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Master's Thesis in Public International Law
30 ECTS

Asymmetric warfare and challenges for international humanitarian law

Civilian direct participation in hostilities and state response

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<tr>
<td>4GW</td>
<td>Fourth generation warfare</td>
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<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)</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)</td>
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<td>CA 2</td>
<td>Common article 2 to the Geneva Conventions</td>
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<td>CA 3</td>
<td>Common article 3 to the Geneva Conventions</td>
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<td>GC</td>
<td>the Geneva Conventions</td>
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<td>GC I</td>
<td>Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)</td>
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<td>GC IV</td>
<td>Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949)</td>
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<td>HC</td>
<td>the Hague Conventions</td>
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<td>IAC</td>
<td>International armed conflict</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>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>IED</td>
<td>Improvised explosive device</td>
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<td>IHL</td>
<td>International humanitarian law</td>
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<td>IHRL</td>
<td>International human rights law</td>
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<td>NIAC</td>
<td>Non-international armed conflict</td>
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<td>POW</td>
<td>Prisoner of war</td>
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<td>WMD</td>
<td>Weapons of mass destruction</td>
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<td>WW I</td>
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1 Introduction

1.1 The subject

KABUL | Sat Sep 1, 2012 3:43am EDT
(Reuters) - A twin suicide bomb attack targeted a NATO base in eastern Afghanistan on Saturday, killing eight civilians and four Afghan policemen, local officials said.

A spokesman for NATO's International Security Assistance Force (ISAF) said no one from the alliance was killed in the attack, which happened in Wardak province's Sayed Abad district.

"The truck bomb was huge, killing 12 and wounding 50 more," said provincial governor spokesman Sahidullah Shahid.

The Taliban, which took responsibility for the early morning attack, said it had dispatched two bombers, one on foot and one in an explosives-laden truck. […]\(^1\)

Today’s armed conflicts hardly resemble of the wars described in history books, where two or more states’ armies engage on a traditional battlefield, and where only the soldiers’ abilities and the military leadership stands between victory and defeat.

The press item above is one example among thousands of how contemporary warfare has changed into a treacherous game in civilian environments where adversaries are trying to defeat each other by exploiting each other’s weaknesses. Warfare today is rarely taking place between states along a front line, but instead between parties with different legal status and considerably different military resources, organization, and commando structure.\(^2\) Conflicts where the parties differ in terms of qualitative and/or quantitative strength can be described as asymmetric. Asymmetric warfare is a broad term catching situations where a party to an asymmetric armed conflict is using illegal, and not necessarily military, means and methods to overcome a military superior adversary.\(^3\)

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3 Ibid. pp. 32-33. A more detailed definition will be provided in chapter 1.5.
Irregular combat that is not limited to geographical areas undeniably leads to civilians being more and more affected by the atrocities of war. Combat is nowadays commonly taking place in urban environments, performed by people whose combatancy status can be questioned, and directed towards targets which should be immune from attacks under international humanitarian law (IHL).

1.2 Scope and purpose

The purpose of this thesis is to discuss the legal implications of the use of asymmetric warfare in armed conflicts between states and non-state actors. The use of warfare methods that are not in compliance with IHL is steadily increasing and is severely affecting civilian populations.

One reason why combat in cities has become more common is that non-state actors benefit from it in terms of support and protection. A less military equipped and trained non-state party to an armed conflict can only overcome the adversary by carrying out sustained and widespread attacks directed towards individuals rather than military units.

People can be targeted in armed conflicts only under certain conditions. One of the most fundamental rules in IHL is that civilians can never be targeted unless and for such time as they are directly participating in hostilities. With today’s increased number of conflicts between states and non-state actors in urban environments comes the hard assessment of who is a legitimate target and who is not. It is important to examine under which conditions someone should be considered to being participating in hostilities and what the consequences are. How can “real” civilians be protected when terrorists and insurgents immediately after having carried out an attack blend in with the rest of the population?

The discussion will be focused on means and methods used in asymmetric armed conflicts and how civilian participation in hostilities should be dealt with under IHL. In particular, the definition of civilian will be discussed in relation to direct participation in hostilities, targeted killings, and detentions.

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Almost all armed conflicts today are asymmetric in the sense that they are carried out between parties with different military resources. For instance, all conflicts to which the U.S. is party will by definition be asymmetric simply because of the military superiority of that state. However, a total asymmetry exists first when also the legal status of the parties are different.\(^5\) This is the case when a state is fighting a non-state actor, and for that reason the thesis will focus on the situation where at least one party to an armed conflict not a state. This in turn means that the law pertaining to non-international armed conflicts (NIACs) will be of special interest. However, since there is no universal consensus regarding the qualification of asymmetric armed conflicts, the rules governing international armed conflicts (IACs) will be referred to when necessary.

It should be noted that the thesis only covers situations of *jus in bello* and not *jus ad bellum*. Discussions relating to the right to enter into an armed conflict will thus be left out.\(^6\) Further, international human rights law (IHRL) will not be covered other than very briefly in relation to chapter 7 on targeted killings and detentions.

To sum up, the purpose of this thesis is to

- Give an historical background of how warfare has changed into becoming increasingly asymmetrical in nature
- Discuss means and methods used in asymmetric conflicts and how these relate to IHL
- Discuss the subject of civilian direct participation in hostilities and how this should be dealt with under IHL
- Discuss problems and challenges that arises under IHL when states respond to hostile acts carried out by civilians

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\(^6\) Art. 2.4 in the UN Charter contains a general prohibition on the use of force that reads: "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." For further reading regarding *jus ad bellum*, see for instance Evans, *International Law*, 2010, pp. 615-645.
1.3 Sources of international law and legal method

Writing a thesis in international law is somewhat difficult in terms of collecting relevant material. The sources are not only written rules found in conventions and treaties, but also customary law established by state practice in combination with *opinio juris*. This requires due consideration of what is existing law. Further, literature in international law is substantial, which could lead to problems in terms of selectivity and determining the value of the text in question.

In order to structure the collection of material and to the largest extent possible obtain an objective result, the legal-dogmatic method will be applied. This means that the content of existing law will be established through the use of sources subsumed in a hierarchical system.\(^7\) The staring point will therefore be art. 38 in the ICJ Statute\(^8\), which lays down the sources of international law. This article’s first paragraph reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

With this article as a staring point, conventions, custom, general principles, judicial decisions, and literature will be considered throughout the thesis. What must be borne in mind, however, are the special characteristics of IHL. This is an area of public international law that regulates means and methods in both IACs and NIACs, including protection of civilians and people no longer taking part in hostilities. IHL has thus close links to security and defense politics, and several actors in the international community have their own agenda when interpreting existing laws. In addition, IHL is an area under constant development. This means that the relevance of a source must be carefully considered.

\(^8\) Statute for the International Court of Justice (1945).
1.4 Outline

In order to understand the problems surrounding asymmetric warfare, it is necessary to look back at the history of IHL. This will be done in chapter 2, and the purpose is to give the reader an understanding of the complexity of applying rules on asymmetric NIACs that were mainly drafted for symmetric IACs.

