.

3.6.2. Support to Iraqi’ government by foreign states
As Daesh has the control over various parts of the territory in Iraq, the local government tries to reclaim its control over these parts. Different foreign states are intervening in Iraq in order to help the Iraqi’ government reclaiming its territory.\textsuperscript{244} These interventions are justified by an invitation by the Iraqi’ government. The internal violence will still be non-international in character.\textsuperscript{245} An intervention by invitation does not change the classification. Regarding the objective of equality under IHL one could definitely argue that a NIAC is taking place on the territory of foreign states, such as France and USA.

3.6.3. Counter-terrorist airstrikes by France
After the terrorist attacks in France, French government decided to counter-attack Daesh in Syria by air striking several military bases.\textsuperscript{246} This operation targeted recruitment camps and had the support from the USA.\textsuperscript{247} Although this operation was very effective, the question arises whether this action was legal or not. Moreover, it is questionable whether IHL applies to the conflict.

3.6.3.1. Jus ad bellum
The president of France called the attack ‘an act of war’ resulting in a declaration of war. It remains the question whether France has the power/capacity to bomb on Syrian territory. The question should be answered by looking to the \textit{jus ad bellum}. The \textit{jus ad bellum} refers to the conditions under which states may resort to the use of armed forces. In principle, it is prohibited to use force amongst states.\textsuperscript{248}

\textsuperscript{242} Report on the International humanitarian law and the challenges of contemporary armed conflicts, ICRC, 32nd International Conference of the Red Cross and Red Crescent, 2005, 18.
\textsuperscript{243} It is beyond this thesis to examine whether Daesh is a unitary state, therefore, this thesis will follow the conclusion of the ICRC.
\textsuperscript{245} It reached the threshold which is discussed above; See chapter 2.3.1.3.3.
\textsuperscript{247} This operation was reaction of the French government after the terrorist attacks in France where more than 130 people were killed. Daesh claimed the responsibility for these coordinated attacks.
\textsuperscript{248} See chapter 3.1, p. 26-27.
Nonetheless, there are several exceptions to this prohibition. As the Syrian government did not give its consent for the attack, one should look to another exception. The French government justified their action by referring to the right of self-defense as Daesh is an imminent threat to the national security. However, it remains extremely questionable whether this justifies the use of force. It is beyond this thesis to examine this discussion as this thesis mainly focuses on the law applicable in the armed conflict and not on the law justifying the use of force amongst states. Therefore, the second question will be answered in the hypothesis that the use of force is legal.

3.6.3.2. Classification
The question whether *jus in bello* applies to the conflict depends on the classification, as IHL will only be applicable if the conflict can be classified as an IAC or NIAC. Moreover, different rules apply to NIACs than to IACs. Therefore, the causes or reasons to use of force are irrelevant as the applicability solely depends on the classification.

IHL will apply to this conflict if the conflict is an armed conflict that satisfies the thresholds. The ICRC uses a case-by-case approach to determine the identity of the conflict. Some situations can be seen as an IAC, others as a NIAC and some situations may fall outside any armed conflict. The conflict with Daesh is not a global NIAC. Thus, the determination is depending on the facts on the ground. If the conflict between Daesh and France reaches the threshold, IHL will apply. The potential classification would have some major consequences. Some attacks will be lawful under IHL, although these attacks will be seen as terrorist attacks.

[^249]: As in the post 9/11 attacks this subject has been the center of several discussions. According to some authors and states, these attack were lawful through the right of self-defense. However, other states, such as Russia, stated that self-defense does not justify the airstrikes.
4. Applicable law

4.1. Introduction

Some consequences will emerge when a conflict reaches the threshold of CA 3 and AP II. One of these consequences is that IHL regulates the conflict. As the legal framework of an IAC does not apply to the situation, it remains questionable which rules apply to it. Do customary rules apply to the conflict? Which treaties apply to the conflict? As these legal sources might contain rules on targeting, it is important to examine whether these sources apply to NIACs and whether non-state actors are bound by these legal instruments. Another question that arises is whether it is possible to bind non-state entities under international law. This chapter will answer these questions without examining the content of the rules, as this will be analyzed in chapter 5.

4.2. Customary law

4.2.1. Customary rules

The applicability of customary international law to internal conflicts is a rather new phenomenon. It was common sense that customary rules did not apply to NIACs. International courts, such as the ICJ, the ICTY and the Rwanda Tribunals, changed this policy. In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons case, the court stated that fundamental rules of the Geneva Conventions are principles of customary law. In the Tadić case, the Appeals Chamber reinforced this judgment by declaring that CA 3 has become part of customary law. Along with the ICTY, the Rwanda Tribunal agreed on this matter in the Akayesu case.

These examples prove that the customary status of CA is universally accepted. This does not stand for the customary status of AP II. The ICTY pleads for the customary status of several provisions. In the Tadić-case the ICTY mentioned: “Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.” The provisions having a customary

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251 ICTY 2 October 1995, Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 98.
status are article 4(2), 5 and 6 of AP II. These articles are closely related to CA 3 which might declare their status.\textsuperscript{254}

The extension of the list of customary law provisions is an ongoing process. For example, in the \textit{Prosecutor v. Kordić and Cerkez} case, the ICTY considered that article 13(2) is part of customary IHL.\textsuperscript{255} The Rwanda Tribunal is more careful on this matter. It recognized the customary status of article 4(2) AP II but it also, even more importantly, said that the Protocol, as a whole, does not have a customary status.\textsuperscript{256}

The analysis of the above judgments and the approval by the states confirm the customary status of CA 3. It also proves the customary status of several articles of AP II, although some courts have been taking a more cautious position. In the future, more and more provisions will be seen as customary international law. Those rules do not get their status through an overnight process, the establishment of state practice and \textit{opinio juris} are necessary. Considering the amount of NIACs that take place nowadays, international courts may recognize the customary status of other provisions in the years to come.

These are not the only customary rules that bind non-state actors. Certain rules for the protection of cultural property have customary status as well.\textsuperscript{257} Even some rules on the conduct of hostilities are considered to be customary. The General Assembly Resolution 2444 (XXIII)\textsuperscript{258} contained some principles concerning the conduct of hostilities and thus targeting. These principles were the reflection of the, at that time, ruling customary law. Thus, the rules concerning protection of civilians and the rules concerning distinction have customary status.\textsuperscript{259} Based on the General Assembly Resolution 2675 (XXV)\textsuperscript{260}, the customary status of rules on precautions in the attack have customary status.\textsuperscript{261} The Rome


\textsuperscript{255} ICTY 9 March 1999, \textit{Prosecutor v. Dario Kordić and Mario Cerkez}, Case No. IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, para. 31.


\textsuperscript{258} Resolution 2444 (XXIII) of the General Assembly (19 December 1968), \textit{UN Doc. A/RES/2444 (XXIII) (1968)}.


\textsuperscript{260} Resolution 2675 (XXV) of the General Assembly (9 December 1970), \textit{UN Doc. A/RES/2675 (XXV) (1970)}.

statute and its war crimes have a customary status. This means that the prohibitions on attacks on objects and personnel bearing the protected emblem, attacks on religious, cultural and other objects and attacks against civilians have customary status. Given that many of these rules normally only apply to IACs, before their customary status, it is important to mention the ICRC study and the ICTY judgment. Following the reasoning of the ICTY, ‘it cannot be denied that customary rules have developed to govern internal strife.’ The court mentioned that the rules concerning the protection of civilians and their objects have customary status applying to NIACs. The ICRC has followed the ICTY in its study of customary IHL. This study concluded that almost all customary rules apply to NIACs. Although there is some criticism, several states have acknowledged that customary international law goes beyond the rules of CA 3 and AP II.

4.2.2. Binding nature of customary rules
Several provisions have a customary status and apply to NIACs. However, the binding nature of customary international law in a NIAC is often the center of discussions. Customary law is after all based on state practice and does not represent non-state actors. Therefore, some authors have been suggesting that the customary rules do not apply to non-state actors but only to states. Only if other non-state armed groups have acted according to these rules, the non-state actor has to comply with the provisions, a so-called ‘non-state actor-practice’. Other authors have suggested that non-state actors do not have international legal personality.

4.2.2.1. International legal personality
Regarding the latter argument, customary international law does not apply to non-state actors as they do not have international personality. In earlier years, this was considered to be normal as states were the exclusive subjects of international law possessing international rights and duties. In the period after the Second World War, it became more and more accepted that non-state entities can be subjects of

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262 It was the intention of the drafters to incorporate exclusively customary international law crimes. The war crimes in the state thus have customary status. In order for the war crime to be customary law, the forbidden action itself has to have customary status. During the Conference some norms crystallized and so they have customary status.


international law. This means that customary IHL does not only bind state entities, but all subjects under international law. The ICJ confirmed this view by stating that ‘by their very nature customary law rules and obligations must have equal force for all members of the international community.’\textsuperscript{269} The key factor for the applicability of customary IHL is whether the entity has legal personality. This international personality is a condition sine qua non for the possibility to act within a certain legal context.\textsuperscript{270} Customary IHL will only apply when the subject reaches the threshold of legal personality.

An armed group only has international legal personality when it is the subject of direct cognition by the international legal order.\textsuperscript{271} In other words, non-state actors have legal personality when they possess rights and duties in the international context. There are several international instruments which have created rights and duties for non-state actors.\textsuperscript{272} Others suggest that the discussion whether an armed group has international legal personality or not should be solved by looking to the needs of the community.\textsuperscript{273} These needs determine the nature of an entity. If the needs change, the participating legal personalities change as well. The presence of non-state armed groups in the actuality proves that they have international legal personality.\textsuperscript{274} Although both views have the same result, namely that armed groups have legal personality, there should be given priority to the second view as this is a more sociological interpretation.

**4.2.2.2. Requirement of participation**

The other argument is based on the fact that armed groups are not involved in the creation of customary law.\textsuperscript{275} As customary law emerges from state practice and the opinion of states, armed groups do not play a role in the creation of customary law. The absence of participation is, or might be, one of the main reasons why armed groups do not comply with IHL. At the moment, the creation of customary law is solely in the hands of the states. One could definitely argue that customary law

\textsuperscript{269} ICJ 20 February 1969, North Sea Continental Shelf, ICJ Reports 1969, Judgment, para. 63.


only binds states, as it is purely the result of state practice. Moreover, taking the practice of organized armed groups into account might have a positive influence on their compliance with IHL.\textsuperscript{276} The ICTY supported this view by taking the practice of the non-state actor into account in the \textit{Tadić} case.\textsuperscript{277} The ICTY considered that agreements concluded by armed groups are evidence of customary law. There is definitely some evidence that one should take the practice of armed groups into consideration.\textsuperscript{278} Lastly, it is rather absurd and unfair to extend the legal personality to armed groups without acknowledging their ability to contribute to the practice needed for the construction of customary international law.\textsuperscript{279}

However, it remains the main view to not take the practice of the armed groups into account. The ICRC stated that the practice of armed groups remains unclear and therefore cannot be taken into consideration. According to the ICRC, the armed groups are bound by customary law even when it goes against their practice.\textsuperscript{280} Only state practice, combined with their opinions, can be the basis for customary rules binding the opposition groups.\textsuperscript{281} Given that organized armed groups often violate cardinal principles of IHL, this seems to be a humanitarian solution. If the creation of customary law would depend on the practice of the armed groups, some key principles would not be part of customary IHL. By why should their practice not be taken into account if it reflects a humanitarian rule? Indeed, one could definitely argue that the practice should be taken into consideration. This does not mean that customary status can be evidenced by just examining the practice of organized armed groups, as it will be necessary to take state practice into account.

\subsection*{4.2.3. Conclusion}

Different rules have a customary status. Not only do the classical NIAC provisions have a customary status, some rules on international conflicts also receive customary status which binds the armed groups. The applicability of customary law closes the existing gap between international conflicts and non-international conflicts, as the customary rules applying to NIACs go beyond CA 3 and AP II.

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Despite having legal personality under international law, organized armed groups do not play a role in the formation of customary law. This influences the non-state actor as they do not feel bound by it. However, it remains the main opinion to ignore the practice of the non-state actors. Non-state actors are bound by customary IHL even if the rules are solely based on state practice. This state practice usually reflects the humanitarian principles. Obviously, non-state actor-practice should not be taken into account when the practice goes against the core principles. In other events, the practice of non-state actors may be one of the sources through which the customary status may be evidenced, especially when this practice reflects a humane rule.

4.3. Common Article 3 and Additional Protocol II

4.3.1. Introduction
As soon as a conflict satisfies the thresholds, CA 3 and AP II apply to the conflict. If the lower threshold is reached, only CA 3 will apply. If the conflict reaches the higher threshold, both will apply. Although CA 3 has customary status, it remains important to determine the scope of application. It is even more important to examine AP II, as not each provision has customary status.

CA 3 applies as soon as a conflict reaches the threshold of this article. Some authors have suggested that this article does not bind the non-state armed group as a whole group. They wrongly believe that CA 3 only applies to the individual members of the non-state armed group. Nonetheless, international courts have confirmed that AP II and CA 3 bind non-state armed groups as a group. In the Tablada-case, the Inter-American Commission took a closer look and stated: “Unlike human rights law which generally restrains only the abusive practices of State agents, Common Article 3’s mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government and dissident forces. Moreover, the obligation to apply Common Article 3 is absolute for both parties and independent of the obligation of the other.”

Other international institutes such as the UN Security Council and the UN Commission on Human Rights support this view. Similarly, this interpretation can be found regarding AP II. In the Akayesu

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282 CA 3 binds organized armed groups through its customary status.
case, the Rwanda Tribunal declared that the Protocol norms apply to both parties.\textsuperscript{287} A breach of those legal instruments by one party, such as targeting an unlawful target, could not be invoked by the other party as a ground for its non-compliance with the article’s obligatory provisions.\textsuperscript{288}

4.3.2. Binding nature of CA 3 and AP II

One question that might arise is how these instruments bind the non-state armed groups. Since non-state armed groups are not parties to the Geneva Conventions and their Additional Protocols, the main view was that an opposition group was only bound by IHL if it chooses to obey IHL.\textsuperscript{289} This is no longer the dominant vision. International courts, such as the SCSL\textsuperscript{290} and the Inter-American Commission\textsuperscript{291}, confirmed that IHL binds states and armed groups equally. Jurisprudence has widely accepted that IHL binds non-state actors. However, there is no consensus about the exact legal basis for this theory. Several explanations have been brought up to clarify this matter.\textsuperscript{292}

4.3.2.1. Bound by customary rules

Firstly, it has been suggested that non-state armed groups are bound by customary IHL. In other words, these groups are not bound by the ratification or signature of the Conventions but by their customary international law status. There is no need for the group to be a party to the Convention in this solution. This explanation is built on two conditions. On the one hand, the Conventions need to have a customary international law status and, on the other hand, armed groups need to be bound by customary IHL.\textsuperscript{293} Focusing on the first condition it has been stated by the ICJ that CA 3 reflects ‘elementary considerations of humanity.’\textsuperscript{294} Although this statement was not based on an analysis of the state practice and the \textit{opinio juris}\textsuperscript{295}, the ICTY\textsuperscript{296} and the ICTR\textsuperscript{297} confirmed this view. This does not

\textsuperscript{288} Art. 60 VCLT.
\textsuperscript{291} Inter-American Commission on Human Rights 30 October 1997, \textit{Juan Carlos Abella v. Argentina}, Case No. 11.137, para. 174.
stand for AP II, as not all of its provisions have a customary status.\textsuperscript{298} Focusing on the second condition, it is the opinion of the majority that non-state armed groups are bound by customary IHL.\textsuperscript{299}

This explanation has several major disadvantages. First of all, provisions that do not have a customary status will not bind the organized armed groups. Furthermore, the rules do not bind the organized armed groups before they are considered to be customary.\textsuperscript{300} Lastly, the ICTY has mentioned its intention to apply all the rules, even the ones without customary status.\textsuperscript{301} In this regard, a non-state actor should be bound by IHL, based on a broader method.

\subsection*{4.3.2.2. Binding nature of treaties on third parties}

Secondly, some refer to the binding nature of treaties on third parties. Considering article 35 and article 36 of the Vienna Convention of the Law of Treaties (hereinafter: VCLT), one may suggest that a treaty applies to third parties in some instances. Several reasons have been given to nullify this theory.

Firstly, the question arises whether it is possible to apply the rules of the VCLT to non-state armed groups. According to article 1 of the VCLT, this treaty only applies to treaties concluded between states. It explicitly limits the scope of application to states.\textsuperscript{302} Furthermore, these articles do not have a customary status. Even if these articles would have customary status, they should be limited \textit{ratione personae} in SIVAKUMARAN’s view.\textsuperscript{303}

Secondly, even if the VCLT would apply, articles 34, 35 and 36 are not satisfying. Following from these articles, CA 3 and AP II only apply when the contracting parties had the intention to bind the armed groups and if the armed groups assent to the rights and obligations. The first requirement is fulfilled as CA 3 refers to ‘parties in the conflict.’ This means that the applicability solely depends on the consent of the organized armed group. In the eyes of the armed group, this seems to be the fairest solution as it would be a positive incentive to comply with IHL. Nonetheless, this would have a negative influence on the legal certainty. It would be unclear when to apply CA 3 as it will vary from conflict to

\begin{itemize}
\item \textsuperscript{299} See chapter 4.2, p. 48-49.
\item \textsuperscript{300} S. SIVAKUMARAN, “Binding Armed Opposition Groups”, \textit{International and Comparative Law Quarterly} April 2006, vol. 55, 375.
\item \textsuperscript{301} ICTY 2 October 1995, \textit{Prosecutor v. Dusko Tadić}, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 143.
\item \textsuperscript{302} Art.1 VCLT: “The present Convention applies to treaties between States.”
\end{itemize}
conflict and from armed group to armed group. If CA 3 and AP II are not applicable, this opens the door for ‘violations of IHL’\textsuperscript{304}, especially because the armed groups who need to be bound by IHL will not express that will.

Therefore, it is not suitable to use the VCLT as the ground for the binding nature of CA 3 and AP II. First of all, one could easily see that VCLT is not applicable. Even if it would be applicable, applying VCLT would not be humanitarian as the applicability of CA 3 and AP II is solely depending on the expressed will.

4.3.2.3. Bound through succession

Thirdly, the ICRC considers an armed group bound by IHL through succession. Pictet stated in his commentary on the Geneva Conventions that: “if the responsible authority at [its] head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country.”\textsuperscript{305} The Geneva Conventions do not only bind the ratifying government, it also binds incoming governments. In order to use this legal basis, the armed group must be the government or must claim to be the government.\textsuperscript{306}

The ICRC has taken this theory one step further. It now considers a non-state actor bound by IHL if the non-state actor exercises the \textit{de facto} control over a part of the territory as they purported represent the state.\textsuperscript{307} The claim does not have to be explicit.

Especially the first view is very problematic as CA 3 only applies if the non-state actor becomes the new government. But CA 3 does not bind the non-state actor, it only binds the newly formed government. If the armed opposition group does not seize control, IHL does not apply unless they are claiming to represent the state. In other words, before the non-state actor makes an official claim, it would have a license to violate IHL. Regarding the second solution, this problem is more or less solved.

\textsuperscript{304} These are not real violations of IHL, as if they do not express their will, they will not be bound by it. In that case, they cannot violate it.


Instead of an official claim, this view requires a *de facto* control of territory for a sufficient period. The non-state actor may be seen as a quasi-government in order to apply CA 3 and AP II.  

However, this legal basis still brings some problems along. Some armed groups do not have a *de facto* control of territory although the intensity of the hostilities is very high. Based on this doctrine, CA 3 and AP II would not apply. Additionally, some non-state armed groups have a *de facto* control of territory although they do not purport to represent the state. Where the non-state actor is for instance fighting with the aim of elections, IHL should not apply. As a conclusion, one may say that succession could be a legal basis, however, the scope of application is too limited.

### 4.3.2.4. Principle of legislative jurisdiction

The majority of the authors correctly plead that the rationale for the purported binding character of treaty law should be the so-called ‘principle of legislative jurisdiction’. This principle can be described as the power of the government to legislate and bind all its nationals. When a government enters into a treaty, this agreement becomes automatically binding on all actors within the state. In other words, CA 3 and AP II bind non-state actors if the state, wherein hostilities take place, has ratified the conventions, as these conventions bind all individuals. States can impose obligations on individuals as the state represent those individuals.

This solution is heavily criticized by many authors. They, for example, declare that CA 3 was not intended to bind non-state actors and therefore does not bind armed groups. This argument does not nullify this solution as CA 3 expressively refers to ‘Parties to the conflict’. As the states had the intention to regulate non-international conflicts, which are fought between a state and a non-state actor, it is quite obvious that they saw the armed groups as a party to the conflict. Secondly, the dominant critique is that this solution does not reflect the position of the armed groups in international law. As pronounced by Cassese, the non-state actors are bound by domestic law, yet they are not

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bound by international treaty laws as such. If, in this case, the armed group would declare domestic law inapplicable, this would include CA 3. Nonetheless, there exist treaties which directly create obligations and rights for non-state entities after the ratification. It is not important whether or not the law has been incorporated in domestic law. It is widely accepted that international treaties can create direct obligations and rights for non-state entities. If it was the intention to create direct obligations and rights, there should be given priority to this intention. The treaty law of IHL clearly creates direct rights and obligations for non-state actors without a transformation in domestic law. Thus, CA 3 and AP II bind non-state actors through ‘the principle of legislative jurisdiction’.

4.3.3. Conclusion
Some of the proposed solutions definitely bind non-state actors. However, they are too limited as they only bind armed groups by certain provisions. Other solutions bind non-state actors as well, however, they are too limited as they only bind certain non-state actors. Therefore, one should give priority to the latter explanation. Non-state actors are bound by CA 3 and AP II through the principle of legislative jurisdiction. When a state ratifies a convention, it does so on behalf of the state and on behalf of the individuals within its jurisdiction.

4.4. Conventions
Since the mid-1990’s, states have more and more treated NIACs and IACs alike. Several conventions apply to NIACs in their entireness. The legal framework of NIACs is no longer limited to the traditional legal sources. Conventions concerning the means and methods of warfare or conventions concerning targeting regulate NIACs.

4.4.1. Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the Conventional Weapons Convention
The Geneva Conventions and AP II are not the only treaties applying to a NIAC. The Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the Conventional Weapons Convention also apply to armed opposition groups. This Protocol refers to

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314 This was confirmed by the International Court of Justice in the Reparations decision; See ICJ 11 April 1949, Reparations for injuries suffered in the services of the United Nations, ICJ Reports 1949, Advisory Opinion, 178.
conflicts of CA 3. When the conflict reaches the lower threshold of CA 3\textsuperscript{317} the Protocol will apply. The Protocol prohibits non-state actors from utilizing landmines against civilians.\textsuperscript{318}

4.4.2. Cultural Property Conventions
The Cultural Property Conventions expands its scope of application to armed groups. Article 19(1) of this Convention explicitly makes the incorporated provisions applicable to armed groups.\textsuperscript{319} Nevertheless it remains unclear which specific rules apply but this will be discussed in the targeting chapter. Its second Protocol also applies to armed groups.

4.4.3. Weapon treaties
Several weapon treaties apply to a NIAC. The Chemical Weapons Conventions, the Convention on Certain Conventional Weapons and the Biological Weapons Conventions apply.

4.5. Concluding remarks
4.5.1. Classification still relevant?
It is of high importance to identify the conflict. If the conflict is of an international character, other rules will apply. It is often said that there is a big gap between the applicable law in IACs and NIACs. In light of some recent evolutions, this statement should be partially abandoned.\textsuperscript{320} The first part of this chapter concluded that customary law, based on rules regulating IACs, apply to NIACs. As the ICTY confirmed this, several rules concerning, for example, attacks on civilians apply to internal situations. These customary rules close the existing gap between international and non-international conflicts. However, there are still some key parts of IHL which do not apply to NIACs. The rules relating to detention of combatants and civilians and the law relating to the status of fighters do not apply to conflicts of a non-international character.\textsuperscript{321} The legal framework of NIACs does also not recognize combatant-status. It is for these reasons that the classification remains relevant.\textsuperscript{322}

\textsuperscript{317} The conditions of intensity and organization should be fulfilled in order to reach the threshold.
\textsuperscript{319} As the article requires armed groups to implement the provisions ‘which relate to respect for cultural property.’
\textsuperscript{321} Stating the opposite would make it impossible for states to convict acts which are normally regarded as treason.
4.5.2. Distinction between AP II and CA 3 still relevant?
The customary status of several provisions of the Protocol has been accepted. In addition, it has been suggested that these particular rules apply to all the NIACs, even those ruled by CA 3. The applicability of these rules to both categories of NIAC renders the Protocol, especially its threshold, less important. However, this position remains doubtful. As not all the provisions of AP II have customary status, the distinction remains relevant. 323

5. Rules on targeting

5.1. Introduction

Targeting is one of the keystones of warfare. As it is the objective to defeat the enemy, targeting is the means by which the objective can be achieved. Targeting can be defined as the extensive process of planning and executing whether the hostilities of a particular object, person or group of persons will be lawful under IHL. The rules on targeting determine which weapon and method should be used during the hostilities. The United States Joint Forces Command Glossary defines targeting as follows: “The process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities.” Since achieving resignation of the opposition is the main purpose of targeting, there was a big need to regulate targeting. Considering the principle of humanity, there definitely needs to be a limitation on the violence used during warfare. If the belligerent parties would have a carte blanche to target haphazardly, this could have some dreadful consequences for civilians and their objects.

It is obvious that war goes hand in hand with suffering. In order to be victorious, parties will use violence. The rules of targeting are the result of balancing the principles of humanity and military necessity. In the 19th century, states recognized the two concepts and their interaction. Today they still play an important role.

The rules on targeting are part of the *jus in bello*, which contains the rules regulating the warfare. It is not important to know who started the conflict or what the reason was behind the attempt to seize control over a territory. Instead, the focus lays on the applicable rules during the conflict. These rules determine which persons and objects can be the lawful object of military attacks and they encourage the very objective of IHL, namely protecting those who do not take part in hostilities.

These rules will equally apply to each party of the conflict irrespective of whom to blame. It remained unsure for a long time whether international law regulates the conduct of hostilities in NIACs. Chapter

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326 In the St. Petersburg Declaration (1986) states confirmed the need to ‘fix the technical limits at which necessities of war ought to yield to the requirements of humanity’.
4 concluded that international law regulates NIACs. It remains questionable whether the legal framework contains rules on targeting. This chapter will attempt to answer the question: ‘Which persons and which objects can be the legitimate target during military operations?’ The operationalization of the rules on targeting will also be the subject of an analysis. Lastly, the legality of the military operations that took place during the conflict between Daesh and the Syrian government will be examined.

This chapter emphasizes the importance and relevance of the chapters above. The rules of targeting differ depending on the classification of the conflict. Different rules apply to conflicts with non-state actors than to conflicts between two states. Given that customary rules, derived from the legal framework of IACs, apply to NIACs, the gap between the regulation of both forms of armed conflicts is partially narrowed.

5.2. Main principles

Several principles affect the rules on targeting. These principles influence the rules and their content. Military necessity and humanity play an important role in the creation of the rules on targeting. Many rules are the result of the equilibrium between these two concepts. Another underlying principle is the concept of proportionality. Lastly, the cardinal principle of distinction will be discussed.

It is essential to determine the meaning of these principles as they assist in interpreting the rules on targeting. Even more, these rules are often the result of the interaction between all the principles. If you analyze a rule on targeting, you should definitely keep these principles in mind.

5.2.1. Military necessity

Military necessity can be described as the permission for a conflict party to use a certain degree of force necessary to achieve the objective of the conflict. In other words, it gives states the possibility to take the measures which are required to seize victory and which are not prohibited by the laws of war. In IACs, this dogma is reflected by one of the most fundamental principles of IHL, namely the right of combatants to target the members of the opposing state armed forces.

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331 Article 22 of the Hague Regulations 1899.
A violation of IHL cannot be justified by the concept of military necessity, although, military necessity can be an exception if the rule itself provides this exception.\(^3\) Lastly, military necessity is often taken into account when creating IHL.\(^4\)

### 5.2.2. Humanity

The principle of humanity is related to the principle of military necessity. For example, it forbids injuries and destruction that are not necessary to achieve the military objectives. This principle forms the basis of the principle of unnecessary suffering. If the military purpose is accomplished, it is prohibited to cause further harm.\(^5\)

### 5.2.3. Proportionality

Another main principle can be discerned from article 51(5)(b) of AP I. Although this article regulates international armed conflicts, it also applies to NIACs. In the NIAC Manual, the rule is as follows: “An attack is forbidden if it may be expected to cause incidental loss to civilians life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”\(^6\) This principle can be linked with the other principles. The rule of proportionality is an example of the interaction between humanity and military necessity. The protection of civilian lives forms the basis of the principle of humanity. Nonetheless, the rule of proportionality does not render the operation unlawful in case of collateral damage. Only if the assault breaches the proportionality test, the operation will be unlawful.\(^7\) This is a derivative from the principle of military necessity.

### 5.2.4. Distinction

The rules on targeting would lose their value without the existence of the principle of distinction. Subsequently, conflict parties must make a distinction between the object that may be attacked and those that definitely cannot be attacked.\(^8\) This does not mean that these objects cannot be the

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3. In the ICRC Study on Customary Rules, Article 43, for example, describes an exception as follows: “The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity.”; See J.M. Henckaerts, “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict”, *International Review of the Red Cross* 2005, vol. 87, rule 43, (175) 202.


victims of hostilities. This principle only assumes that injuring the protected objects cannot be the objective of the military operation.\textsuperscript{338} The presence of civilian losses does not indicate a violation of the particular rule, as an attack on lawful objects may cause collateral damage.\textsuperscript{339}

The underlying principle of distinction plays an important role in determining who or what is a legitimate target in a conflict. In order to implement this principle, lawful targets must distinguish themselves from unlawful targets. The ICRC Study on Customary law describes the principle as follows: “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.”\textsuperscript{340} The protection of civilians is seen as the cardinal principle of IHL.\textsuperscript{341} Chapter 5.3.4.4. will dwell on the obligation to distinguish.

The principle of distinction is the result of the interaction between the principles of humanity and military necessity. The assaults on the protected persons could have some military advantages, such as the demoralization of the soldiers or creating the willingness amongst the civilians to end the conflict\textsuperscript{342}, however, these attacks are not necessary to achieve victory. Allowing attacks on protected persons would go against the principle of humanity. In order to respect the principle of distinction it is necessary to take reasonable efforts in gathering and digesting the relevant information. A breach of this rule depends on the quality of the available information.\textsuperscript{343}

The principle of distinction contains three facets. Firstly, the prohibition to target or attack the civilian population. Secondly, the prohibition to target or attack civilian objects and lastly, the prohibition placed on indiscriminate attacks.\textsuperscript{344}

\begin{flushleft}
\textsuperscript{341} ICJ 8 July 1996, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, Advisory Opinion, para. 78.
\end{flushleft}
5.3. Targeting of persons

Battles cannot be fought without the use of force, which implies the targeting of persons. It is the very objective of IHL to protect certain persons during the conflict. Some persons can be lawfully targeted in order to achieve victory. Other persons have a certain protection and may not be targeted during the conflict. The rules on targeting define the subjects who may be lawfully targeted.

As mentioned above\(^\text{345}\), several provisions on targeting have a customary status, although they are derived from the laws on international armed conflicts. For example, the rules concerning the protection of civilians have customary status. Nonetheless, NIACs do not recognize the status of combatants. The combatant status is part of the legal framework of IACs but it does not have a customary status which would render it applicable to NIACs. Whereas it is clear in IACs that combatants are an legitimate target\(^\text{346}\), this does not apply to NIACs. Therefore, this thesis will analyze whether or not a person can be lawfully targeted during a NIAC. First, the legitimacy of directly targeting civilians will be evaluated. Secondly, this dissertation will answer the question whether or not the member of an armed group is a legitimate target. Thirdly, this thesis will examine the concept ‘civilian taking direct part in hostilities’. Lastly, chapter 5.3.4. will focus on the operationalization of the rules on targeting.

5.3.1. Civilians

One of the bedrocks of modern humanitarian law is the protection of civilians.\(^\text{347}\) Therefore, article 13 AP II forbids the direct targeting of civilians. Civilians have protection through article 13 AP II.