Following this, chapter 3 will explain the term “armed conflict” and also discuss the qualification of conflicts. Since the thesis is focused on NIACs, the concept will be explained in some detail. The special problem of qualifying the so-called “war on terrorism” will also be discussed. The purpose of this chapter is to lay a foundation for the following chapters, where, e.g., the specific problems pertaining to civilian status in NIACs will be discussed.

Chapter 4 will explain in further detail the theory behind asymmetric warfare and also provide the reader with some practical examples of means and methods used by terrorists, guerillas, and insurgents. Chapter 5 will go on to discuss the concept of “civilian”. Who is a civilian in NIACs? The implications of membership in organized armed groups will here be examined. Chapter 6 will focus on the subject of direct participation in hostilities, a situation where a civilian risks losing protection from attack. Chapter 7 will discuss problems that can arise when a state responds to hostile acts from civilians and non-state actors. Targeted killings and detentions will be used as examples. In chapter 8, three present challenges for IHL will be discussed whereas chapter 9 will sum up with some concluding remarks.

1.5 Definitions

Asymmetric conflict
An asymmetric conflict exists when the parties to an armed conflict significantly differs in terms of qualitative and quantitative strength (e.g. by having a military, technologic or economic advantage). This is a broad definition that will lead to the classification of most armed conflicts as asymmetric, as one party often is seen as stronger from an
objective point of view. Therefore, one other dimension to asymmetry will be added: difference between parties’ in terms of legal status. This means that the one party not being a state characterizes a fully asymmetric conflict. However, statehood is a complicated question and there might be cases where it could be argued that a non-state party to an armed conflict does in fact have the characteristics of a state (as for the case with Palestine). Given the purpose of this thesis, main focus will not be on the characterization of conflicts as asymmetric, but to discuss the methods used in asymmetric conflicts and the consequences thereof. This means that discussions pertaining to e.g. statehood will be left out.

Asymmetric warfare

The definition of asymmetric warfare used in this thesis is when the weaker party to an asymmetric conflict, as a way to compensate for lacking resources, uses means and methods that are prohibited under IHL. One example of this is the use of terrorism. The strategy behind asymmetric warfare is to strike against the adversary’s weak points and to avoid him where he is strong. The weaker party seeks to avoid an open confrontation, and therefore the civilian society is often used as cover for the operations. In theory, an armed conflict could be asymmetric without any party engaging in asymmetric warfare.

Armed conflict

Armed conflicts are qualified as either IACs or NIACs. It is important to distinguish between these types of conflicts since different sets of rules apply depending on the qualification. An IAC is characterized by at least two states being involved in an armed conflict and the trigger for IHL application is that states have resorted to armed force. In NIACs, at least one party is not a state and the armed conflict is taking place within the territory of one state. For NIACs there is thus no international element triggering the same set of rules as for IACs. The threshold for IHL application in NIACs is higher than for IACs and the treaty rules governing these conflicts are much fewer.

Non-state actor / organized armed group

The term non-state actor will here be used to describe an organization, which in an armed conflict uses force that is not authorized by a state. Non-state actors that falls within this definition are thus terrorist organizations, revolutionary groups, guerillas, and other military units not part of a state’s army. When these groups are carrying out military activity, they sometimes bear the characteristics of an organized armed group, which is a term found in Additional Protocol II (AP II) art. 1. It should be borne in mind, however, that the threshold for application of AP II is high, and not all states are party to the protocol.

The term nongovernmental organization is often used to describe an organization that is independent from a state’s government. This term, however, is often used to describe peaceful organizations (such as the Red Cross) that do not use violence to achieve political goals, and it might therefore be inappropriate to use the term for terrorist organizations and the like. Thus, the more neutral term non-state actor will be used when speaking more generally about a non-state party to an armed conflict, whereas the term organized armed group will be used when membership in such a group have legal implications under IHL.

Combatants and civilians

Anyone not qualified as a combatant is a civilian. The term “civilian” is thus a negative definition of combatant and derives from AP I art. 50.1:

Art. 50 – Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.


Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977). The legal background to AP II is described in chapter 2.1.3 and the term organized armed group is discussed in chapter 5.

Fowler, Amateur Soldiers, Global Wars: Insurgency and Modern Conflict, 2005, p. 3.
This definition gives that a person is either a combatant or a civilian; there is nothing in between from a pure legal point of view. The distinction is fundamental in IHL and the purpose of the rule is to ensure that military operations are directed only against military objectives as stated in AP I art. 48:

Art. 48 – Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

**International humanitarian law**

There are at least three terms commonly used to describe the branch of international law pertaining to the means and methods of warfare. In its simplest form those rules could be called *the law of war*. Others call it the *law of armed conflict*, which is probably more accurate given that not all armed conflicts are necessarily labeled as wars. The term used in this thesis will be *international humanitarian law* (IHL), a term that is used by the International Committee of the Red Cross (ICRC) which suggests that not all rules are directly connected to warfare itself, but also to protect people from the effects of war.\(^{17}\)

**Military objectives and civilian objects**

Only military objectives are to be targeted in an armed conflict. Military objectives are defined in AP I art. 52.2 (cited below), and all objects that fall outside that scope are civilian objects. Civilian objects are thus negatively defined in the same manner as with combatants and civilians. The rule has, according to ICRC, become customary international law.\(^{18}\)

To be a military objective, the object must contribute to military operations, and, if attacked, lead to a military advantage for the attacking party. Objects that fall within the scope of this article are, e.g., a state’s armed forces (i.e. combatants), military means of


transportation, military buildings and facilities (e.g. fuel storages, supplies, military harbors and compounds, etc.).

Art. 52 – General Protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to 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.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Symmetric/conventional warfare

Symmetric, or conventional, warfare means that the parties to an armed conflict are equally qualified in military operations in terms of equipment, size of units, technology, weaponry, etc. In these cases it is therefore factors such as the military leadership of operations and the individual soldiers’ skills that will determine the outcome of the conflict.

Unconventional warfare

Unconventional warfare is a term used to describe all types of methods a weaker party to an armed conflict may use in order to compensate for a qualitative or quantitative inferior position. The weaker party is normally using a strategy that is focused on exploiting the adversary’s weaknesses. Asymmetric warfare is included the term unconventional warfare.

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2 The historical background of IHL and sources of law

In this chapter, the development that has led up to today’s regulation of IHL will be explained. The purpose of the chapter is to provide the reader with a background to the rules that will later be examined in further detail and pertaining to civilians and direct participation in hostilities.

2.1 Geneva Law

The body of law that is IHL is commonly separated into two branches: Geneva Law and Hague Law. The former regulates protection of people that are affected by armed conflict, whereas the latter regulates means and methods in warfare, such as the use of certain weapons and conduct of hostilities. This section will explain the development of Geneva Law and section 2.2 below will deal with Hague Law.