It is common to NIACs that civilians assist non-state actors by giving water, food or shelter.\(^\text{348}\) Some states interpret these actions as falling under the concept of taking direct part in hostilities. Per contra, members of non-state actors might see the refusal by civilians to help the non-state actor as an indicator that they support the state forces. All these factors clearly underline the relevance of an analysis of the word civilian. However, the analysis brings some difficulties with it, as there is often no wrong or right in this matter.\(^\text{349}\)

\(^{345}\) See chapter 4.2, p. 45-46.
\(^{346}\) Art. 43(2) AP I.
\(^{347}\) ICTY 14 January 2000, Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, Judgment Trial Chamber, para. 521.
Treaty law does not define the concept civilian. In order to fill this gap one could look to the domestic law of the states. This is not preferable as the hostilities would be subject to human rights law and more particularly to the right to life.350

A correct solution would be to interpret the little law and state practice. Not so long ago, the perception of the concept of civilians was extremely restrictive. Civilians were those persons who were not part of state armed forces. This interpretation was used in IACs and it was widely accepted that this also applied to NIACs. As a NIAC does not recognize the concept of combatant and non-combatants, IHL did not mention anything about armed groups and their fighters. Due to this background, members of non-state actors were considered to be civilians who are taking direct part in hostilities, as they are not part of state armed forces.351

This view changed dramatically in 2009 when the ICRC interpreted this concept in its Guidance on direct participation in hostilities.352 The ICRC correctly pleads for an adaption of this concept. Civilians are those who are not members of the armed forces of the state nor are they member of organized armed groups.353 Attacks directed at that category of persons are unlawful. The rules on targeting do not protect the members of armed groups; moreover, these members can be lawfully targeted during operations. However, international law does not define when an individual is member to an armed opposition group. Yet again, this concept should be defined by interpreting the available law and state practice.354

Individuals who are not members of state armed forces nor are they member of armed groups have protection through article 13 of AP II. This article is the codification of a rule that has customary status. As mentioned above355, the ICTY and the ICRC confirmed that the customary rules of AP II also applies

352 Although AP II refers to civilians and civilian population, it does not define this concept.
354 Chapter 5.3. will define the concept individual membership.
355 See chapter 4.5.2, p. 56.
to the NIACs below its threshold.356 This means that these rules will apply to the conflicts satisfying the threshold of CA 3. It contains three paragraphs which will be analyzed below.

5.3.1. Article 13(1) of AP II
The first paragraph of this article describes the protection as follows: “The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.”

This article protects individual civilians and civilians as a group. The concept of general protection does not mean that it is sufficient to give a minimal protection. It refers to the difference between the civilians with the general protection and the ones with an additional specific protection, such as the wounded and sick, children etc.357 The general protection covers the dangers arising from military operations. This implies the obligation of reducing the incidental losses to a minimum as this is one of the dangers. In order to achieve this, it will be necessary to take safety precautions.358

5.3.1.2. Article 13(2) of AP II
Article 13(2) of AP II confirms that civilians cannot be the object of a military operation. It is defined as follows: “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

This provision is in its first sentence an absolute obligation as there are no possible exceptions. It is absolutely forbidden to directly attack civilians as a group or individual civilians. However, an operation may still be lawful when the attack is directed at military objectives but has effects on the life of civilians. Following from the interaction between the core principles, article 13(2) of AP II does not prohibit this scenario.359

Although recent examples might suggest the opposite, non-state actors have often confirmed that directly targeting civilians is unlawful. For example, The Liberation Tigers of Tamil Eelam of Sri Lanka stated that ‘the directly targeting of civilians ... cannot be justified under any circumstances.’ The Front for the Liberation of the Enclave of Cabinda declared that it was not their intention to attack the national football team of Togo.

Article 13(2) of AP II also prohibits attacks which focus on terrorizing the civilian population. However, this does not stipulate a new restriction as it is mainly an example of the general prohibition. This means that an act which primary aim is frightening the civilians will be unlawful.

5.3.1.3. Article 13(3) of AP II
The third paragraph describes the scope of application as follows: “Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.” Civilians will lose the protection offered by the first paragraph when they take direct part in hostilities as long as they take part. The meaning of the term ‘taking direct part in hostilities’ will be analyzed in chapter 5.3.3.

5.3.1.4. Concluding remarks
Despite that AP II prohibits deliberate attacks on civilians, it does not define the concept civilian. By examining the little law and the state practice, the ICRC tried to fill the gap. Civilians are those who are not members of state armed forces nor are they member of armed groups.

The prohibition makes also part of the legal framework of NIACs satisfying the conditions of CA 3 through its customary status. The ‘absolute’ protection of civilians should be nuanced in two ways. First of all, only the direct targeting of the civilians is prohibited. If the primary objective of the military operation was not targeting civilians, the presence of civilian losses does not render the operation

unlawful.\textsuperscript{365} This needs to be assessed through the principle of proportionality. The military operation is only unlawful when the civilian losses are excessive to the gained military advantage. Secondly, only a civilian that does not participate in hostilities has this protection. If the civilian engages in hostilities, he or she will lose his or her protection.

5.3.2. Members of the opposing parties

AP II expressively refers to the unlawfulness of targeting civilians. Through the customary status of this provision, it also applies to conflicts fulfilling the conditions of CA 3. Civilians are those who are not part of the armed forces of a state nor are they member of an organized armed group. This definition introduces the concept of membership in an organized armed group. Treaty law does not refer to this concept. Therefore, it is important to clarify the membership of a non-state actor. If a person will be seen as a member of an organized armed group, he or she will lose his or her civilian status, which implies the loss of protection. The question arises whether members of non-state actors may be lawfully targeted and if so, which individuals are considered to be member of the military wing of a non-state actor.

5.3.2.1. Legality of the targeting

When an individual has the status of being a member of the military wing, the question remains whether this member can be lawfully targeted. In other words, is the status of membership sufficient to directly target the individuals?

Whereas AP I precisely recognizes combatants\textsuperscript{366}, NIACs do not recognize this status. The legal framework of NIACs does not provide such legitimate status-based targeting. This implies, at first sight, that the targeting of members of the state armed forces will be punishable under domestic law. It will only be lawful to deliberately target members of the opposing forces when they take direct part in hostilities.\textsuperscript{367} It is self-evident that the states were not keen to grant their civilians the right to target members of the state armed forces.\textsuperscript{368}

\textsuperscript{365} The lawfulness of incidental loss of civilian is recognized under IHL through the principle of collateral damage. This concept can be derived from the principle of proportionality and comes more or less down to the fact that incidental loss of civilians does not render the attack unlawful when these losses are not excessive compared with the gained military advantage. Obviously, the particular attack should be directed at a lawful target, such as military objectives or members of the armed forces.

\textsuperscript{366} Which are a legitimate target through art. 43(2) AP I.

\textsuperscript{367} This dissertation will analyze the concept of taking direct part in hostilities in chapter 5.3.3.

Nonetheless, the members of both the armed group and the state forces should be treated as combatants, as a consequence, both members may be targeted without violating IHL.\textsuperscript{369} An individual who is a member of an armed opposition group loses his or her civilian status and therefore he or she can be the legitimate target of an operation.\textsuperscript{370} The ICRC confirmed this approach in its Commentary on Additional Protocol II.\textsuperscript{371} In order to avoid confusion with the combatants in an IAC, one should use the word ‘fighter’ instead of combatant, as the legal framework of NIACs lacks the entitlement of ‘combatant’.\textsuperscript{372}

Members of the military wing of the armed group, just as the members of the state armed forces, may be targeted at any time, even when those members are not taking direct part in hostilities at the moment of targeting.\textsuperscript{373} The fighters are then, for as long as they are member of the armed group, a lawful target and may be the object of an attack for the duration of their membership.\textsuperscript{374} In order to maintain the equality between the conflict parties, the members are a legitimate target at any time.

5.3.2.1. Members of an organized armed group
Whereas domestic law determines whether an individual is member of the state armed forces, there is no legal source that defines the concept membership in an organized armed group. It is necessary to interpret the little law and the state practice in order to define this concept.\textsuperscript{375} Due to the quasi non-existence of state practice, the discussion has moved away from legal arguments as the focus lays on military reality.

\textsuperscript{371} In its commentary the ICRC describes this as follows: “those who belong to armed forces or armed groups may be attacked at any time.”; See Y. SANDOZ, C. SWINARSKI & B. ZIMMERMANN (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva, Martinus Nijhoff Publishers, 1987, 1453, para. 4789.
\textsuperscript{375} State practice on this matter is almost non-existent.
The term organized armed group needs to be defined in accordance to the test used to determine the existence of a NIAC. In theory, there exist several approaches to identify members of an organized armed group. In a first approach, an individual is only a member based on the combat function he or she has within the organized armed group. The author SIVUKAMARAN does not agree on this first approach. He advocates the approach where an individual becomes a member through two distinct forms.

5.3.2.1.1. Continuously combat function
The ICRC supports the first approach. According to the Interpretive Guidance, a person is the member of an armed group when his or her continuous function is taking direct part in hostilities, the so-called ‘continuous combat function’. The ICRC introduced this concept, as there was no other solution according to them. One could look to domestic law, but this does not regulate the membership of opposition groups unlike the armed forces of a state. The ICRC prefers to take the function rather than some formalizations into account.

The function should be executed continuously in order to receive membership. This term includes persons who are involved in ‘the preparation, execution or command of acts or operations amounting to direct participation in hostilities.’ The continuously combat function may be openly expressed by the carrying of signs, weapons or uniforms. If individuals are recruited, trained and equipped in order to continuously take part in the hostilities, these individuals are members of non-state actors, which implies the loss of their civilian status. However, if their functions do not involve actions amounting to direct participation in hostilities, then these individuals will be categorized as civilians. This does not only apply to recruiters, trainers and financiers, but also to those whose tasks are restricted to ‘the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside...

380 Their function may not amount to direct participation in hostilities, otherwise they will lose protection.
specific military operations or to the collection of intelligence other than of a tactical nature.381 Such persons will be regarded as civilians who only lose their protection if they take direct part in hostilities, although they might offer substantial assistance to an armed group. For example, individuals that assist the non-state actor by giving food are not member of an armed group and thus remains civilians under protection.382 This view is altogether very restrictive and does not respond to state practice.383

5.3.2.1.2. De jure and de facto membership
The author SIVAKUMARAN has suggested an alternative approach in order to determine whether an individual has membership within an armed group.384 In his work, he presents a solution which is more adopted to military reality. He pleads for a combination of de jure and de facto membership.

The de jure membership of an armed group may be evidenced through the law of the opposition group.385 De jure membership refers to a formal membership within an armed group, without the necessity to take direct part in hostilities.386 This creates the opportunity to target individuals which do not participate in hostilities but assist the military wing of the armed group, such as logistic roles.387

An individual may also lose its protection through a de facto membership within the non-state actor. An individual who takes an ongoing direct part in hostilities is a de facto member of the armed group, without the need to be a de jure member. This form of membership is evidenced through ‘an ongoing chain of hostilities, with short periods of rest between them (..) particularly if the periods of rest serve as preparation for the next engagement.’388 These members differ from the civilians taking direct part

383 State practice regarding membership of an organized armed group is quasi non-existent. The decision that the ICRC made was not the result of legal interpretation but rather it was the outcome of a discretionary decision; See M. HLAVKOVA, “Reconstructing the Civilian/Combatant Divide: A Fresh Look at Targeting in Non-International Armed Conflict”, Journal of Conflict & Security Law 2014, vol. 19, (251) 262.
385 Given that the membership of the armed forces of a state has its ground in national law, it would be contradictory to state the opposite for non-state actors.
in hostilities as they do not take a direct part in the hostilities on an ad hoc basis. Individual civilians who take an ad hoc part in hostilities will lose their protection, without having the membership of one of the parties to the conflict. These individuals are civilians who take direct part in hostilities, without losing their status as civilians. This is the opposite for de facto members, as they lose their status as civilian.

Several indicators to determine the time aspect of the participation have been proposed. These indicators are definitely not decisive. On this basis, only the members of the military wing are considered to be a de jure or de facto member. For example, members who are responsible for the education or political wing maintain their civilian status.

The combination of these two memberships should be followed for several reasons. First of all, the concept of the de jure membership fills the gap which the ICRC proposal created. Membership in an armed group solely depends on the particular function one has in the armed group. This criterion is only fulfilled when the individual has a continuous combat function. An individual who performs an important non-combat function is not a member. Individuals with a logistical role will not be a lawful target. Not only does this proposal ignore the importance of these members, it also ignores the existence of formality in membership within the armed group. The approach of the ICRC is also not adopted to the military reality. It will be impossible to distinguish between fighters and non-combating personnel.

389 These individuals lose their protection regardless of on whose side they take direct part in the hostilities. They can either assist the state armed forces or the opposition group, nonetheless, the result will be the same as they will remain civilians who lose their protection for the time they are taking part in the hostilities. However, if these individuals engage in hostilities for an ongoing time, they receive a de facto membership which leads to the fact that they cannot be seen as a civilian. As mentioned above, a civilian is an individual who is not a member of the armed forces of the state nor is he member of the armed opposition group.


391 In the Halilovic case, the ICTY came up with indicators such as the age and gender of the victim, the activity of the victim and the presence of weapons. These indicia may assist the assessment in some situations, however their existence should not automatically result to the conclusion that the person was a de facto member of the non-state actor; See S. SIVAKUMARAN, The Law of Non-International Armed Conflict, Oxford, Oxford University Press, 2012, 361.


393 SIVAKUMARAN correctly comes up with these arguments himself.


Following the perception of the ICRC would create an inequality between the armed forces of a state and the military wing of an armed group. For example, persons with a logistical role would be members of the armed forces of a state while this would not apply to members of the non-state actor with the same role.\textsuperscript{396} This would breach one of the main principles of IHL, namely the equality of the belligerent parties. Lastly, the ICRC argues that the continuous combat function can be expressed through the carrying of weapons, uniforms or signs.\textsuperscript{397} But does this expression not rather indicate an existing membership than the continuous combat function? In the view of this author, this question should be answered positively.

5.3.2.3. Concluding remarks

Members of the military wing of an armed group or members of the state armed forces may be lawfully targeted at any time in order to achieve the military objectives. They are a legitimate target as they do not have the protection through AP II. It is preferable to use the approach suggested by SIVAKUMRAN when determining whether an individual is a member of the military wing of an opposition group or a civilian. The membership can take two separate forms, namely a \textit{de jure} membership and a \textit{de facto} membership.\textsuperscript{398} Using the solution proposed by the ICRC would go against the principle of equality between the belligerent parties. Only if they are part of the military wing, they become a legitimate target. Members responsible for other subjects remain civilians under protection. However, if they take direct part in the hostilities, they render a targetable individual.

5.3.3. Civilians taking direct part in hostilities

The protection that civilians enjoy is not unconditional. Following from article 13(3) of AP II, civilians lose their protection for the time they take direct part in hostilities.\textsuperscript{399} This is a rule of customary international law.\textsuperscript{400} There are two categories of civilians, namely those who are protected and those are not protected as they are taking part in hostilities. Under IHL, direct participation is not unlawful\textsuperscript{401}.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{398} It is irrelevant whether an individual is a \textit{de facto} member or a \textit{de jure} member. Both members may be lawfully targeted.
\item \textsuperscript{399} Art. 13(3) AP II.
\item \textsuperscript{400} J.M. HENCKAERTS, “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict”, \textit{International Review of the Red Cross} 2005, vol. 87, rule 6, (175) 198.
\item \textsuperscript{401} However, it may be unlawful under domestic law.
\end{itemize}
\end{footnotesize}
nor is it criminalized through international law. It only leads to the withdrawal of protection.\footnote{S. SIVAKUMARAN, The Law of Non-International Armed Conflict, Oxford, Oxford University Press, 2012, 363.} The individuals participating in hostilities do not lose the status of civilian.

The participatory acts are inconsistent with the comportment of the status of civilian under international law. When civilians decide to take part in the hostilities, they will temporarily lose their immunity.\footnote{B. BOOTHBY, “And for such time as”: The Time Dimension to Direct Participation in Hostilities”, New York University Journal of International Law and Politics 2010, vol. 42, (741) 754-755.} International courts have often been referring to ‘taking an active part in hostilities’, however, this concept has the exact same meaning.\footnote{ICTR 2 September 1998, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment Trial Chamber I, para. 629.}

\subsection*{5.3.3.1. Constitutive elements}
The ICRC has worked out three constitutive elements to determine whether the action can be identified as active participation in hostilities. First of all, the relevant act must be likely to result in a certain threshold of harm.\footnote{The ICRC Guidance described this element as follows: “the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack”; See N. MELZER (ed.), Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Geneva, ICRC, 2009, 45, available at: \url{https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf}, accessed 12 May 2016.} The harm does not need to be materialized as the possibility of occurrence is sufficient\footnote{N. MELZER (ed.), Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Geneva, ICRC, 2009, 47, available at: \url{https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf}, accessed 12 May 2016; The ‘likelihood’ of the harm has been widely accepted by several authors. See e.g., W.H. BOOTHBY, The Law of Targeting, Oxford, Oxford University Press, 2012, 153.} and it should be assessed through its quality rather than through its quantity.\footnote{W.H. BOOTHBY, “And for such time as”: The Time Dimension to Direct Participation in Hostilities”, New York University Journal of International Law and Politics 2010, vol. 42, (697) 716.} This condition symbolizes the interaction between military necessity and humanity. As these civilians lose their protection, they become a lawful target if military necessity demands so. When the civilians harm the enemy, the loss of their protection is merited.\footnote{B. BOOTHBY, “And for such time as”: The Time Dimension to Direct Participation in Hostilities”, New York University Journal of International Law and Politics 2010, vol. 42, (697) 713.} The formulation is too restrictive as it only refers to an adversely effect on the enemy\footnote{The enemy may be the armed stated forces or the non-state armed group, the civilian will lose his or her protection regardless of on whose side he is taking an active role.} however, the act may embellish the military operation of a party.\footnote{W.H. BOOTHBY, The Law of Targeting, Oxford, Oxford University Press, 2012, 153; M.N. SCHMITT, “Deconstructing Direct Participation in Hostilities: The Constitutive Elements”, New York University Journal of International Law and Politics 2010, vol. 42, (697) 719.} The reference to the death, injury or destruction on civilians is also too limited as it does not take other threatening acts such as hostage-taking into account.\footnote{Hostage-taking could be extremely linked with the conflict as the hostage taker might demand, for example, the withdrawn of the military troops; See M M.N. SCHMITT, “Deconstructing Direct Participation in Hostilities:}
there must be a direct causal link between the act and the harm. This formulation excludes the withdrawal of protection in case of indirect participation. Acts that assist in creating capacity to cause harm do not fall under the scope of application.\footnote{N. MELZER (ed.), \textit{Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law}, Geneva, ICRC, 2009, 51, available at: \url{https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf}, accessed 12 May 2016.} Lastly, the ICRC proposed the concept of belligerent nexus. In order to satisfy this constitutive element, the act must be specifically designed to directly cause the required threshold.\footnote{W.H., BOOTHBY, \textit{The Law of Targeting}, Oxford, Oxford University Press, 2012, 155.} The belligerent nexus condition distinguishes acts taking advantage of the instability from acts related to the conflict. The object of the act must be to improve the position of one of the parties.\footnote{Art. 13(3) AP II.}

5.3.3.2. Revolving door principle

Whereas the targeting of fighters is based on their status during the conflict, the legitimate targeting of civilians taking direct part in hostilities is based on the specific act directly causing the harm. Article 13(3) of AP II stipulates that a civilian only loses the protection ‘for such time as they take direct part in hostilities.’\footnote{In the Target Killings case, the Supreme Court of Israel has implicitly confirmed the revolving door concept by stating that ‘a civilian who ... commits act of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy- during that time- the protection granted to a civilian’; See Supreme Court of Israel 13 December 2006, \textit{The Public Committee Against Torture in Israel v. the Government of Israel}, Case No. HCJ 769/02, Judgment, para. 30.} The ICRC has worked out the principle of the ‘revolving door’, which provides that ‘civilians lose and regain protection against direct attacks in parallel with the intervals of their engagement in direct participation in hostilities.’\footnote{N. MELZER (ed.), \textit{Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law}, Geneva, ICRC, 2009, 70, available at: \url{https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf}, accessed 12 May 2016.} An individual will restore his or her protection against a direct attack when his or her engagement in hostile acts ends.\footnote{N. MELZER (ed.), \textit{Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law}, Geneva, ICRC, 2009, 71, available at: \url{https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf}, accessed 12 May 2016.} This proposal, where the protection comes and goes with one individual act, is the most adequate and has the support from international jurisprudence.\footnote{N. MELZER (ed.), \textit{Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law}, Geneva, ICRC, 2009, 72, available at: \url{https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf}, accessed 12 May 2016.}

The principle of the revolving door is the subject of much controversial in the jurisprudence. One of the main critics is that those civilians regain their protection in the interval between multiple
participations. Using the revolving door principle would ignore the fact that individuals often use these intervals to prepare the next attack. Another approach would therefore be that such individuals have lost their protection and may be targeted at any time, even after engaging to hostilities. Such persons cannot restore their immunity according to this approach. A second approach suggests that such persons remain lawful targets until they demonstrate that they are no longer taking an active part in hostilities.

The principle of the revolving door should be followed, as the other approaches give a license to kill civilians who only participated one time. Where it will be extremely difficult to demonstrate that they are no longer taking part in the hostilities, they remain a lawful target although they are no longer a danger for the belligerent parties. Directly targeting these individuals would go against the principle of military necessity. Therefore, the mechanism of ‘revolving door’ should be followed as it puts the weight on the shoulders of the opposing parties, who will need to investigate whether the civilians are taking direct part in the hostilities or not.

5.3.4. Targeting of persons in practice

Civilians that take direct part in hostilities are a lawful target. As these individuals are only a lawful target during the act, it may be difficult to target them in practice. On the other hand, fighters are a lawful target at any time based on their status of fighter. The question arises how these rules are converted in practice. The armed forces of a state often use the targeting cycle. The cycle creates a framework that needs to be followed when one wants to successfully target a lawful object. It will be important to gather the relevant information in order to establish the membership of an individual within the non-state actor. This also applies to civilians taking direct part in hostilities. Based on the gathered intelligence, the decision-maker needs to anticipate on their action in order to lawfully target these civilians, as they only lose their protection for the time they are taking an active part in hostilities.


423 Although this will make it more difficult for the opposing parties to respond effectively to the participation, it is preferable to use this mechanism as it protects civilians from arbitrary attacks; See N. MELZER (ed.), Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Geneva, ICRC, 2009, 71, available at: https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, accessed 12 May 2016.
5.3.4.1. Targeting cycle

As mentioned in the introduction of this chapter, targeting can be described as ‘the process to detect, select, and prioritize targets; match the appropriate action; and assess the appropriate effects based on the commander’s objective, guidance and intent.’ The targeting cycle helps transforming the theory into practice. This cycle provides a framework that needs to be followed during the process of targeting in order to successfully target.\textsuperscript{424} The joint targeting cycle contains six phases: end state and commander’s objectives, target development and prioritization, capabilities analysis, commander’s decision and force assignment, mission planning and force execution, and assessment.\textsuperscript{425} The figure below illustrates the targeting cycle.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{targeting_cycle.png}
\caption{Targeting cycle\textsuperscript{426}}
\end{figure}

In the first phase of the targeting cycle, the understanding of the military end state and the commander’s operational objectives initiate the targeting process. By looking to the end state, parties try to achieve the military objectives. The military end state can be defined as the set of required conditions in order to achieve the commander’s military objectives. These objectives can be found in the commander’s intent, which is the result of a mission analysis. The commander’s intent is a clear expression of the purpose of the operation and the military end state. It sets out the military conditions


that need to be fulfilled in order to accomplish the military operation. Therefore, it is extremely important to understand these objectives and conditions as they influence the target development.\footnote{United States Joint Chiefs of Staff 2013, Joint Publication 3-60, Joint Targeting, ii-4, available at: \url{http://www.cfr.org/content/publications/attachments/Joint_Chiefs_of_Staff-Joint_Targeting_31_January_2013.pdf}, accessed 12 May 2016.} 

In the second phase, the target development comes into play. The military objectives lead to a list of targets whose destruction assists in achieving these military objectives. The examination, assessment and documentation process to identify these targets is performed during this second phase. The assessment includes the prioritization of the targets. During the target development, the answer whether a target is a military objective or not should be given. If not, the target should not be put on the list.\footnote{United States Joint Chiefs of Staff 2013, Joint Publication 3-60, Joint Targeting, ii-5 – ii-6, available at: \url{http://www.cfr.org/content/publications/attachments/Joint_Chiefs_of_Staff-Joint_Targeting_31_January_2013.pdf}, accessed 12 May 2016.}

The third phase concerns the evaluation of all possible capabilities against the critical spots of the target to determine the most suitable option for target engagement. Both lethal and non-lethal weapons may be used to realize the result, though, the conflict party needs to allocate the weapons while considering the possible effects. In the assessment of the effects, the underlying principles should be taken into account. The capabilities should be assessed through the principle of proportionality. This implies that if several capabilities have the same military advantage, the one with the least grave consequences in the eyes of the civilians should be used. Trained and certified personnel will estimate the possible collateral damage which the operation might bring along during this phase.\footnote{United States Joint Chiefs of Staff 2013, Joint Publication 3-60, Joint Targeting, ii-13 – ii-14, available at: \url{http://www.cfr.org/content/publications/attachments/Joint_Chiefs_of_Staff-Joint_Targeting_31_January_2013.pdf}, accessed 12 May 2016.}

Assigning the armed forces to a specific target is the main characteristic of phase four. Although this is an operational function, it requires substantial intelligence to allocate the armed forces effectively. Regarding the information gathered in the first three phases, the planning of the operation takes place in this stage. The assignment of the armed forces is not only the result of a combination between the
gathered information and the availability of the forces\textsuperscript{430}, it also depends on other issues. The planners should take the weather, rules of engagement\textsuperscript{431}, law of war, and environmental issues into account.\textsuperscript{432}

The detailed planning in order to execute the operation will be performed during the fifth phase. This phase involves the identification, locating, validation and tracking of the target, which eventually entails in the execution of the operation.

In the last phase, the question whether the end state and the military objectives have been achieved will be answered. If the answer is positive, the cycle is completed. A negative answer will trigger the forces to start this process all over again in order to achieve the military objectives this time.

\textbf{5.3.4.2. Targeting of members of an organized armed group}

The membership of the military wing of an organized armed group could take two forms. On the one hand, an individual can be a \textit{de jure} member. On the other hand, an individual can be a \textit{de facto} member. The membership renders an individual targetable. The establishing of the membership, taking place in the second phase of the target cycle, will be challenged.\textsuperscript{433} As a \textit{de facto} membership may only be derived from a chain of hostilities on an ongoing basis on behalf of the armed group, this raises difficulties in determining this membership.\textsuperscript{434} By using a functional test\textsuperscript{435}, one could identify a \textit{de facto} member of an armed group. All the acts linked with the armed group, even the non-hostiles in nature, will be analyzed to determine the status of the individual.\textsuperscript{436} Establishing the \textit{de facto/de jure} membership renders the individual targetable at any time, based on his or her status of fighter.

\begin{itemize}
  \item \textsuperscript{430} Previous missions, for example, could have damaged the equipment.
  \item \textsuperscript{431} Rules of engagement are ‘directives issued by competent military authority that delineate the circumstances and limitations under which US forces will initiate and/or continue combat engagement with other forces encountered.’; \textit{See United States Joint Chiefs of Staff 2013, Joint Publication 3-60, Joint Targeting, ii-14, available at:}\texttt{http://www.cfr.org/content/publications/attachments/Joint_Chiefs_of_Staff-Joint_Targeting_31_January_2013.pdf}, accessed 12 May 2016.
  \item \textsuperscript{433} Target identification is being challenged by several difficulties. For example, it may be hard to distinguish between the military—and political wing of an armed group. Other difficulties will be discussed in chapter 5.3.4.4.
  \item \textsuperscript{434} As mentioned above, the ICRC Guidance states that membership is often not expressed through uniforms and signs. This will make the determination even more difficult as the membership can only be derived from the chain of hostilities.
  \item \textsuperscript{435} In a functional test one ‘looks to conduct in connection with a group, presumably over a period of time, to label an individual as a member of an armed group.’; \textit{See R.E. VANDLANDINGHAM, “Meaningful Membership: Making War a Bit More Criminal”, Cardozo Law Review 2013, vol. 35, (79) 120.}
  \item \textsuperscript{436} R.E. VANDLANDINGHAM, “Meaningful Membership: Making War a Bit More Criminal”, \textit{Cardozo Law Review 2013, vol. 35, (79) 121.}
\end{itemize}
The identification depends on the intelligence-driven assessments of the acts of an individual. The government forces gather information, which forms the basis to determine the status of the individual. Several present factors may indicate a de facto membership. Taking direct part to hostilities might be an indicator. However, it will not automatically lead to membership, as civilians can take direct part in hostilities without losing their status as civilian. Only when the participation implies, for example, the knowledge of inside information, one may establish membership.437 The US Federal courts have worked out several relevant factors that might indicate the membership within an armed group. Some indicia could for instance be whether an individual is part of a command structure, whether an individual attended training camps or whether an individual stayed in guesthouses.438

In other words, governmental forces look at ‘the significance of a person’s activities in relation to the organization.’439 These are not settled criteria to establish the membership of an armed group.440 The determination must be made on case-by case basis by focusing on the totality of circumstances, which contains all the relevant acts in relation with the armed group. Once the membership is established, the member is a lawful target at any time and cannot restore his or her civilian status.

As mentioned above441, it is necessary to take all reasonable efforts into account when determining the status of an individual, in order to not violate the rule of distinction.442 Only when a reasonable commander in the same circumstances would come to the exact same conclusion, based on the gathered intelligence concerning the acts of the individual, the determination will be correct. The commander should be extremely careful when determining this status, as it has some major consequences. Most importantly, it may kill innocent civilians. Furthermore, deliberately targeting civilians constitutes a war crime which arises individual criminal responsibility through the Rome Statute.443

440 For other indicia such as ‘the extent to which an individual performs a function on behalf of an organized armed group that is both analogous to a function traditionally performed by a member of a state military who is liable to attack and that is performed within the command structure of the organization’, see K. Watkin & A.J. Norris (eds.), Non-International Armed Conflict in the Twenty First Century, International Law Studies, vol. 88, Naval War College, Newport, 2012, 189, available at: http://www.peacepalacelibrary.nl/ebooks/files/356612716.pdf, accessed 12 May 2016.
441 See chapter 5.2.4, p. 59-60.
443 Art. 8(2)(e)(i) of the Rome Statute.
5.3.4.3. Targeting of civilians taking direct part in hostilities

Civilians who take direct part in hostilities lose their immunity and become legitimate targets as long as they take part in the hostilities.\(^{444}\) When their engagement in the hostile act ends, they restore their protection. Whereas members of the armed forces or members of the military wing of an armed group are legitimate targets based on their status, civilians taking direct part in hostilities can only be lawfully targeted based on the act they engage to.

During the hostile act, they lose their protection for an ad hoc period. This tense interval challenges the process of targeting civilians taking an active part in hostilities. Some activities have a direct and clear-cut connection with the hostilities. When, for example, a civilian uses a weapon against one of the opposing parties, he or she will render a targetable individual.\(^{445}\) However, not all the situations are crystal-clear. As it is necessary that the act is especially designed to directly cause the harm, the decision-maker should crawl into the head of the actor. Only the actor knows the reasons behind the hostile act. The decision-maker can only infer, within a certain margin of appreciation, from the available intelligence.\(^{446}\) Furthermore, the limited temporal scope of the loss of the protection demands a certain predictability of the future hostile act. The decision-maker needs to anticipate on a possible hostile act in order to lawfully target the civilian.