2.1.1 The battle of Solferino

Through history, the conduct of hostilities has evolved from being barbaric and unregulated to now being governed by regulations that take into account ethical considerations and compromises between military necessity and humanity. From antiquity to the Middle Ages, warfare was hardly governed by any rules; people and goods coming in the way of a belligerent were treated as war booty and the belligerent could dispose of it as he wished. Only a few rules pertaining to prohibited weapons were considered during the battle.20 The turning point came in 1859 when French, Sardinian and Austrian armies clashed in the Battle of Solferino, Italy. During this battle, more than 40 000 combatants were deadly injured and left behind without any medical assistance. This striking lack of respect for humanitarian values was observed by Henry Dunant, a Genevan businessman, who decided to take action by publishing a book where he stressed the need for legal protection of the wounded and sick in field.

He also proposed the establishment of national societies who should operate in peacetime as well as providing assistance to wounded and sick in wartime. This proposal led to the foundation of national Red Cross Societies and the International Committee of the Red Cross (ICRC). Dunant’s important contribution furthermore led to the creation of the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field (hereinafter GC I), which laid the foundation for modern IHL.  

2.1.2 The development of the Geneva Conventions

Since GC I, several treaties within the area of IHL have been adopted. GC I was revised in 1906, 1929, and 1949, each time updated with a new convention expanding the scope of IHL. Although now comprising four conventions, the whole set is commonly referred to as “the Geneva Convention”. GC I deals with the protection of the wounded and sick in armed forces in the field; GC II sick and shipwrecked members of armed forces at sea; GC III prisoners of war; and, as a response to the devastating effects of World War II (WW II), GC IV the protection of civilians. The GC has been almost universally ratified, and is considered to have passed into customary international law in its entirety. The only practical implication of the rules having become customary is thus when a new state has come into existence and is involved in an armed conflict without having had the time to ratify the conventions.

22 The different conventions will hereinafter be referred to as GC, followed by the number of the convention.
23 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949).
24 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949).
25 Geneva Convention (III) relative to the Treatment of Prisoners of War (1949).
26 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949).
2.1.3 The Additional Protocols

As a complement to GC, two additional protocols were added in 1977. The Additional Protocol I\textsuperscript{28} (hereinafter AP I) addresses protection of war victims and conduct of hostilities in IACs, whereas Additional Protocol II\textsuperscript{29} (AP II) applies to NIACs. These two instruments have not gained the same acceptance worldwide as GC. As concerns AP II, there has been a great deal of reluctance among states to regulate civil wars, which is mainly because states are not willing to give up their power to decide how to deal with domestic outbreaks of violence. Regulating NIACs is thus a controversial area, which is also one reason why AP II contains much fewer articles than AP I.

Among the states that have signed but not yet ratified the protocols can be found Pakistan, Iran, India, and the U.S. These countries all possess significant military power and it is of course notable that they are not yet parties to the protocols. However, many rules in the protocols are now seen to reflect customary law, which makes those rules binding even on non-signatory states.\textsuperscript{30} The exact scope of the customary rules is not entirely clear, though, which creates a legal uncertainty in terms of application.\textsuperscript{31}

2.1.4 Common article 3 (CA 3)

Given the above said, the rules set out in AP II are not always applicable in armed conflicts. This might be so either because a state is not party to the protocol or because the threshold for application is not met. Whereas AP II applies only in armed conflicts “which takes 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”, Common article 3 (CA 3) to the GC will apply to all armed conflicts not of an international character. This article contains minimum rules for the conduct of hostilities and thus

\textsuperscript{28} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977).
\textsuperscript{29} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977).
\textsuperscript{31} Kolb & Hyde, An Introduction to the International Law of Armed Conflicts, 2008, p. 53.
constitutes a “mini-convention” for NIACs. CA 3 is recognized as customary international law and is therefore binding on all states. The minimum provisions stipulate humane treatment and care of civilians as well as combatants no longer taking part in hostilities, and prohibit acts that are degrading, violent, and humiliating.

2.2 Hague Law

The term Hague Law is commonly used as a generic name for treaties governing means and methods of warfare. This section will briefly explain the main contents of Hague Law, as well as the Martens Clause which is a fundamental principle governing all conduct of warfare.

2.2.1 The Hague Conventions

The core of the Hague Law is the Hague Conventions (HC) of 1899 and 1907, which governs the conduct of hostilities on land, at sea, and in air. The HC have in large parts been recognized as customary international law, and most provisions are thus binding on all states. The cardinal principles deriving from the HC are that (a) parties do not have an unlimited choice of means and methods in armed conflicts, (b) the causing of superfluous and unnecessary suffering is prohibited, and (c) the only legitimate object of war is to overpower or weaken enemy forces in order to get in control of territory or to enforce a political will, not to kill as many as possible.

2.2.2 The Martens Clause

The Martens Clause can be found in the preamble to HC II of 1899 and HC IV of 1907 and connects to (b) above regarding the choice of means and methods in armed conflicts. In the preamble of HC IV of 1907, the Martens Clause has the following

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32 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1899), and Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907).


wording: “[u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.”

The same clause, in a somewhat different wording, has also been incorporated in GC and AP I. Art. 1.2 in AP I reads: “[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

The Martens Clause got its name after the professor in international law and delegate at the 1899 Hague Peace Conference, Frederic de Martens, and the (simplified) meaning of the clause is that what is not explicitly prohibited is not e contrario permitted. The clause serves the role of filling up any gaps in IHL and puts up restraints on the warring parties to comply with principles of humanity even in cases where regulation is lacking. The Martens Clause thus lays a foundation for analogies whenever needed due to technological or other military progresses.

2.2.3 Other conventions

Rules governing means and methods of warfare can also be found in numerous conventions regulating specific areas. Examples of this are the prohibition on the use of poisonous gases etc., the prohibition on the use of biological weapons, the prohibition on the use of environmental modification techniques for military or hostile

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35 The equivalent to this provision can also be found in GC I art. 63, GC II art. 64, GC III art. 142, and GC IV art. 158.
37 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925).
38 Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1975).
purposes,\textsuperscript{39} the prohibition on the use of chemical weapons,\textsuperscript{40} the prohibition on the use of anti-personnel mines,\textsuperscript{41} and, of great importance, the certain conventional weapon-convention with its protocols.\textsuperscript{42}

### 2.3 From limited to total wars

A conclusion that can be drawn from the historical background given above is that IHL has moved from protecting only those fighting on the field to also protecting others affected by the war. This broader scope of protection came with increased civilian contribution to the war effort. WW II was a turning point in history, where war went from being limited to being total, the latter meaning that whole populations became involved in the war by the performance of compulsory war services. Up until the beginning of the twentieth century, wars were limited "cabinet wars" fought among kings as a mean to achieve political goals or to secure or increase territorial borders. Civilians were not directly targeted and could carry on with their lives as normal, suffering only from shortages or other indirect consequences.\textsuperscript{43}

One reason for this change from limited to total wars was the shift towards nationalism. People tended to identify themselves with the state to a larger extent than before and were willing to serve the state by active and direct contribution to the war effort, with or without serving in the army. This development has led to increased civilian participation in hostilities and hence having created difficulties in determining the status of the people involved in the conflict. Other reasons for the change were the shift towards modern industrialism and the shift in technologies. The effectiveness of the industrial production and the invention of new weapons came to be the difference between victory

\textsuperscript{39} Convention on the Prohibition of Military or any Other Hostile use of Environmental Modification Techniques (1976).

\textsuperscript{40} Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1992).

\textsuperscript{41} Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997).

\textsuperscript{42} UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980), and protocol I-V on non-detectable fragments (Protocol I); on mines booby-traps and other devices (Protocol II); on incenduary weapons (Protocol III); on blinding laser weapons (Protocol IV); and on the explosive remnants of war (Protocol V).

\textsuperscript{43} Kolb & Hyde, \textit{An Introduction to the International Law of Armed Conflicts}, 2008, pp. 29-31.
and defeat, and since this production is mainly being performed by civilians, the limits for what constituted a military objective has become blurred.\(^{44}\)

Even more recently, there has been a development of conducting hostilities in urban environments, which has led to an increased number of civilians taking part in the conflict. The distinction between being a passive by-stander in an armed conflict and actively taking part in hostilities is an important one, since participation may lead to a civilian losing protection under IHL. The topic of direct participation in hostilities will be further discussed in chapter 6.

### 2.4 Customary international law

IHL is not only governed by conventions, customary international law also plays an important role in regulating the area. Customary international law is established through a combination of state practice and \textit{opinion juris}. In the \textit{North Sea Continental Shelf} case, the International Court of Justice (ICJ) discussed the process that precedes the emergence of a customary international rule: “\textquote{[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the \textit{opinio juris sive necessitatis}.}”\(^{45}\)

This description makes a good starting point, but there lie some difficulties in establishing whether an IHL rule has become customary international law. To all rules there are exceptions; firstly, states that are persistent objectors will not be bound by the rule in question as long as the rule has not become customary (i.e., there is a possibility to ‘opt out’), and, secondly, custom can be local and thereby only binding on the states in a specific region, as in the \textit{Asylum} case.\(^{46}\)

\(^{44}\) Ibid., pp. 30-31.
\(^{45}\) \textit{North Sea Continental Shelf cases}, Judgment, ICJ Reports, 1969, p. 3, para. 77.
\(^{46}\) \textit{Asylum}, Judgment, ICJ Reports, 1950. The court concluded that the granting of diplomatic asylum between certain Latin-American countries constituted a regional custom that did not correspond to established practice elsewhere.
Whether or not a rule is binding on all states is thus depending on if practice and *opinio juris* could be established in a wider sense. A problem pertaining to these criteria is, e.g., that it could be hard to draw conclusions regarding *opinio juris* based on a certain practice. And it could also be hard to determine to which specific rule the *opinio juris* is connected to. Further, some states could hardly express their view on the matter based on geographical or other circumstances. This would for instance be the case for a land-locked state in relation to a certain maritime rule, or for a state that has never been engaged in any armed conflict. Although the establishment of a customary rule is not dependent on practice of all states of the world, the practice must be widespread and consistent.

In IHL as well as in other areas of international law, it is natural that states have different opinions of the exact scope of which rules have become customary. As an attempt to clarify the contemporary situation, ICRC (in close cooperation with several other actors) undertook to do research on most areas of IHL and has presented its view of what has become customary law in different reports. Some of these reports will serve as a foundation for the discussion in the following chapters, and although this expresses the view of ICRC, it is justified by the wide acceptance and thorough knowledge ICRC has gained as an impartial humanitarian actor in armed conflicts. What the reader should bear in mind, though, is that it lies in the interest of ICRC that as many rules as possible is considered binding upon states as to fulfill their humanitarian obligations in armed conflicts. However, it naturally also lies in the interest of ICRC that the reports reflect reality in an accurate and correct way so that parties to armed conflicts can agree upon and are willing to comply with the rules.
3 Qualification of armed conflicts

Although IHL was initially drafted to cover IACs, i.e. armed conflicts between two or more states, only a handful of recent conflicts actually fall into the scope of this definition. Most armed conflicts today are fought between actors where at least one party is not a state, and often these conflicts take place within the territory of one single state, but there might also be international elements in these conflicts. Since different sets of rules apply to IACs and NIACs, it is important to start by qualifying the conflict at hand.

3.1 What amounts to armed conflict?

The starting point in all qualification operations is whether there exists an armed conflict at all. Not all violent acts lead to the applicability of IHL, and different thresholds apply in IACs and NIACs. What complicates the matter is that armed conflict is not defined in any treaty. According to the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadić case, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. [IHL] applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, [IHL] continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”

The statement above shows that there are different thresholds for when IHL comes into application for IACs on the one hand and NIACs on the other. For IACs, it suffices to

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49 Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Interlocutory Appeal), Case No IT-94-1-AR72, 2 October 1995, para 70.
conclude that states have resorted to armed force, whereas in NIACs the conflict must reach a certain level of intensity and the parties must reach a certain level of organization. And even if established that there is an armed conflict, there are different thresholds in CA 3 and AP II, the latter which not all states are parties to, but in large parts reflect customary international law. Given the scope of the thesis, main focus in this chapter will be on determining when a NIAC exists.

3.2 International armed conflicts

The main source regarding the definition of IACs is Common Article 2 (CA 2) of GC, which regulates armed conflicts between two or more “High Contracting Parties”, i.e. states parties to the conventions. This provision stipulates that there are three different situations where IHL applies, namely in cases of (1) effective armed conflict, (2) declared war, or (3) occupation of territory without armed resistance. Not surprisingly, effective armed conflicts between states are today the most common trigger for application of IHL in cases of IACs. As follows from the Tadić case above, IHL comes into application when states resort to armed force. The threshold for application is thus rather low. If established that armed conflict is actually taking place, then the whole set of rules within IHL becomes applicable, i.e. both treaty law and customary rules.

3.3 Non-international armed conflicts

Just as IACs, NIACs are regulated through both treaties and customary international law. The main difference, however, is that because states have been reluctant to give up their sovereign right to regulate internal matters, there is a higher threshold for application of IHL in NIACs. There are also significantly fewer treaty rules pertaining

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50 It is of course subject to interpretation regarding what constitutes “armed force” between states, something that will not be further discussed here. Although there is a threshold in IACs, it is lower than for NIACs.

51 Additional protocol I art. 1(4) regulates wars of national liberation, which is a situation also covered by IHL. This will not be further examined here. The interested reader is referred to Kolb & Hyde, An Introduction to the International Law of Armed Conflicts, 2008, p. 77.

to NIACs than to IACs. As mentioned above in 2.1.4, CA 3 is a “mini convention” that provides minimum protection for victims of internal armed violence. The threshold for application of this article is low, but it should be borne in mind that it only covers certain very fundamental rules regarding the conduct of hostilities.