Therefore, it is useful to draft an illustrative list of acts that habitually constitute, notwithstanding unusual circumstances, direct participation. Examples of direct participation are: taking up arms or attacking the personnel or property of one of the belligerent parties, undertaking sabotage operations, transmitting military information for the immediate use of a party to the conflict, transporting weapons close to the combat zone and providing intelligence.\(^{447}\) Some acts may or may not be direct participation, depending on the situation. When, for example, a civilian repairs military equipment of use in connection with military operations, it will not be crystal-clear whether this is direct participation. The definitive determination of the hostile act depends on the circumstances. The decision-maker has to determine, based on the gathered information, whether the civilian becomes a

\(^{444}\) A civilian takes part in the hostilities when three constitutive elements are being satisfied. First of all, the relevant act must be likely to result in a certain threshold of harm. Second, there must be a direct causal link between the act and the harm. Lastly, the act must be specifically designed to directly cause the required threshold.


targetable individual. When the decision-maker is not sure, the attack must be delayed in order to gather more information.448

The determination requires a careful review of all the available information as a wrong decision would have grave consequences.449 The revolving door principle implies that in practice the decision-maker needs to anticipate on the possible act. The moment the civilian ends his or her participation in hostilities, he or she restores his or her immunity.

5.3.4.4. Operationalization of distinction
The principle of distinction is the cardinal principle of IHL. It implies that parties to the conflict need to distinguish between fighters and civilians, between those who are a lawful target and those who are not. Following from the description of the ICRC, the principle of distinction is related with the duty to distinguish. Combatants should distinguish themselves from civilians when engaging in an attack or in a military operation preparatory to an attack450 in order to apply the principle of distinction. Otherwise, the distinction-principle would have no meaning, as it would be practically impossible to identify the civilians under protection, resulting in the use of force against each individual. However, NIACs do not recognize the status of combatants and thus one could argue that the members of the opposing parties do not have the duty to distinguish themselves from the civilians.

The duty to distinguish is a rule of customary law that only applies to IACs, according to the ICRC.451 Regarding the nature of the contemporary conflicts, this view is no longer tenable. It should be clear that the fighters, including the members of the military wing of the organized armed group, have the duty to distinguish themselves from civilians, as non-distinguishing would render the principle of distinction meaningless. In order to maximize the protection of the civilians, the fighters need to distinguish themselves from civilians to ensure their protection.452

449 This means that a civilian under protection will be targeted.
450 Art. 44(3) AP I.
5.3.4.1. Challenges for the operationalization

Despite having the duty to distinguish, fighters often launch rockets from civilian buildings or blend into the civilian population. During this modern form of warfare, several difficulties arise when making a distinction between lawful targets and targets under protection.

For example, it is not rare that the members of an organized armed group dress the same as civilians with the aim of creating a perspective in which they have protection. When these fighters do not wear distinctive uniforms, it will be extremely difficult for the state armed forces to determine whether these individuals are a lawful target. Moreover, the members of the state forces find themselves in a critical position, as the members of the non-state actor are wolves in sheep’s clothing. The state armed forces may get closer to fighters without being aware that these “civilians” present a threat. The armed groups may then use suicide bombers to kill the members of state armed forces.\footnote{L.R. BLANK, “Taking distinction to the next level: accountability for fighters’ failure to distinguish themselves from civilians”, Valparaiso University Law Review 2012, vol. 46, (765) 775-776.} This is an act of perfidy\footnote{The traditional definition of perfidy is: “[t]o kill or wound treacherously individuals belonging to the hostile nation or army.”; See art. 23(b), Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land of 18 October 1907, The Hague, available at: https://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument, accessed 12 May 2016.} which is prohibited under IHL.\footnote{J.M. HENCKAERTS, “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict”, International Review of the Red Cross 2005, vol. 87, rule 65, (175) 204.} The fighters deliberately claim to have protection by not distinguishing themselves, which leads to the perverse effect that the soldiers of the state armed forces will believe that they are not under any threat. If, in this case, the members of the non-state actors will kill the opposite soldiers, this is an act of perfidy.\footnote{L.R. BLANK, “Taking distinction to the next level: accountability for fighters’ failure to distinguish themselves from civilians”, Valparaiso University Law Review 2012, vol. 46, (765) 786-787.}

Furthermore, armed groups often use civilians as human shields in order to protect their members from attacks. The use of a human shield is prohibited through customary law.\footnote{J.M. HENCKAERTS, “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict”, International Review of the Red Cross 2005, vol. 87, rule 97, (175) 207.} By blending into the civilian population, which violates IHL, members of the armed groups abuse the protection provided by IHL. The armed groups are aware of the fact that in most of the cases the armed forces will not deliberately target the fighters, as the incidental loss of civilians will be excessive to the gained military advantage. To achieve this advantage, they use civilians as a human shield. The refusal to distinguish...
themselves from civilians does not only create huge dangers for the civilians, it also renders the task to implement the principle of distinction extremely difficult.  

5.3.4.4.2. Operationalization

Although the above examples violate IHL and ensure criminal responsibility, this does not give the opposing parties a license to violate IHL themselves. On the battlefield, the soldier will have to determine whether an individual is a lawful target or not. All the de facto and de jure members of the military wing of the armed group are targetable. However, it will be extremely difficult to identify these fighters, especially when these members do not distinguish themselves from civilians. Therefore, the operationalization of distinction requires intensive training and the use of the gathered intelligence to identify the member.

In practice, the state armed forces implement the principle of distinction through the rules of engagement. Rules of engagement are ‘directives issued by competent military authority that delineate the circumstances and limitations under which [US] forces will initiate and/or continue combat engagement with other forces encountered.’ In the event of a NIAC, states will label the members of the military wing of the armed group as legitimate targets and declare them hostile in the rules of engagement. However, it will be very difficult to determine who exactly is a member of the armed group. As mentioned above, the identification is mainly a data-driven process by which the decision-maker needs to take all relevant facts into account.

Treacherous acts make status-based targeting almost impossible for the state armed forces. Whereas state armed forces normally have the right to target the members of the military wing of an armed based on their status, they now will have to target fighters based on their conducts. Questions such as ‘how do these members look like?’ or ‘do they wear equipment?’ can often not be answered, even with the available intelligence. As a result, state armed forces can only identify the members when

462 See chapter 5.3.4.2, p. 76-77.
these members engage in hostilities. This form of targeting is similar to the targeting of civilians taking direct part in hostilities.

Therefore, the rules of engagement will implement the right to use force in self-defense, in response to the hostile act or the hostile intent of an opposing fighter. The rules of engagement incorporate several examples of hostile acts and hostile intent will be defined.464

5.3.5. Concluding remarks

Civilians are those individuals who are not a member of the state armed forces nor are they a member of the military wing of the armed group. Individuals with civilian status are protected by IHL and cannot be directly targeted. However, when a civilian takes direct participation in the hostilities, he or she will lose his or her immunity, though he or she will not lose the status of civilian, 'for such time as they take part in the hostilities.'465 Following from the revolving door principle, the participating civilian restores his or her immunity when his or her engagement in the hostile act ends. Civilian immunity does not mean that they cannot be the victim of attacks. Incidental loss of civilians while directly targeting a lawful object does not render the operation unlawful.

Members of the armed forces of a state or the members of the military wing of an armed group are lawful targets, based on their status. The membership of the military wing of a non-state actor could take two forms. An individual can be a de jure member or an individual can be a de facto member. Where the de jure membership is based on the idea of a formal membership, the de facto membership can be derived from ‘an ongoing chain of hostilities, with short periods of rest between them.’466 Although the legal framework of NIACs does not recognize the combatant status, these members may be targeted. The protection of civilians implies that fighters are a legitimate target at all times.

The targeting cycle assists in translating these principles into practice. The parties should act in accordance with the six stages of the target cycle in order to successful target. Targeting is an intelligence driven process whereby specialized personnel determine the status of an individual. This vital evaluation of one’s status should be done in the second phase of the cycle, namely the target development. After the determination, forces will be assigned with the task to attack the target. However, on the ground, it may be extremely difficult to identify a member of the military wing of an

465 Art. 13(3) AP II.
armed group. These members often blend into the civilian population, furthermore, they often do not wear uniforms. The failure to distinguish themselves from civilians will make it tough to implement the principle of distinction.

If one of the belligerent parties breaches IHL by directly targeting protected civilians, this will incur individual criminal responsibility. Deliberate attacks on civilians constitute a war crime on which the ICC may convict the persons responsible for this war crime.467

5.4. Targeting of objects

Conflicts cannot be won by only targeting persons. It will be necessary to attack certain objects in order to achieve victory. For example, the destruction of a military basis definitely offers a huge military advantage. Taking a closer look to contemporary examples, it is definitely noticeable that objects are often the center of an attack. Syrian government, for example, has been air striking military bases from Daesh in pursuance of recapturing several cities. However, not only military sites are the object of targeting. Blinded by the intention to seize victory, belligerent parties may proceed to less obvious targets. Amnesty International reported that the Syrian government ‘has been deliberately attacking health facilities as part of their military strategy.’468 By destroying hospitals, the government tried to pave a way for ground troops to move up to the city Aleppo. Although these attacks may be part of the military strategy, the question arises whether these attacks are lawful.469 The legality of targeting an object should be assessed through the applying rules on targeting.

The rules, which regulate the targeting in a NIAC, are once more the result of the interaction between the two core principles, namely military necessity and humanity. It comes more or less down to this question: “which measures may the belligerent parties take in order to seize victory while taking the principle of humanity into account?” Although attacks on hospitals might indirectly imply a military advantage, their lawfulness might be questioned when the principle of humanity comes into play. Furthermore, it is questionable whether the immunity of the civilians may be extended to their objects. If attacks on civilian objects are not prohibited, would this not render the afforded protection through

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467 Art. 8(2)(e)(i) of the Rome Statute.
By analyzing the rules on targeting of certain objects, this thesis will answer the above questions.

5.4.1. Civilian and military objects

5.4.1.1. Civilian objects
The protection of civilians is one of the keystones of IHL. Does this also imply that civilian objects have protection through IHL? CA 3 and AP II do not prohibit attacks on civilian objects in general, as they only protect certain civilian objects. However, in chapter 4, this thesis concluded that certain customary rules apply to NIACs. The rules on the protection of civilian objects, which can be derived from the principle of distinction, have a customary status resulting in the applicability of this protection to both forms of NIACs. Therefore, one could undeniably argue that civilian objects are protected through customary international law in the event of a NIAC. Just like civilians, it is prohibited to directly target civilian objects.

It is necessary to define the concept ‘civilian objects’ in order to know which objects this rule covers. As AP II does not regulate this topic, the definition used in AP I should be followed. According to article 52(1) AP I, civilian objects are objects that are not military objectives. Consecutively, military objects are ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’

5.4.1.2. Military objectives

The definition of military objective requires the satisfaction of two cumulative criteria in order to lawfully target an object. First, the objective, by its nature, location, purpose or use, must make an effective contribution to the military action. Secondly and cumulatively, attacking the objet must offer a definite military advantage. This second condition seems to be unnecessary as the destruction of a

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470 N. ZAMIR, “Distinction matters: rethinking the protection of civilian objects in non-international armed conflicts”, Israel Law Review 2015, vol. 48, 111. Cultural property is an example of a civilian object that has protection through AP II. Chapter 5.4.2. will examine this protection.

471 Art. 52(2) AP I.

military objective, which effectively contributes to military action, will automatically have a definite military advantage.\footnote{Y. DINSTEIN, The Conduct of Hostilities under the Law of International Armed Conflicts, Cambridge, Cambridge University Press, 2010, 91, para. 223.}

\subsection*{5.4.1.2.1. First element}

Location refers to the geographical area of the objective. It does not only include immovable objects, such as buildings, but it also includes territory.\footnote{S. SIVAKUMARAN, The Law of Non-International Armed Conflict, Oxford, Oxford University Press, 2012, 344.} Bridges, for example, are a military object when they make an effective contribution to military in action, by cause of its location.\footnote{Y. SANDOZ, C. SWINARSKI & B. ZIMMERMANN (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva, Martinus Nijhoff Publishers, 1987, 1353, 636, para. 2021.} However, the location must always be taken into account when determining the characterization of an objective. When a control post is situated at a particular site, this site is a targetable object. Once the post is transferred to another site, the original site becomes a civilian object.

Purpose relates to the intended use of the object, while use refers to the current function.\footnote{W.H. BOOTHBY, The Law of Targeting, Oxford, Oxford University Press, 2012, 103.} According to this condition, an attacker should not wait to directly target a civilian object until it is actually being used for military purposes. The intended use of an object may be derived from the gathered intelligence, however, it is necessary that the purpose can be ‘predicated on intentions known to guide the adversary, and not on those figured out hypothetically in contingency plans based on a “worst case-scenario.”\footnote{Y. DINSTEIN, The Conduct of Hostilities under the Law of International Armed Conflicts, Cambridge, Cambridge University Press, 2010, 100, para. 244.} The member of the state armed forces or armed group must act reasonably given the information available at the moment of targeting. The current function of the objective is not without any importance in case of a NIAC. Not rarely does an armed group use civilian objects such as
schools and hospitals to assist in the military operations.\textsuperscript{481} It is not important to which extent the object is being used, the fact that it is being used to assist military operations will be sufficient. This does not give a carte blanche to target these “civilian” objects. First, one should be very careful in identifying a military object based on this condition. Only when it is crystal-clear that the armed forces or armed groups use these objectives to support the operations, these objectives render targetable. Secondly, while targeting, the attacker must take the principle of proportionality into consideration. When the attack may be expected to cause incidental loss to civilians’ life which would be excessive compared to the military advantage, the attack is forbidden. When, for example, a school is being used to assist military operations but at the same time innocent civilians are present, an attack is forbidden although the school may be a targetable object. Thirdly, the use must make an effective contribution to the military action.

Once the nature, location, purpose or use of the object has been identified, it is necessary to assess whether or not the object makes an effective contribution to military actions.\textsuperscript{482} The objective satisfies this condition when it makes an effective contribution in general.\textsuperscript{483} An object will be qualified as a military objective when there is a proximate nexus to military actions.\textsuperscript{484}

5.4.1.2.2. Second element
Still, an objective will only be qualified as being military when the destruction of the objective, in the circumstances ruling at the time, offers a definite military advantage.\textsuperscript{485}

‘The circumstances ruling at the time’ refers to the moment of targeting. The legality of the targeting should be assessed at this moment, as the use of an object might change through time. When, for

\textsuperscript{483} There is no need to be directly linked with a specific operation; See Y. DINSTEIN, The Conduct of Hostilities under the Law of International Armed Conflicts, Cambridge, Cambridge University Press, 2010, 95, para. 233.
\textsuperscript{484} The United States have created a theory wherein military actions may take two forms, namely war-fighting and war-sustaining. War-fighting should be seen as a synonym for military action, while war-sustaining means that ‘economic targets of the enemy that indirectly but effectively support and sustain the enemy’s war fighting capability may also be attacked.’ However, this proposal should be set aside as it extremely limits the scope of protection of civilian objects as quasi all objects indirectly support a party’s war-fighting capacity; See S. SIVAKUMARAN, The Law of Non-International Armed Conflict, Oxford, Oxford University Press, 2012, 345; Y. DINSTEIN, The Conduct of Hostilities under the Law of International Armed Conflicts, Cambridge, Cambridge University Press, 2010, 96, para. 234; M.N. SCHMITT et al., “The Law of Targeting” in P.A.L. DUCHEINE, M.N. SCHMITT & F.P.B. OSINGA (eds.), Targeting: The Challenges of Modern Warfare, The Hague, T.M.C. ASSER PRESS, 2016, 132.
\textsuperscript{485} An object must fulfil these two cumulative elements in order to be a lawful target. As mentioned above, the second element appears to be less important because the destruction of an object that has an effective contribution to military action will have a military advantage.
example, a tank is being used on the battlefield, its destruction will be lawful.486 If one of the parties does not use this tank anymore, it is not a lawful target as, at the circumstances ruling at the time, the destruction does not offer a definite military advantage.487

Yet, the exact meaning of ‘definite military advantage’ needs to be clarified. Military advantage refers to the achievement of military objectives of the parties, such as weakening the enemy, gaining ground or securing the safety of their own attacking forces.488 Additionally, a definite military advantage refers to ‘a concrete and perceptible military advantage rather than a hypothetical and speculative one’.489

The advantage may not only be expected from particular parts of the attack but also from the whole operation, however, this does not mean that the military advantage may be expected from the whole conflict.490 Thus, the long-term advantage of a military attack may be sufficient to identify the object as a military objective.491 Furthermore, one cannot take political advantages into account when assessing this condition. The qualification cannot be purely based on a possible political outcome as the advantage gained must be military in nature.492

5.4.1.3. Lawful targets in practice
The distinction between civilian objects and military objectives might seem to be self-evident, this definitely is not the case. The characterization of an object depends on the circumstances ruling at the time. A school, in nature a civilian object, may be targeted when it is being used by snipers of the opposing party. The moment these snipers abandon the school; the school should be considered as a civilian object. The decision-maker needs to classify the object, based on the gathered information. In case of doubt, the object may not be directly targeted.493

486 A tank is a military objective by nature and definitely makes an effective contribution to military actions.
493 Art. 52(3) AP I.
The character of several specific objects challenges the operationalization of the rules on targeting. For example, dual-use objects serve both the civilian and military population of the opposing party. An integrated power plant, which distributes electricity for both sides of the population, is the perfect example.\textsuperscript{494} The destruction of the power plant may have a military advantage, it also affects the civilian population. IHL does not provide a unique category for these dual-use objects. An object is either military or civilian in character. The military character should be assessed through the two cumulative criteria.\textsuperscript{495} If the power grid satisfies both conditions, then it becomes, in principle, a lawful target. However, the principle of proportionality comes to the fore at this stage. According to this principle, an attack is prohibited when it causes excessive damage to civilian objects compared to the concrete and direct military advantage.