Following the _Tadić_ case, it is now accepted that there are two main criteria in order for the application of IHL in NIACs to come into force. These are, firstly, that rebel forces must show a minimum level of organization, and, secondly, that the armed conflict shows a certain degree of intensity. The consequence of this is that there might be situations where armed violence takes place, but nevertheless fall beneath the threshold for when IHL comes into application. These are, e.g., internal disturbances and tensions, riots, and sporadic acts of armed violence.\(^\text{53}\) That said, it is of course possible that a conflict might change in classification during ongoing hostilities, or that different conflicts take place at the same time in the same area.\(^\text{54}\)

### 3.3.1 Minimum level of intensity

The term “protracted armed violence” was introduced by ICTY in the _Tadić_ case, and suggests that for an armed conflict to be classified as a NIAC, the hostilities must not only be sporadic. This implied temporal element has created some confusion, since the term “protracted” is not to be found in either CA 3 or AP II. CA 3 does not contain any intensity criteria, and it might therefore be somewhat difficult to establish when CA 3 becomes applicable in low-intensity conflicts. However, since this is a very broad article serving as a fundamental guarantee for humane treatment, the threshold should not be set too high. As regards AP II, the term protracted is not mentioned, but instead art. 1.1 speaks of a party’s ability to carry out sustained and concerted military operations. Art 1.2 excludes from the Protocol’s scope of application the sporadic outbursts of violence and internal disturbances.

There have been suggestions that “protracted” does not mean the same thing as sustained or continuous armed violence, but rather the combination of factors such as

\(^{53}\) Kolb & Hyde, _An Introduction to the International Law of Armed Conflicts_, 2008, p. 78.

time, violence, deaths, and so on.\textsuperscript{55} There has also been debate as to whether terrorist attacks carried out by terrorist organizations generally should be seen as reaching the minimum level of intensity or if this instead should be dealt with as criminal acts subject to a domestic law enforcement system.\textsuperscript{56}

\textbf{3.3.2 Minimum level of organization}

There is no definition of “party to the conflict” in CA 3 or AP II. The \textit{Tadić} case gives little guidance: ICTY speaks of “organized armed groups” but does not define it. Instead, the question was further discussed in the \textit{Milošević} case,\textsuperscript{57} where it became necessary to evaluate the status of the Kosovo Liberation Army (KLA). If KLA would be found not to have the attributes of an organized armed group, Milošević could not have committed war crimes since there would not have been an ongoing NIAC. However, ICTY found that there was “a sufficient body of evidence pointing to the KLA being an organized military force, with an official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.”\textsuperscript{58}

In the \textit{Limaj} case,\textsuperscript{59} ICTY provided further guidance on the question, once again with regard to the status of KLA. Here it was emphasized that the functions carried out by the leaders could lead to a classification of the group as organized, for instance if they were found to be “speaking with one voice” and carrying out diplomatic negotiations. Also underscored was the ability to recruit, arm, and train members of the group, as well as the ability to carry out effective and large military operations. The types and quantity of weapons used could also give guidance on what level of organization the group in question possesses.\textsuperscript{60}

\textsuperscript{55} Cullen, \textit{The Concept of Non-International Armed Conflict in International Humanitarian Law}, 2010, pp. 127-133.
\textsuperscript{56} Even-Khen, \textit{Can We Now Tell What “Direct Participation in Hostilities” is?}, 2007, p. 220.
\textsuperscript{58} \textit{Prosecutor v. Milošević}, Trial Chamber Decision, Case No. IT-02-54-T, 16 June 2004, para. 23.
\textsuperscript{59} \textit{Prosecutor v. Limaj et al.}, Second Amended Indictment, Case No. IT-03–66-PT, 6 November 2003.
\textsuperscript{60} \textit{Limaj et al.}, Judgement, Case. No. IT-03-66-T, 30 November 2005, para. 94-134.
Although each armed conflict has its own special characteristics and requires a case-to-case evaluation, the Milošević and Limaj cases provide some guidance on when an armed group reaches the level of minimum organization. In summary, it should resemble a military unit in its structure and have access to military equipment that makes it able to conduct military operations.

3.4 The “war on terrorism” – IAC, NIAC, or something in between?

After the 9/11 attacks, the Bush administration proclaimed the existence of a war between the U.S. and al Qaida – the so-called war on terrorism. One important question is therefore whether IHL applies in this “war on terrorism”, since the adversary is not a state, but instead loose entities carrying out sporadic acts of violence. Given what has been discussed above, not all terrorist groups would fulfill the organizational criterion above, and the sporadic acts might not reach the required level of intensity.

Terrorism is a generic name for violence directed towards civilians to obtain a political goal. Terrorism as such is therefore not a “party” to a conflict, and therefore it is highly disputable whether it could be labeled as a war in a strict legal sense.61 In addition, even if the war on terrorism would be considered a war under IHL, would it then be an IAC or a NIAC? The difficulty here lies in that the definition of an IAC either must be stretched to encompass conflicts not only between states, or that the definition of a NIAC must be stretched to cover conflicts that are not only taken place within a single territory.62 The IAC/NIAC dichotomy therefore becomes more and more obsolete.

As mentioned above, an IAC exists when states resort to armed force, either by factual hostilities, by declaration, or by occupation. If armed force is used against the state where terrorists are residing without consent or invitation, then it is possible for an IAC to have come into existence, given that the threshold for application is met. Armed force used against a non-state actor within another territory does not automatically make the conflict international, since an IAC by its strict definition takes place between two or

61 Kolb & Hyde, An Introduction to the Law of Armed Conflicts, 2008, p. 27.
more states. The fact that non-state actors cannot be parties to the relevant IAC treaties has been stressed by the Bush administration in the aftermath of 9/11, but the Bush administration has not been keen on qualifying the conflict as a NIAC either.\(^{63}\) Since the terrorist adversary is not a state, the fight against it is not entirely compatible with the “ordinary” NIAC definition: that a NIAC lacks international elements and takes place within one single state. These arguments taken together would mean that the war on terrorism is neither an IAC nor a NIAC, which would create sort of a legal vacuum where hostilities actually take place. It is correct that IHL does not apply when there is no armed conflict present, which might be the case for some isolated counter-terrorist measures, but a party could hardly say that no IHL rules apply when at the same time claiming that there is an ongoing war. The Obama administration has abandoned the policy established under Bush’s time in office,\(^ {64}\) but actual fighting is still taking place on the same grounds for which it once were initiated.

Israel, on the other hand, has taken the view that the fight against terrorism, which is a response to the Palestinian intifada, is an armed conflict of international character: “[t]he terrorists and their organizations, with which the State of Israel has an armed conflict of international character, do not fall into the category of combatants. They do not belong to the armed forces, and they do not belong to units to which international law grants status similar to that of combatants. Indeed, the terrorists and the organizations which send them to carry out attacks are unlawful combatants. They do not enjoy the status of prisoners of war. They can be tried for their participation in hostilities, judged, and punished.”\(^ {65}\) The effect thus becomes the same here as with the U.S. reasoning: although this conflict is qualified as international, the terrorists stand outside the frames of IHL.

If, and in that case which set of IHL rules apply in cases where a state fights a non-state actor on the territory of another state is thus open for argumentation.\(^ {66}\) Kretzmer argues that “[t]here is no substantive reason why the norms that apply to an armed conflict between a state and an organized armed group within its territory should not also apply


\(^{65}\) HCJ 769/02, *The Public Committee Against Torture in Israel v. the Government of Israel*, 11 December 2006, para. 25.

to an armed conflict with such a group that is not restricted to its territory. It therefore seems to me that to the extent that treaty provisions relating to [NIACs] incorporate standards of customary international law, these standards should apply to all armed conflicts between a state and non-state actors.” Many scholars seem to agree that the “war against terrorism” more resembles of a NIAC than of an IAC, but that contemporary warfare very seldom falls within one single definition.

The view taken in this thesis is that it is not possible to determine on a general level that certain rules will always apply when a state takes up the fight against terrorism. However, as long as a state directs armed force not only of an insignificant character against a non-state actor, it will be presumed that (a) IHL applies, and that (b) the rules governing the conflict are those of NIACs rather than of IACs, even if there might be transnational elements. The reason for this is, firstly, because when one party to the conflict is a non-state actor, NIAC rules are better suited for governing the conflict, and, secondly, NIAC rules are much more general and serve as a “minimum standard” in armed conflicts, which thus is more likely to gain acceptance from both parties.
4 Asymmetric warfare

In a sense, all warfare could be labeled as asymmetric since no adversaries will be entirely equal. However, as mentioned above in 1.5, for the purposes of this thesis asymmetric warfare is when a weaker party to an armed conflict seeks to defeat a military superior opponent by using methods that are not in conformity with IHL. This chapter will explain three types of asymmetric warfare common in contemporary armed conflicts, which all tend to disregard protection of civilians and civilian objects. These are terrorism, guerilla warfare, and insurgency.\(^6^7\) Main focus in section 4.3 below will be on terrorism, since also guerillas and insurgents occasionally employ the same means and methods. Before discussing those methods, the theory behind asymmetric warfare and the concept of fourth generation warfare (4GW) will be explained in further detail.

4.1 The theory behind asymmetric warfare

Although today’s international community is facing different threats than a century ago, asymmetry in conflicts is in itself nothing new. Parties to armed conflicts have through all times sought to defeat their opponents by striking against the opponent’s weakest points. As Sun Tzu described it more than 2000 years ago, “[t]he nature of water is that it avoids heights and hastens to the lowlands. When a dam is broken, the water cascades with irresistible force. Now the shape of an army resembles water. Take advantage of the enemy’s unpreparedness; attack him when he does not expect it; avoid his strength and strike his emptiness, and like water, none can oppose you.”\(^6^8\)

According to Thornton, “[a]symmetric warfare is as old as warfare itself and as recent as the last terrorist outrage.”\(^6^9\) But even if asymmetry in theory is nothing new, the means and methods in those conflicts have changed to involve the civilian society to a much larger extent than before. Contemporary asymmetric warfare catches situations where a weaker party to an armed conflict choses methods that are not in conformity with IHL to weaken its stronger opponent. This is very effective for non-state actors,

because opponent states normally do not consider themselves able to deviate from the rules in the same manner without facing the risk of serious consequences both in terms of responsibility and reputation. As Barnett puts it, “true asymmetry [involves] those actions that an adversary can exercise that you either cannot or will not”.70

The constant race toward new military innovations and world leading technology means that the disparity between weak and strong is ever increasing. Paradoxically, the more equipped and trained strong states get, the bigger the risk becomes for being defeated by weak non-state actors using asymmetric warfare.71 But with technology comes also opportunities; a military superior party to an armed conflict is today able to defeat a weaker opponent without even physically entering foreign soil.72 The consequences of asymmetric warfare are not yet clearly evident in terms of IHL contents and application, and more thorough research would therefore be a much-welcomed contribution to literature on IHL.

There is generally large consensus worldwide that casualties should be kept to a minimum in armed conflicts. Chapter 2 explained the history behind IHL and the reasoning behind protection of civilians, and most people would agree that the civilian population should be left out whenever hostilities is going on. This could be seen as a “casualty aversion policy” shared by most states and shaping the conduct of hostilities. For the non-state actor who uses asymmetric warfare as strategy, however, striking against the civilian society is often seen as a necessary method in order to win the war.

The non-state actor can benefit from the state’s fear of casualties in different ways. Firstly, the casualty aversion policy means that the opponent state will be easily coerced if threats are directed towards its citizens. The state will normally do everything possible to avoid the deaths of innocent people. This puts the non-state actor in a more powerful position than it would otherwise have. Secondly, casualty aversion also means that there are time limits for how long a conflict is justifiable.73 The non-state actor is usually well aware that the state will only fight for as long as it has support; otherwise

the government runs the risk of not being reelected. Support will be likely to decrease with every single death of an innocent person, regardless of which side fired. This means that as long as the non-state actor avoids open confrontation and is carrying out sustained operations against soft targets such as the civilian population, there is chance of winning the conflict. The non-state actor does of course take the risk of losing support for its own cause when targeting civilians, but generally asymmetric warfare is closely surrounded by propaganda campaigns and strong local support for the non-state actor.

4.2 Fourth generation warfare

A term that sometimes is used as a synonym to asymmetric warfare is fourth generation warfare (4GW). The U.S. Marine Corps introduced the term 4GW in 1989 after having analyzed the contemporary security situation under the lead of William Lind. The conclusion of this analysis is that modern military history can be divided into three different eras, or “generations” of warfare, and that a fourth generation had begun to crystalize at the time for the analyze. The theory makes an interesting contribution to the discussion on the development of warfare and will therefore be described in short here.