Furthermore, the non-state actor may hide the military objectives in the civilian population. Although the principle of distinction implies the obligation to distinguish military objectives from civilians and civilian objects, armed groups often violate this obligation. For example, fighters may use civilian buildings to hide weapons, RPG’s and missiles. In Afghanistan, the Taliban hid rocket launchers in religious buildings and positioned them in front of the building of a non-governmental organization.\textsuperscript{496}

The armed groups receive a tactical and strategical advantage by deliberately hiding objects in the civilian population. Placing rocket launchers on the roof of civilian buildings protects these military objectives, as it discourages the opposite party to attack. The strategical advantage is to use the possible civilian losses as a tool to accuse the opposite party of war crimes.\textsuperscript{497} By promoting the accusations of the violation of IHL in the media, they hope to change the course of the warfare, as civilian population may choose the side of the armed group or foreign states may recall their troops. In other words, armed groups sacrifice civilians in order to gain tactical and political advantages.\textsuperscript{498}

These conducts render the targeting of the military objectives extremely difficult. The state armed forces need to distinguish between lawful and unlawful targets within the framework of

\textsuperscript{496} L.R. Blank, “Taking distinction to the next level: accountability for fighters’ failure to distinguish themselves from civilians”, \textit{Valparaiso University Law Review} 2012, vol. 46, (765) 774, 790.  
proportionality. The attacking party still needs to take precautions in order to comply with IHL.\textsuperscript{499} The violation of IHL by the armed group does not absolve the state armed forces from implementing the principle of distinction.\textsuperscript{500}

Thus, it will be important to take the principle of proportionality into account when targeting dual-use objects or military objectives hidden in the civilian population. In the case where the character of the objects changes through time, the decision-maker should handle carefully, taking all the gathered intelligence into consideration. If the character remains doubtful, the target cannot be attacked. When targeting the hidden military objectives, the state armed forces need to operationalize within the framework of proportionality. Targeting civilian objects will incur criminal responsibility through article 8(2)(e)(ii) of the Rome Statute, as this constitutes a war crime.

5.4.1.4. Concluding remarks

Thus, a civilian object cannot be directly targeted in a NIAC, whereas military objects are lawful target. In order to qualify an object as a military object, two cumulative conditions must be fulfilled. First, the objective, by its nature, location or purpose, must make an effective contribution to the military action. Second, attacking the object must offer a definite military advantage. If one of these conditions is not satisfied, the object will be protected by IHL. The assessment of the conditions needs to be done regarding the circumstances ruling at the time. For example, a school is not a military object in nature. However, the attendance of snipers in this school may render the school a lawful target as the school becomes a military objective by use. On the other hand, a military bunker is a military object by nature which may be lawfully attacked. However, when the bunker is deserted and civilians use this bunker as a shelter, this bunker transforms into a civilian object. In other words, there does not exist a fixed borderline between civilian objects and military objects.\textsuperscript{501} Therefore, a civilian object remains civilian in case of doubt.\textsuperscript{502}

\textsuperscript{499}This will be discussed in chapter 5.6.

\textsuperscript{500}L.R. BLANK, “Taking distinction to the next level: accountability for fighters’ failure to distinguish themselves from civilians”, \textit{Valparaiso University Law Review} 2012, vol. 46, (765) 790.


\textsuperscript{502}Art. 52(3) AP I.
5.4.2. Cultural property

In the event of a NIAC, a non-state actor may target cultural property in order to wipe out the identity of a state. Daesh, for example, fights with the purpose of establishing an Islamic state. Therefore, the attack on cultural property could symbolize the new reign. By destroying property that characterizes the Western world, Daesh demonstrates the rejection of Western history.

They do not target cultural property for esthetical reasons, but they attack cultural property for several other underlying reasons such as destroying the culture or identity of a nation.\footnote{S. SIVAKUMARAN, *The Law of Non-International Armed Conflict*, Oxford, Oxford University Press, 2012, 377.} The director-general of the United Nations Educational, Scientific and Cultural Organization (hereinafter: UNESCO) stated that ‘culture and heritage are not about stones and buildings—they are about identities and belongings.’\footnote{Cited from L. ARIMATSU & M. CHoudhury, “Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq”, *International Law Studies* 2015, vol. 91, (641) 652.} Damaging these objects does not only have the loss of the object itself as a consequence, the destruction of the object goes hand in hand with the intrinsic value of the object.\footnote{Cultural property is a source of knowledge which provides information about the human existence through history; See L. ARIMATSU & M. CHoudhury, “Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq”, *International Law Studies* 2015, vol. 91, (641) 653-654.} As cultural property is often the representation of a shared identity, IHL accords these objects with a special protection.\footnote{L. ARIMATSU & M. CHoudhury, “Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq”, *International Law Studies* 2015, vol. 91, (641) 652.}

Despite that the value of cultural has been widely acknowledged, there is no consensus about the exact meaning of this concept. The definition differs from treaty to treaty which means that each legal instrument has its own scope of application. After defining the term cultural property, the protection will be analyzed. For each legal instrument, this thesis will examine whether the provided protection applies to NIACs of the lower threshold as well to NIACs of the higher threshold.

Firstly, this following chapter will analyze the protection provided by the Hague Convention on Cultural Property (hereinafter: Hague Convention) and its Second Protocol. Secondly, the protection through AP II will be analyzed. Thirdly, the question whether customary IHL regulates the protection of cultural property will be answered.
5.4.2.1. Protection through the Hague Convention on Cultural property

The convention describes the protection as follows: “The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.”  

Non-state actors have the same obligations during a NIAC.  

In other words, it is forbidden for the opposing parties to directly target cultural property and to use the property in such manner that may expose it to destruction or damage the cultural property.

5.4.2.1.1. Scope of protection

The convention defines cultural property as ‘movable or immovable property of great importance to the cultural heritage of every people’. Other definitions, for example those proposed by UNESCO, cannot be used to examine whether the property in a party’s territory has protection through the Hague Convention. The Hague Convention covers both immovable and movable objects irrespective of who is the owner of the object. Article 1(a) does not include an exclusive list of specific types of property, as these are rather examples.  

The Hague Convention only protects properties which are ‘of great importance to the cultural heritage of every people’. This means that each Party has the discretionary power to determine the character of the property within its territory, in alignment with its own criteria. The description of cultural property in the Hague Convention is a reflection of the principle that ‘cultural objects and properties which make up one state’s national heritage are, consequently, the world’s heritage.’ Still, this discretionary competence should be exercised reasonably and in good faith.  

514 This obligation can be derived from article 26 of The Vienna Convention on the Law of Treaties which obliges the Parties to apply a treaty in a reasonable way.
The convention protects cultural property against each act of hostility.\textsuperscript{515} This means that the Hague Convention not only forbids direct attacks against the cultural heritage, it also prohibits the demolition of the cultural property. Each act of demolition is forbidden irrespective of which means or methods are being used. Only military necessity may render an act of hostility lawful.\textsuperscript{516}

At first sight, a Party may thus identify a strategically important property in its territory as a cultural property and it will therefore be protected by the Hague Convention.\textsuperscript{517} Taking a closer look to the Hague Convention, this needs to be nuanced in light of two reasons. First, the use of this strategically important property may expose the property to its destruction or damaging which would lead to a breach of article 4(a) of the Hague Convention.\textsuperscript{518} Secondly, cultural property may be directly attacked in case of military necessity.\textsuperscript{519} If the military objective cannot be achieved in any other manner, the property may be lawfully attacked.\textsuperscript{520}

Given that a Party has the discretion to determine whether a property is of great importance to its cultural heritage, several difficulties arise when the non-state actor targets property. During a conflict, it may be difficult for the opposing party, \textit{in casu} a non-state actor, to distinguish property protected by the Hague Convention from property which is not of great importance to the cultural heritage. In order to clarify the distinction between the protected and not-protected property, the territorial state may mark all the cultural property with the Convention’s distinctive emblem.\textsuperscript{521} In addition, the territorial state may inform the opposing party of the identity and location of the protected property\textsuperscript{522}, especially when the territorial state invited another state to assist in fighting against the non-state actor. Before engaging in hostilities, the invited state should be informed that some property may not be directly targeted. However, it may be practically impossible to inform the opposing non-state actor, as these armed groups do not wish to communicate with the governments in the majority of the cases. In the hypothesis that the territorial state did not take the above measures, the non-state actor, and to a lesser extent the intervening state, should presume that all the examples of the non-

\textsuperscript{521} Art. 6 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.
\textsuperscript{522} Art. 3 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.
exhaustive list of article 1 cannot be directly targeted, or else, a breach of the Hague Convention seems to be inescapable.\footnote{523}{R. O’KEEFE, \textit{The Protection of Cultural Property in Armed Conflict}, Cambridge, Cambridge University Press, 2006, 111.}

Lastly, the opposing parties must refrain from using the cultural property in such manner which exposes it to damage in case of an armed conflict.\footnote{524}{Art. 4(1) Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.} Using the cultural property for military objectives, placing military objective near the cultural property and using the cultural property in such way that the opposing party reasonably would regard it as a military objective are examples of unlawful use.\footnote{525}{L. ARIMATSU & M. CHOUDHURY, “Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq”, \textit{International Law Studies} 2015, vol. 91, (641) 677.} Even the passive use of the cultural property may be unlawful through the Hague Convention.

\subsection*{5.4.2.1.2. Scope of application}
The ratification of the Hague Convention renders this convention applicable to a NIAC. In the event of a NIAC occurring within the territory of one of the Parties, each party to the conflict must apply the provisions related to the protection of cultural property.\footnote{526}{Art. 19(1) Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.} The threshold used in the Hague Convention is identical to the one set out in CA 3. This means that the classification of the conflict, which implies the satisfaction of the lower threshold, triggers the rules on targeting of cultural property provided by the Hague Convention. These rules apply to a NIAC taking place on the territory of a state that has ratified the Hague Convention. In the case where a state has not ratified this Convention, the protection of cultural property should be provided through other legal instruments.

\subsection*{5.4.2.2. Protection through the Second Hague Protocol}
The Second Protocol to the Hague Convention on Cultural Property (hereinafter: Second Hague Protocol) provides an enhanced protection for cultural property when three conditions are met. Firstly, it must be cultural heritage of the greatest importance for humanity. Secondly, it must be protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection. Lastly, it may not be used for military purposes or to shield military sites and the party which has control over the cultural property must confirm in a declaration that it will not be used so.\footnote{527}{Art. 10 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999.}
5.4.2.2.1. Scope of protection

The Second Hague Protocol grants enhanced protection to certain cultural property.\(^{528}\) In order to gain this immunity, a state must submit a list of cultural property to the Committee for the protection of Cultural Property in the Event of Armed Conflict (hereinafter: Committee). The Committee will then decide whether the proposed cultural property receives enhanced protection.\(^{529}\)

The definition of cultural property is the equivalence of the definition provided by the Hague Convention.\(^{530}\) Thus, only movable or immovable objects of great importance to the cultural heritage of every people may be the subject of enhanced protection.\(^{531}\)

A Party has the full discretion to determine whether property is of great importance to its cultural heritage. After a request by a state, the Committee decides whether this cultural property receives enhanced protection. When assessing the request of a state, the Committee will take the three conditions of eligibility into account. First, the cultural heritage must be of the greatest importance for humanity. This requirement is stricter than the condition of the Hague Convention as it refers to ‘the greatest importance’ while the Hague Convention refers to ‘very great importance’. The fulfilment of this condition depends on the factual appreciation of the Committee.\(^{532}\) Secondly, the cultural heritage needs to be protected by adequate domestic legal and administrative measures which recognize its exceptional cultural value and ensure the highest level of protection. This means that the national legislation must be corresponding to the protection on international level. Lastly, it must not be used for military purposes or to shield military sites and the Party must confirm that it will not be used this way.\(^{533}\)

Once enhanced protection is established, the property may not be the object of an attack nor may it be used in support of military action.\(^{534}\) Military necessity does not render cultural property under enhanced protection targetable. Only in two circumstances the cultural property may lose its immunity


or even its status of enhanced protection.\textsuperscript{535} Cultural property loses its enhanced protection when this cultural property no longer fulfils anyone of the three requirements. In case of such event, the Committee ‘may suspend its enhanced protection status or cancel that status by removing that cultural property from the List.’\textsuperscript{536} The Committee may also suspend the enhanced protection whenever there is a breach of article 12. When these violations take place on a continuous base, the Committee may even cancel enhanced protection by removing cultural property from the list.\textsuperscript{537} The second situation in which enhanced protection can be lost, is if, and for as long as, the property becomes a military objective.\textsuperscript{538} This implies that the property loses its protection when it, by its use, becomes a military objective. The property restores its immunity when it can no longer be considered as a military objective. Unlike civilian objects, cultural property under the Second Hague Protocol can only become a military objective by its use.

\textbf{5.4.2.2.2. Scope of application}

Just as the Hague Convention, the Second Hague Protocol applies to NIACs covered by CA 3. The Second Protocol literally states that ‘the Protocol shall 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.’\textsuperscript{539} Whereas the special protection through the Hague Convention did not apply to NIACs, enhanced protection through the Second Hague Protocol applies to NIACs.

The applicability of this protocol depends on the ratification by a state. If the state has ratified both the Protocol and Convention, cultural property can have either enhanced protection, if it is incorporated in a list by the Committee, or it can have the general protection through the Hague Convention. In the case where a state did not ratify these instruments, another legal source may trigger the rules on targeting of cultural property.

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5.4.2.3. Protection through AP II

AP II regulates the targeting of cultural property in a NIAC. Article 16 stipulates that ‘it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.’

5.4.2.3.1. Scope of protection

The article does not expressly refer to cultural property as such. It only prohibits attacks against ‘historic monuments’, ‘works of art’ or ‘places of worship’. Whereas the terms ‘historic monuments’ and ‘works for art’ should be seen as the equivalence of the definition used in the Hague Convention,540 ‘places of worship’ seems to introduce a new kind of cultural property. Despite the introduction of this concept, the protection of these places is not innovating. Only those places of worship which constitute the cultural or spiritual heritage of peoples are protected.

In practice, this does not differ from the protection through the Hague Convention, as places of worship satisfying the second (cultural or spiritual) condition will be historic monuments in the meaning of that Convention.541 Whereas the convention refers to property which forms part of the cultural heritage of ‘every people’,542 article 16 of AP II refers to the cultural or spiritual heritage of ‘peoples’.543 Though, this textual difference does not create a distinction between both legal instruments. The author O’KEEFE correctly pleads for an identical interpretation of the meaning of these two references.544 Thus, each party may determine whether the property in its territory is protected as cultural property.545

540 The formulation used in article 16 is an abbreviation of the definition of that Convention; See R. O’KEEFE, “Protection of Cultural Property”, in D. FLECK (ed.), The Handbook of International Humanitarian Law, Oxford, Oxford University Press, 2008, 439, para. 4; The ICRC agreed on this matter as it stated that it ‘does not seem that these expressions have a different meaning’; See Y. SANDOZ, C. SWINARSKI & B. ZIMMERMANN (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva, Martinus Nijhoff Publishers, 1987, 1469-1470, para. 4844.
543 Art. 16 AP II.
545 However, the ICRC Study on Customary International Humanitarian law pleads for a more restrictive interpretation of the concept ‘cultural or spiritual heritage of peoples’. Only when the property is ‘of such importance that it will be recognized by everyone, the property is protected as cultural property’; See; R. O’KEEFE, “Protection of Cultural Property”, in D. FLECK (ed.), The Handbook of International Humanitarian Law, Oxford, Oxford University Press, 2008, 441-442, para. 8; Y. DINSTEIN, Non-International Conflicts in International Law, Cambridge, Cambridge University Press, 2014, 211, para. 669.
Any act is prohibited through article 16, as this provision does not create an exception. Unlike other provisions, the protection is not the result of the interaction between military necessity and humanity. Article 16 only reflects the principle of humanity, as even military necessity cannot render these objects targetable.

Article 16 of AP II also forbids the use of cultural property in support of a military effort. Does the illegal use render these objects a lawful target? The legal framework of NIACs does not mention anything concerning civilian and military objects. Per contra, customary international law of targeting applies to both forms of NIACs. Given that customary IHL applies to a conflict of the higher threshold of AP II, one definitely could argue that cultural property renders a lawful target when such property, by its nature, location, purpose or use, makes an effective contribution to military action and its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.\(^\text{547}\)

The second part of article 16 should not be confused with the first part of the article. An attack on cultural property, which is not being used for military benefits, can never be lawful, even if its destruction would be necessary to achieve the military objectives. When the cultural property is being used for military effort, it may be lawfully targeted if the property can be classified as a military object.

**5.4.2.3.2. Scope of application**

Article 16 of AP II applies to conflicts which satisfy the conditions provided by article 1 of AP I.\(^\text{548}\) This protection does not apply to conflicts which only satisfy the lower threshold of CA 3. The Convention on Cultural Property applies to CA 3-conflicts through which cultural property will be protected during the conflict.

The provision refers to the Hague Convention by mentioning that it does not prejudice this convention. The reference to ‘without prejudice’ implies that in case of inconsistency there should be given priority to the Hague Convention.\(^\text{549}\) The effect of this formulation is rather perverse. While AP II does not embody military necessity as an exception, the Hague Convention does recognize the exception for

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\(^{548}\) Five conditions must be fulfilled in order to apply AP II, as mentioned above in chapter 2.

military necessity. This means that when a state is party to both legal instruments, cultural property may be directly targeted if military necessity demands so. When a state, United Kingdom for example, is only party to AP II and not to the Hague Convention, article 16 will apply and military necessity cannot be a reason to directly target the cultural property. In the event of a conflict where the state has not ratified AP II nor has it ratified the Convention on Cultural property, the legal framework of NIAC seems to offer no protection to cultural property. Somalia, for example, has not ratified one of these legal instruments. This shortcoming arises particularly in a NIAC under CA 3 as AP II obviously does not apply in these circumstances. As customary IHL applies to NIACs, this might provide a solution.

5.4.2.4. Protection under customary IHL
The majority of the customary rules protecting cultural property are based on the norms of the above legal instruments. Additionally, the study on the Customary International Humanitarian Law introduced two different rules.

5.4.2.4.1. Scope of protection
The protection of cultural property provided by the Hague Convention has a customary status. Article 38B of the study is the equivalence of the protection afforded by that Convention. Property that is of great importance to the cultural heritage of every people must not be the object of attack unless military necessity requires so. Similarly, the use of that property is also prohibited through customary IHL.

Article 38A states ‘special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives’. Although the objects that have protection seem to be less restrictive, this

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customary rule refers to the general precautions which need to be taken before engaging to attack.\textsuperscript{554} Seizing, destructing or willfully damaging those objects is also forbidden.\textsuperscript{555}

\textbf{5.4.2.4.2. Scope of application}
Whereas the treaties only bind the parties for all of their territories, customary rules bind all states irrespective of whether a state was party to the convention on which the customary norms are based. Customary rules do not have a limited territorial scope of application, except for the state who is a persistent objector. A state is a persistent objector if it fulfils two requirements. First of all, states must maintain their objections ‘from the early stages of the rule onwards, up to its formation and beyond’\textsuperscript{556} Secondly, states must maintain their objections consistently in order to be not bound by customary rules.\textsuperscript{557}

The customary rules on targeting cultural property applies to all NIACs satisfying the lower threshold of CA 3. This implies that NIACs satisfying the higher threshold of AP II automatically trigger the rules on targeting of cultural property as each NIAC of AP II satisfies the requirements of CA 3.

\textbf{5.4.2.5. Concluding remarks}
The practical relevance of the protection of cultural property is crystal-clear. By attacking property of great importance to the cultural heritage of a state, the non-state actor actually attacks the identity of the State.

The direct targeting of cultural property is in principle prohibited through several legal instruments regulating NIACs. The Hague Convention affords in a general protection of cultural property in case of a NIAC which fulfils the conditions of CA 3. Through this convention, it is prohibited to directly target cultural property, unless military necessity demands so. The Second Hague Protocol also applies to NIACs which satisfy the requirements of CA 3. The Protocol provides an enhanced protection which cannot be directly target even if military necessity demands so. Thirdly, AP II regulates the targeting of cultural property. AP II prohibits direct attacks on cultural property and military necessity does not render the cultural property targetable. However, AP II gives priority to the Hague Convention and its protocol which implies that when a state has ratified both legal instruments, military necessity forms

the legal basis on which cultural property may be targeted. Lastly, the protection of cultural property is part of customary IHL which applies to NIACs satisfying the requirements of CA 3. Therefore, it is hard to imagine a NIAC where cultural property has no protection. If one of the belligerent parties violates this rule, individual criminal responsibility through the Rome Statute may arise.\textsuperscript{558}

5.5. Indiscriminate attacks

The principle of non-distinction implies three subsequent rules. Firstly, civilians cannot be directly targeted in hostilities. Secondly, civilian objects are not a lawful target in a NIAC. Lastly, it implies that indiscriminate attacks are prohibited. However, inexplicably, AP II does not prohibit indiscriminate attacks. As customary IHL closes the majority of the gaps between IACs and NIACs, the legal basis of this prohibition can be found in customary law.\textsuperscript{559} The ICTY confirmed this in the \textit{Tadić} case where it stated that the protection of civilians from indiscriminate attacks is a customary rule which applies to NIACs.\textsuperscript{560} Indiscriminate attacks are those attacks that are not directed specifically at military objectives. The prohibition on targeting goes hand in hand with the prohibition placed on the use of indiscriminate means and methods of combat.\textsuperscript{561} The means and methods of combat which cannot be directed at a specific military objective are indiscriminate. Their indiscriminate character should be assessed through the circumstances ruling at the time of the military operation. The use of specific means and methods may be unlawful regarding the specific circumstances.\textsuperscript{562}

The targeting of an entire entity, which contains as well legitimate targets as civilians, without making any distinction is a breach of this rule. The attendance of members of an opposition group in, for example, a village does not render the particular area targetable. Instead, the members should be targeted individually with means and methods which are not indiscriminate. The attack may still include the incidental loss of civilians. The lawfulness of these losses will be assessed through the principle of proportionality. Collateral damage is not prohibited as long as the incidental loss is not excessive to the gained military advantage.

\textsuperscript{558} Art. 8(2)(e)(iv).
\textsuperscript{560} ICTY 2 October 1995, \textit{The Prosecutor v. Dusko Tadić}, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 69.
5.6. Precautions in attack

Civilians, civilian objects and cultural property have protection in times of warfare. This protection is not absolute as only direct attacks against these objects and individuals are prohibited. Attacks which are directed at, for example, military objectives may affect these protected subjects. In order to maximize the protection under IHL, the immediate and long-term effects of attacks on military objectives should be limited to a minimum.563

The assessment of these effects mostly takes place in the third phase of the targeting cycle. While planning the attack, the non-state actor or the state should take precautions in order to minimize these incidental effects. However, neither CA 3 nor AP II includes the obligation to take precautions in planning and carrying out attacks. The non-inclusion of this obligation does not mean that parties to a NIAC must not take precautions. Once more, customary rules throw a lifeline. The obligation to take precautions is part of customary IHL applying to NIACs564; as the underlying principles of distinction and proportionality imply the requirement to take precautions.565 Lastly, it can be derived from the general protection afforded to civilians. Civilians must be protected from dangers arising from military operations.566 This implies the obligation of reducing the incidental losses to a minimum which can only be done by taking precautions.567 The fighters of a lower rank should also take precautions while battling on the field. Even if the fighter must take the decision in a split second, he must take, in theory, precautions.568

Thus, a party to the conflict must take all practically possible precautions to minimize both injury and death to civilians and damage to civilian objects.569 This could mean that the planned attack cannot take place. When it is impossible to minimize the incidental loss of civilians, one cannot direct its forces to engage in hostilities. It may be feasible for one party to minimize the effects while it may be not for another party. Depending on for example the financial capability of a party, precautions can be taken.

565 The Trial Chamber stated in the Galić Judgment that ‘the practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible.’; See ICTY 5 December 2003 30, Prosecutor v. Galić, Case No. IT-98-29-T, Judgment Trial Chamber, para. 58.
566 Art. 13(1) AP II.
It is a derivative of this general rule that parties should take all feasible measures to establish whether an objective is a military objective. Considering that the identification is of great importance, as it ensures that the military operations only target legitimate objects, the party needs to take effective measures to identify the status of an individual during the second phase of the targeting cycling. Not only should these precautions be taken while planning the attack but also during the execution one needs to take precautions. If it becomes apparent that the target is not a legitimate target, the attack must be cancelled.

Complementarily, a party must do everything feasible to assess whether the attack is not disproportionate. This results in the obligation to take all practically possible precautions to guarantee that the collateral damage is not excessive to the military advantage. If a party cannot ensure that the collateral damage will not be excessive, the attack must be cancelled. Taking all feasible precautions also includes the obligation for a party, when it has the choice between several military objectives whose destruction has a similar military advantage, to attack the military objective which may be expected to cause the least damage to civilians and their objects. In order to keep the collateral damage to a minimum, a party should give an effective warning when the circumstances permit so. When the effectiveness of the attack depends on its unexpected character, a warning must not be given. In other circumstances, the warning gives the civilians the opportunity to take preventive actions such as leaving the area or hiding in a bunker. The party may communicate through social media, radio announcements or dropping leaflets. These derived precautions have customary status according to the ICRC. However, this remains extremely doubtful, especially for the obligation to warn civilians, as state practice does not evidence this customary status.

Supplementary to the precautions the attacking party must take, the defending party must also take precautions to minimize the effects of hostilities. In this regard, the civilian authorities and military commanders should take all feasible measures to protect civilians and civilian objects from the effects

of the hostilities. This obligation applies to NIACs through customary IHL.\footnote{J.M. HENCKAERTS, “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict”, International Review of the Red Cross 2005, vol. 87, rule 22, (175) 200.} A derivative from this rule is the prohibition to place military installations in civilian areas with the purpose of encouraging the opposing party to cancel the attack.\footnote{S. SIVAKUMARAN, The Law of Non-International Armed Conflict, Oxford, Oxford University Press, 2012, 356.} However, as mentioned above\footnote{See chapter 5.4.1.3, p. 88.}, non-state armed groups often violate this obligation by placing, for example, rocket launchers on civilian buildings. Therefore, the attack party must take precautions in attack, in order to minimize the civilian losses. If these losses are excessive to military advantage, one cannot direct the attack.

5.7. Case-study: Daesh

Chapter 2 concluded that the conflict between the Syrian government and the organized armed group Daesh has reached both the threshold of CA 3 and AP II. However, as Syria did not ratify AP II, only the rules which apply to a conflict under CA 3 regulate the legitimacy of targeting. Furthermore, IHL applies to conflicts between several non-state actors on the territory of Syria satisfying the threshold of CA 3.

The lawfulness of practical examples will be examined through the rules on targeting. Firstly, Amnesty International reported that the Syrian government, with the support of Russia, deliberately attacked hospitals in the conflict with Daesh. At first sight this seems to be automatically unlawful, nonetheless, there is no clear-cut borderline between civilian and military objectives. Therefore, the attack on Syrian hospitals will be analyzed.

Second, Daesh controlled the city of Palmyra for a noticeable period. In March 2015, the Syrian government recaptured the control over this city. Following from that, international newspapers reported about the poor state in which the site of Palmyra was abandoned by Daesh. As both the capture of Palmyra by Daesh and the recapture by the Syrian government goes hand in hand with military operations, the question arises whether these attacks are lawful. As the UNESCO incorporated the site of Palmyra into the List of World Heritage, the site of Palmyra may have protection through its character of cultural property.
5.7.1. Attacks on hospitals
The Syrian government deliberately attacked hospitals and medical units. The United Nation Commission on Inquiry ascertained that the targeting of hospitals, medical personnel and transport has almost become a habit in the conflict on the Syrian territory. The government forces have been targeting hospitals in cities not under their control. Daesh has targeted hospitals and medical units with bombs in areas which the People’s Protection Units recaptured. On 10 December 2015, Daesh targeted a hospital in Tel Tamar which killed over fifty civilians. In streets near the hospitals in Ar Raqqah, Homs and Hasakah suicide bombers killed several civilians.

The assessment in determining whether these hospitals were a lawful target starts by analyzing the character of these clinics. Civilian objects have protection through customary IHL and may not be directly targeted. As an exhaustive list of civilian objects does not exist, one needs to take the relevant facts into account. Objects that are not military have protection. An objective is military in character if two criteria are fulfilled.

First, the objective, by its nature, location, purpose or use must make an effective contribution to the military action. Clinics are neither by their nature military objectives nor by their in casu location. In addition, the purpose and use of the object may render it military and thus targetable. The circumstances do not seem to point out that the object is being used or may be expected to be used for military reasons. It is not necessary to examine the second condition as both conditions need to be fulfilled cumulatively. The attack on hospitals are therefore unlawful and constitute a breach of IHL. If the attack does not directly target these clinics but rather target legitimate military objectives, the damaging of the hospitals and the injuring of the civilians should be assessed through the principle of proportionality. Attacks which affect the protected objects excessively in relation to their military advantage are unlawful.

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5.7.2. Palmyra
Since 2012, Syrian government is in a combat with several armed groups. In and around the site of Palmyra, numerous combats took place between the Syrian government and these armed groups. The site of Palmyra is an ‘oasis in the Syrian desert’ which accommodates monumental ruins of an ancient city that formed a cultural center since the 1st century. The architecture is the result of a combination between Persian influences and Greco-Roman techniques.582

In February 2012, Syrian government set up a military base in the site of Palmyra. By building roads, the government obtained greater strategic control over the city. It even created the opportunity to use tanks on the site. The geographical location of Palmyra forced the Syrian government to secure the control over the city. Not only is Palmyra located within 134 miles of the capital city Damascus, it is also surrounded by multiple gas and oil fields which supply several strongholds with electricity.583 Losing the control over Palmyra would affect the civilians majorly.

Between 2012 and 2014 several conflicts took place in and around Palmyra. It came to a climax in Mid-May 2015 when the Syrian government battled with Daesh. Daesh overran Palmyra and seized control over the city. In June 2015, Daesh destroyed a statue by placing bombs at the entrance of the Museum of Palmyra.584 Several weeks later, Daesh publicized pictures of their members who were destroying funerary busts. In the end of August 2015, Daesh once again released pictures of the demolition of the Temple of Baalshamin. The United Nations confirmed that Daesh destroyed this temple.585 When the Syrian government recaptured Palmyra in March 2016, newspapers reported about the noticeable damage of the ruins of Palmyra.

As concluded above586, a NIAC triggers the rules on targeting of cultural property. Cultural property has protection through both treaty and customary law. Thus, the question arises whether the ruins of Palmyra have protection through these legal instruments. Whereas Syria has not ratified AP II, it has ratified the Second Hague Protocol and it is a party to the Hague Convention. The ruins of Palmyra are

586 See chapter 5.4.2.5, p. 99-100.
not placed under enhanced protection. The latter convention protects ‘movable or immovable property of great importance to the cultural heritage of every people’. The determination whether the site of Palmyra is of great importance to the cultural heritage of every people depends on the discretion of Syrian government. In consonance with the Antiquities Law, Syrian government entitled the site of Palmyra as a national monument. Thus, the ruins of Palmyra must be seen as cultural property in the sense of the definition of the Hague Convention. As this convention affords protection to cultural property, the legitimacy of the damaging is extremely doubtful. It is also questionable whether the use of the site prior to the hostilities is legitimate under the Hague Convention.