The first generation of warfare (1GW) started by the Treaty of Westphalia in 1648 and went on until around 1860. At this time in history, the political, economic, and social development in Europe permitted states to set up large armies who clashed on traditional battlefields, using the tactics of line and column. During 1GW, the foundation was laid for many traditions that distinguish military from civilian, such as the use of uniforms, saluting, and gradation of rank. The weapons used were muskets

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74 The reason why the U.S. Marine Corps undertook the analysis is probably because they traditionally has been fighting small, low-intensity wars, as opposed to the Army who are trained to fight “big wars”, see Thornton p. 153.


and canons, however, states were not industrialized enough to maintain a steady supply of arms for their armies.\textsuperscript{79}

The second generation of warfare (2GW) took place during the Industrial Age. At this time in history, states had become even more economically developed and thus had the possibility to mass produce more advanced weapons. Tactics were based on fire and movement, and the state that produced the largest quantity of arms was likely to win the war. Not only were new weapons developed during this time; communication systems and logistics did also contribute to a new and more effective way of fighting.\textsuperscript{80}

The third generation warfare (3GW) was first seen during World War I (WW I). Here, non-linear fighting and use of intelligence to overcome the adversary came to play the crucial parts of warfare. During WW II, the Germans introduced the concept of Blitzkrieg – to quickly overcome the opponent by “shock operations”. The mental part of warfare came to be at least as important as the military equipment.\textsuperscript{81}

This development led on to what has now come to be called the fourth generation of warfare, or 4GW. The 4G adversaries will almost exclusively use non-linear tactics that are directed against both military and civilian targets. The goal is to obtain a collapse from within and to create as much harm as possible with the smallest possible use of military means.\textsuperscript{82} This harm is easiest to attain in civilian environments.\textsuperscript{83}

Given the historical background, it could be concluded that traditional armies have a military structure and organization that is well prepared to meet the threats of 2G or 3G adversaries, but when it comes to 4GW they are insufficiently trained both from a physical and psychological point of view.\textsuperscript{84} In order to meet the new threats coming from 4G adversaries, it has been suggested that conventional armies must adopt the same way of fighting.\textsuperscript{85} The 4G adversaries are skilled at turning their shortcomings to advantages, for instance by operating in small and flexible units as a corollary to lacking

\textsuperscript{80} Thornton, \textit{Asymmetric Warfare: Threat and Response in the Twenty-First Century}, 2007, p. 154.
\textsuperscript{82} Thornton, \textit{Asymmetric Warfare: Threat and Response in the Twenty-First Century}, 2007, pp. 155-156.
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid., p. 174.
\textsuperscript{85} Ibid., p. 156.
in manpower. In fact, as Lind et al. puts it, “mass may become a disadvantage as it will be easy to target.”

Accordingly, the big challenge that lies ahead for conventional armies is thus to adapt to 4GW. It is important to underscore that this is not about using the same means and methods as the 4G adversaries, which today are likely to be terrorist groups, guerilla units, or insurgents. Rather, it is about being more flexible and being able to adjust the operation to the specific environment. Armies are trained to carry out large operations in large units, and if doing this in urban environments, there is always a risk that the civilian population will be disproportionally affected. Excessive use of force against small units will undeniably lead to collateral damage if carried out in densely populated areas. The challenge that lies in cities becoming battlefields will be further discussed in chapter 8.3.

4.3 Three types of asymmetric warfare: terrorism, guerilla warfare, and insurgency

4.3.1 Terrorism

4.3.1.1 What is terrorism?

The word “terrorism” can be found in most newspapers every day of the year, all around the world. But despite the widespread use, no consensus of the term has been reached. In UN Security Council resolution 1566, terrorism is defined as “[...] criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act [...]” According to a definition by the U.S. government, “[t]he term terrorism means premeditated, politically motivated violence perpetrated against noncombatant

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targets by subnational groups or clandestine agents, usually intended to influence an audience.”

The definition of terrorism that will be used in this thesis is the use of violence or the threat thereof by a non-state actor directed towards civilians or civilian objects in order to defeat a military superior adversary. Most definitions of terrorism include that the actions should be politically motivated. However, the motives behind the terrorist actions are of subordinate interest here. Rather, focus is on the terrorist action as a warfare method in an asymmetric armed conflict.

As noted above, no single definition of terrorism has thus been agreed upon among states. Many governments and various organizations have tried to define the term in a simple, yet comprehensive way, but differences between them remain. The difficulty to define terrorism lies in that it is a political label on an undesirable and unlawful behavior, which may lead to measures being taken against the terrorist organization, and states have different views on and interests in which organizations that should fall within this scope. “One person’s terrorist is another person’s freedom fighter” is an often quoted saying which describes the different views two parties can have on the same matter.

4.3.1.2 An increased number of terrorist organizations and terrorist attacks

Terrorist organizations themselves naturally want to avoid the terrorist label and often choose names with a more sympathetic connotation, including words such as liberation (e.g. the Palestine Liberation Organization), freedom (e.g. Freedom for the Basque Homeland), or defense (e.g. the Jewish Defense Organization). Other names give the impression that the organization has a military structure and that its members are combatants (e.g. the National Military Organization). As terrorists see themselves as freedom fighters, they often argue that they should be granted the same rights as lawful combatants, and that the unlawful methods used are only a consequence of the superior opponent’s (allegedly unlawful or excessive) acts. One example of a non-state actor

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89 Measures could be both violent and non-violent, an example of the latter is the freezing of assets.
using terrorism as a “countermeasure”, or reprisal, can be found in bin Laden’s *Letter to America*,\(^91\) published in 2002. In his letter, bin Laden claims that al Qaida’s attacks on American civilians was justified on the basis that the American people had elected a government who was, allegedly, guilty of killing and torture of Palestinians and other people in the Islamic world. Even the paying of taxes should be seen as economically supporting the war. Furthermore, because the American army consists of combatants recruited among the American people, the whole American population is attacking the Islamic society and is hence not immune from any violent countermeasures. bin Laden concluded by stating that ”whoever has killed our civilians, then we have the right to kill theirs.”

This letter raises some interesting questions, and, not surprisingly, bin Laden’s views can be contested on several grounds. Firstly, it implies that civilians are directly participating in armed conflict by such indirect measures as voting and paying taxes. The limits for direct participation in hostilities will be examined in below in chapter 6. Secondly, it suggests that reprisals taken out on the adversary’s civilian population is an adequate response to a previous attack. This view is clearly against IHL. Responding to asymmetric warfare will be further discussed in chapter 7 and the challenge of maintaining reciprocity in NIACs will be dealt with in 8.2.

There are several reasons why terrorist attacks have come to increase in number. First of all, globalization has made it easier to travel and to transfer information. New technological inventions have contributed to the creation of weapons that are small enough to be carried everywhere and still have a devastating effect if used in strategic locations. More liberal laws concerning movement of people, e.g. through the establishment of EU and the Schengen agreement, has made it easier for terrorists to get access to countries where they want to operate without raising suspicion.\(^92\) Secondly, there has been a rapid increase in possibilities to cause mass casualties. The evolvement of Internet and use of new information channels has contributed to a more open world, but it has also made societies more vulnerable.\(^93\) When information about a state’s


\(^93\) Ibid., p. 55.
infrastructure is easy accessible, there is always a risk that it will be used for the wrong purposes. This could be the case for instance when it comes to gathering information regarding the whereabouts of certain people or meetings, getting access to maps or blueprints, learning about local transportation systems, etc. The Internet and other information channels could also be a target in itself: if terrorists take out the possibilities for people to communicate, it could have serious implications in several areas such as health care, emergency services, police operations etc. These types of terrorist attacks are often called information warfare.94