5.7.2.1. Strategical use of Palmyra by the government

Parties to the Hague Convention have the obligation to protect cultural property throughout a NIAC. By not using the cultural property for purposes which are likely to expose it to damage in the event of a NIAC, the states and non-state actors respect cultural property.

Nonetheless, the Syrian government set up a military base in and around Palmyra. The government positioned tanks and members of the armed forces within Palmyra. At first sight, this seems to be unlawful use in the terms of article 4 (1) of the Hague Convention. However, the Hague Convention provides an exception on this probation, namely military necessity. If military necessity demands the use of cultural property for military objectives, such use is not forbidden.

There does not exist a consensus between states concerning the exact interpretation of military necessity. Using the Second Hague Protocol as a guidance would mean that the use of cultural property for military objectives is only allowed when there is no other feasible option that has the same military

589 See chapter 5.4.2.1.1, p. 91-92.
advantage.\textsuperscript{594} In other words, the commander may only take the decision to use the cultural property as a military site when the military objectives demand so and there was no other feasible option to achieve these military objectives.

Regarding the situation in Palmyra, it seems that military necessity does not apply in these circumstances. The Director-General of UNESCO appealed to the Syrian government to refrain from using Palmyra as a military base as this does not only goes against international obligations, it also ‘constitutes an infringement of the rights of the Syrian people’.\textsuperscript{595} In a report, the U.N. Human Rights Council condemned the use of Palmyra as a military base and it confirmed that this use is a breach of the obligation to respect and protect the cultural property.\textsuperscript{596} In similar cases, the Independent International Commission of Inquiry on the Syrian Arab Republic reported that Syrian government has based their military forces in historic citadels such as the fort above Tadmor or the citadel of Aleppo which was not required by military necessity.\textsuperscript{597} Thus, the specific use of Palmyra by the Syrian government violates the obligation provided by the Hague Convention.\textsuperscript{598}

\textbf{5.7.2.2. Damaging the ruins of Palmyra}

\textbf{5.7.2.2.1. Direct attacks}

The unlawful use of the ruins of Palmyra does not directly mean that the belligerent parties have the permission to attack the protected property.\textsuperscript{599} It is also prohibited to attack cultural property on the site of Palmyra through the Hague Convention. Not only does the convention prohibits direct attacks against the site of Palmyra, it prohibits any act of hostility directed against the particular cultural heritage.\textsuperscript{600} This implies that all acts resulting in damaging or destructing the cultural property are prohibited.

\textsuperscript{598} By using the ruins of Palmyra in such manner, the Syrian government also breaches customary IHL as the protection provided by the Hague Convention has customary status.
Like the prohibition on military use, the latter restriction is not absolute. Cultural property, in casu the ruins of Palmyra, may be lawfully targeted if military necessity demands so.\textsuperscript{601} This is a derivative from the principle that civilian objects may not be targeted unless they render military in character.\textsuperscript{602} The ruins of Palmyra are a military objective if they make an effective contribution to the military action and if their destruction offers a definite military advantage.\textsuperscript{603}

The use of the ruins of Palmyra by the Syrian government definitely falls under this scope. By setting up a military basis, the cultural heritage plays an important military role. Attacking the ruins of Palmyra would thus have a definite military advantage.\textsuperscript{604} The justification of attacking Palmyra does not imply that the opposing party, in casu Daesh, may attack the ruins without any boundaries. The principle of proportionality and the obligation to take precautions in attack apply to Daesh through customary law. As mentioned above\textsuperscript{605}, the obligation to take precautions implies that the party needs to attack the military objective in such way which cause the least damage and has the same military advantage. In other words, if another feasible measure exist which has the same military advantage, military necessity does not justify the attack on the ruins of Palmyra.\textsuperscript{606} The opposing parties also need to take all feasible precautions when choosing the means and methods of attack. Daesh should use the means and methods which causes the least damage but still has the same military advantage.

Whereas military necessity may justify the attacks which causes damage to the ruins of Palmyra, it does not justify the deliberate demolition of ancient monuments, such as the funeral busts and the temple of Baalshamin. The destruction of the ruins by Daesh definitely violates IHL.

### 5.7.2.2.2. Incidental damage

Another threat to the ruins of Palmyra was the incidental damage it had to suffer during the confrontation between Daesh and the government in and around Palmyra. While attacking lawful targets, such as the fighters, these attacks caused incidental damage to the cultural heritage within Palmyra.


\textsuperscript{603} Art. 52(2) AP I.


\textsuperscript{605} See chapter 5.6, p. 100-101.

The Hague Convention does not regulate this threat to cultural property. However, while engaging into the hostilities, the opposing parties needs to verify whether the incidental damage to the cultural property, *in casu* the ruins of Palmyra, is not excessive to the possible military advantage. Through the customary principle of proportionality, the conflict parties must cancel attacks which may be expected to cause excessive incidental damage in relation to the military advantage. Furthermore, the parties must, through the principle of distinction, do everything feasible to ensure whether the target is military in character.607

The incidental damage to the ruins of Palmyra may have been excessive to the gained military advantage. Regarding the facts on the ground, the commanders must take the decision to attack the military objective while taking precautions to minimize the incidental damage to the ruins of Palmyra. The military operation violates IHL if the attack caused excessive incidental damage.

5.7.3. Concluding remarks

The failure to comply with the above obligations may be punished as war crimes recognized under customary IHL. The violation of the prohibition to use the cultural property does not arise individual criminal responsibility through IHL.608 On the other hand, direct attacks against protected property may incur criminal responsibility. The war crime of unlawful attacks against cultural property applies to NIACs.609 In September 2015, for example, Niger transferred Ahmad Al Faqu Al Mahdi to the ICC in order to prosecute him for direct attacks against protected mausoleums.610 However, it seems that military necessity renders the ruins of Palmyra a targetable object.611 If this was the case, Daesh did not violate IHL. Attacks which do not directly target cultural property but causes excessive incidental damage to it are also unlawful under IHL. It remains uncertain whether these unlawful attacks incur individual criminal responsibility during a NIAC as this is not incorporated in the Rome Statute.612 The

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609 Article 8(2)(e)(iv) of the Rome Statute of the International Criminal Court states: “Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”
611 Ultimately, the legitimacy of the direct attacks depends on the actual facts on the ground. The commander must take the decision whether the ruins of Palmyra were a lawful target based on the gathered intelligence.
destruction of the temple of Baalshamin cannot be justified by military necessity. Therefore, the demolition incurs criminal responsibility as such act constitutes a war crime under the Rome Statute.\footnote{Art. 8(2)(e)(iv) of the Rome Statute.}

The deliberate attacks on hospitals violate IHL as well. The unlawfulness incurs individual criminal responsibility under the Rome Statute. Intentionally directing attacks against civilians, civilian objects or buildings constitutes a war crime under the Rome Statute.\footnote{Art. 8(2)(e)(i) of the Rome Statute; Art. 8(2)(e)(ii) of the Rome Statute.}
6. Conclusion

Conflicts can be either international or non-international. The proposal to create a third group of conflicts should not be followed. A conflict between a state and non-state actor remains non-international in character, even if it has a transnational character. Only when a state uses forces through a non-state actor, the conflict will be international. In all the other cases, conflicts between non-state actors and states will be non-international in character. These conflicts can be covered by CA 3 or AP II. Whereas CA 3 regulates the simpler NIACs, as the threshold is not high, AP II regulates conflicts which satisfy the more demanding conditions.

These non-international armed conflicts trigger a variety of rules on targeting. The legal framework of NIACs regulates the protection of civilians. This protection is a derivative from the principle of distinction. Civilians have protection in NIACs of the lower threshold through customary rules and through AP II in conflicts of the higher threshold. Although their injuries may have a military advantage, directing deliberate attacks against civilians is forbidden under IHL. However, the rules on targeting provide an exception. Civilians taking direct part in hostilities may be lawfully attacked, for as long as they take part. The legal sources do not define the concept of civilians. By interpreting the little treaty law and state practice, the jurisprudence tries to fill this gap. The ICRC correctly pleads to define civilians as individuals who are not members of the armed forces of the state nor are they member of organized armed groups.

The targeting of civilians taking direct part in hostilities is conduct-based, as these individuals do not lose their status of civilians but only lose their protection for the time performing the hostile act. It is the task of the decision-maker who needs to determine whether the civilian has protection or not. This does not imply that incidental loss of civilians is prohibited during a NIAC. The legal core of NIACs allows military operations which brings collateral damage along, as long as the incidental loss of civilians is not excessive to the gained military advantage. The violation of these provisions constitutes a war crime under the Rome Statute.

Members of the military wing of the armed group and state armed forces may be deliberately targeted at any time. Although the traditional treaties do not recognize combatant-status, the legality of targeting these fighters follows from the protection of civilians. As civilians are those persons who are not members of the armed forces of the state nor are they member of organized armed groups, these members have no protection and may be lawfully targeted. Whereas states have the discrete power to determine, through domestic law, whether an individual is member of the state armed forces, the
legal sources do not define the concept membership within an organized armed group. There is little state practice on this matter, therefore, the interpretation of this term is mainly a doctrinal discussion based on military reality. In the view of this author, an individual is a member of the non-state actor when he or she is a de jure or de facto member of military wing of the organized armed group. De jure membership may be evidenced through the rules of the non-state actor. De facto membership refers to an ongoing chain of hostilities through which membership may be evidenced. The continuously combat function, as proposed by the ICRC, creates an inequality between the opposing parties. Furthermore, based on the little state practice, it will be impossible to distinguish between the lawful targets and unlawful target within the same organized armed group when using the continuously combat function as a criterion.

NIACs also trigger the rules on targeting of objects. Civilian objects, through customary law, have protection and may not be directly targeted. Military objectives, on the contrary, are lawful targets. Military objectives are objectives which by their nature, location, purpose or use effectively contribute to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Civilian objects are objectives which are not military in character. There is no clear-cut borderline between these objects, parties will need to take the relevant facts into account when determining the character of the objective.

The legal framework of NIACs also provides a more elaborated protection of cultural property. Several legal instruments protect cultural property. The Hague Convention protects property that is of great importance to one’s cultural heritage. A state has the full discretion to determine whether the property is of great importance to the state’s cultural heritage. When the state establishes the great importance of the property, the cultural property may not be attacked, unless military necessity requires an attack. Furthermore, the opposing parties may not use this cultural in such manner that exposes it to damage in case of an armed conflict. This convention applies to conflicts fulfilling the conditions of CA 3 provided by the ICTY. The Second Hague Protocol provides an enhanced protection for cultural property if three conditions are met. Through AP II, cultural property has an absolute protection from which one cannot derive, even if military necessity requires so. Lastly, cultural property also has protection through customary law.

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615 As mentioned in chapter 2.3.1, the conflict needs to be of a certain intensity and the non-state actor must be organized to a certain degree.
The lawfulness of attacks targeting military objectives or members of the belligerent parties does not give them a carte blanche to attack randomly attack these members. It is, for example, forbidden to place indiscriminate attack through customary IHL or to direct disproportionate attacks. Furthermore, the parties need to take all feasible precautions while attacking or defending.

It is clear that the traditional legal sources, CA 3 and AP II, does not regulate targeting on a large scale. Most of the rules apply to both forms of NIACs through customary IHL. This renders the distinction between both classifications less relevant in the context of targeting. The customary status of several provisions of AP II debilitates the relevance of the distinction even more.
Abstract

Gewapende conflicten tussen staten en niet-statens zijn deel geworden van onze samenleving. Quasi elke dag verschijnt er een artikel in de media omtrent deze gewapende conflicten. Reguleert het internationaal humanitair recht deze conflicten? Het recht der gewapende conflicten was immers doorheen de geschiedenis voornamelijk van toepassing op conflicten tussen twee of meer staten. Conflicten tussen non-statelijke actoren en staten werden gezien als behorende tot de interne gelegenheden van de betrokken staten. Deze stelling is niet langer houdbaar. Diverse rechtsbronnen reguleren nu ook gewapende conflicten tussen statelijke actoren en non-statelijke actoren. Zo reguleert Gemeenschappelijk Artikel 3 van de Verdragen van Genève deze conflicten. Ook Additioneel Protocol II is van toepassing op bepaalde conflicten. Voorts worden deze conflicten gereguleerd door verschillende verdragen en ook het internationaal gewoonterecht is van toepassing.


In een tweede situatie is er een conflict die aan de voorwaarden van artikel 3 van de Verdragen van Genève voldoet. Enkel en alleen wanneer de niet-statelijke acteur georganiseerd is tot een bepaalde graad en de vijandigheden een bepaalde intensiteit bereiken zal dit artikel van toepassing zijn. De internationale rechtbanken hebben verschillende indicators uitgewerkt die wijzen op een bepaalde organisatie– en intensiteitsgraad.

In een derde situatie zal het conflict de voorwaarden van Additioneel Protocol II vervullen. Deze voorwaarden zijn strikter dan die van artikel 3 van de Verdragen van Genève. Zo moet er minstens één staat een conflictpartij zijn. De non-statelijke acteur moet bovendien georganiseerd zijn tot een
bepaalde graad en de actor moet controle hebben over een bepaald gebied die het hen mogelijk maakt om internationaal humanitair recht te implementeren. De controle over het territorium moet het hen ook mogelijk maken om aanhoudende en intensieve militaire operaties uit te voeren.

Het internationaal humanitair recht bepaalt wie of wat er een rechtmatig doelwit is ten tijden van oorlog. Zo hebben burgers en civiele objecten bescherming gedurende niet-internationale gewapende conflicten. Zij mogen niet het rechtstreeks doelwit zijn van een militaire operatie. Echter, indien er burgers het slachtoffer zijn van een militaire operatie wil dit niet automatisch zeggen dat de operatie onrechtmatig is. ‘**Colleteral damage**’ is toegelaten voor zover het verlies aan burgers niet disproportioneel is ten opzichte van het behaalde militaire voordeel. Deze burgers verliezen wel hun bescherming als ze deelnemen aan de vijandelijkheden. Ze verliezen hun bescherming voor zolang dat ze deelnemen aan de vijandelijkheden. Het recht der gewapende conflicten definiert het begrip ‘burger’ niet. Het Rode Kruis definiert het begrip als volgt: “elk individu die geen lid is van de strijdmachten van een staat noch is hij of zij lid van een georganiseerde gewapende groep.”

De bovenstaande leden mogen wel het doelwit zijn van een militaire operatie. Hoewel het juridisch kader van niet-internationale gewapende conflicten dit niet voorziet, kan dit worden afgeleid uit de bescherming voor burgers. Individuen die geen lid zijn van de strijdmachten van een staat noch zijn ze lid van een georganiseerde gewapende groep hebben geen bescherming. Het juridisch kader bepaalt echter niet wanneer iemand lid is van een georganiseerde gewapende groep. Volgens de auteur SIVAKUMARAN kan dit lidmaatschap twee vormen aannemen. Ofwel is een individu een *de jure* lid, ofwel is hij of zij een *de facto* lid. Deze definitie sluit het dichtst aan bij de militaire realiteit en moet daarom gevolgd worden. Ook militaire objecten zijn een rechtmatig doelwit. Dit zijn objecten die wegens hun natuur, locatie, intentioneel gebruik of effectief gebruik bijdragen aan de militaire oorlogshandelingen. Bovendien moet een aanval op deze objecten een duidelijk militair voordeel verschaffen.

Cultureel erfgoed geniet ook van een bescherming gedurende niet-internationale gewapende conflicten. Op grond van verschillende rechtsbronnen heeft cultureel erfgoed bescherming. Cultureel erfgoed mag niet worden aangevallen noch mag het worden gebruikt als militaire basis, tenzij de rechtsbron zelf in een uitzondering, zoals militaire noodzakelijkheid, voorziet.

Tenslotte moeten de conflictpartijen voldoende voorzorgen nemen wanneer zij beslissen om over te gaan tot vijandelijkheden. Zo moeten ze proberen het incidentele verlies van burgerlijke levens te minimaliseren. Deze verplichtingen hebben een gewoonterecht-status en zijn dus van toepassing op niet-internationale gewapende conflicten.
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