4.3.1.3 Means used by terrorists

An increased possibility to access weapons that are highly injurious, such as weapons of mass destruction (WMD), is often claimed to constitute a risk of terrorists causing mass casualties. WMDs could be chemical, biological, radiological, and nuclear.95 However, the threat of WMDs should not be over exaggerated, since the access to and successful use of them is dependent on a number of combined factors.96 Instead, much more simple – but nevertheless dangerous – improvised explosive devices (IEDs) are commonly used to cause damage to the adversary. The use of IEDs has emerged as one of the primary warfare methods by terrorists and insurgents in asymmetric conflicts.97 An IED is exactly what it sounds like: an improvised bomb that is made of either military components or commercially sourced explosives, or a combination of both. Common for all IEDs is that they contain explosive material, detonators, and trigger mechanisms. However, as a corollary to being improvised, IEDs almost never look the same and could be hard to detect even for trained military personnel. This illustrates the risk that innocent people will accidentally come in contact with the explosive without knowing what it is or without even noting it in the first place.98 IEDs could also be attached to vehicles, so called vehicle-borne IEDs, to cause even greater damage. A vehicle can carry a substantial amount of explosive material and be placed in urban

95 Ibid., pp. 32-33.
96 Ibid., p. 40.
environments without raising suspicion. If detonated, the bomb could thus cause devastating and indiscriminate damage to civilians and civilian objects.

One of the more controversial methods used by terrorists is suicide bombing; a committed member of the group takes his own life in a strategic location and is thereby aiming at killing members of the oppositional force. This type of attack is highly indiscriminate since the suicide bomber cannot control who will get killed in the attack other than himself.

According to Thornton, a terrorist organization is the typical asymmetric adversary, since it lacks in both number and military equipment, but still can make a devastating damage to society. He takes the 9/11 attacks as an example: when the terrorists hijacked four airplanes and killed nearly 3000 people, they were armed only with box cutters. This says something about the disproportionate and indiscriminate damage a few people may cause by disregarding laws regulating warfare. Already in 1989, Lind et al. predicted what could be the consequences of an asymmetric attack such as on 9/11:

“[t]he tactical and strategic levels will blend as the opponent’s political infrastructure and civilian society become battlefield targets. It will be critically important to isolate the enemy from one’s own homeland because a small number of people will be able to render great damage in a very short time.”

4.3.2 Guerilla warfare

“If weaker numerically, be able to withdraw; [...] if the enemy is strong and I am weak, I temporarily withdraw and do not engage. [...]”

Guerilla warfare is a strategy used by non-state actors to impose costs on an adversary, who often is the armed forces of the state in which the guerilla is operating. Costs may be either material or psychological, such as the destruction of an adversary’s camp or the prolonging of a conflict by attacking and then withdrawing, thereby avoiding the conflict coming to an end. The rationale behind guerilla warfare is

101 Sun Tzu, The Art of War, Ch. III, Offensive Strategy § 16.
that the adversary is assumed to give up if realizing that proceeding with the strategy will not be worth it. It is also a way for the guerilla organization to get the time to gain in strength and to recruit more fighters.

A successful guerilla warfare strategy is dependent on sanctuary and the support of the population.\textsuperscript{103} Being able to withdraw to a safe place is crucial for the guerilla fighter, since he will not be able to defeat his military superior opponent on an open battlefield. Having the support of the population is also necessary since guerilla fighters are dependent on the locals in order to be provided with supplies, intelligence, and shelter. This reliance on the civilian population means that civilians often will be drawn into the conflict in one way or another, which in turn have serious implications for those involved. If a civilian takes direct part in hostilities, he loses his immunities under IHL and could therefore be subject to attack. Thus, it is of great importance to determine the meaning of “direct participation in hostilities”, since this qualification could mean the difference between life and death in a military operation. Direct participation in hostilities will be further examined in chapter 6 below.

There are both similarities and differences between guerilla warfare and terrorism. The same tactics are often employed and neither terrorists nor guerillas are likely to distinguish themselves from the civilian population by the wearing of uniform or other insignias.\textsuperscript{104} The guerilla organization, however, is more of a military unit than the terrorist organization. A guerilla is a larger group of armed people whose aim is to maintain or gain control over a certain territory and its population, whereas terrorists operate on a more irregular basis and not in armed units.\textsuperscript{105}

4.3.3 Insurgency

Insurgency is the armed attack of rebellions against a constituted authority to achieve a political goal. One could say that rebellion turns into insurgency once having survived

\textsuperscript{103} Ibid.
\textsuperscript{104} Whittaker, The Terrorism Reader, 2003, p. 8.
\textsuperscript{105} Ibid.
the initial suppression from the authorities. There is no clear definition of insurgency, however, it has been suggested that when the government of the state in which the insurgents are operating finds it necessary to establish relations with the insurgent party in order to overcome it, then there is generally a NIAC going on. The only criterion for insurgency is thus that of necessity.

The problem of recognizing insurgency from the state’s point of view is that once this is done, the insurgent party becomes a legitimate contestant instead of simply being seen as lawbreakers. From a legal point of view, though, recognition of belligerency is not necessary, since the existence of a NIAC is governed by the objective criteria of intensity and organization.

Supporting insurgents, or the governments fighting the insurgency, has since a long way back been a way for states to achieve own policy goals in foreign countries. During the Cold War, the U.S. backed up the contras in Nicaragua who were fighting the communist government, whereas the former Soviet Union supported communist guerillas in Greece and Angola. Since insurgency is aimed at overthrowing a government, other states often have a political interest of a certain outcome, and there is thus a risk of the conflict changing from being a NIAC to an IAC over time. This was for instance the case with the U.S. involvement in Nicaragua, after the U.S. having breached international law by violating Nicaragua’s territorial integrity, e.g. by the use of force against the state and the intervention in its internal affairs. The end of the Cold War has led to a much less prominent existence of rivalry between superpowers, and it has thus become less common that states intervene in conflicts on mere ideological grounds. Today states more often have geopolitical, humanitarian, or security based interests in supporting a party to a NIAC.

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106 Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law, 2010, pp. 10-11.
107 Ibid., p. 11.
108 Ibid.
109 See chapter 3.3.
5 Defining civilians in non-international armed conflicts

In armed conflicts, members of armed forces (i.e. combatants), and persons who take a direct part in hostilities are the only people who lack immunity from attacks. In NIACs, hostilities take place between the armed forces of a state on the one hand, and an armed group on the other. The consequence of this is that members of the non-state party cannot be afforded combatants status, which creates a need to separate between “combating civilians” and “real civilians”. This chapter will discuss how the term civilian should be understood in NIACs, whereas the following chapter will focus on direct participation in hostilities. In chapter 5 and 6 there will be several references to the ICRC Interpretive Guidance on Direct Participation in Hostilities (hereinafter “the DPH Guidance” or “the Guidance”). The DPH Guidance was introduced by ICRC in 2009 with the purpose to strengthen the implementation of the principle of distinction in armed conflicts. Although there has been some disagreement about parts of the Guidance, it provides a good structural foundation for the following section.

5.1 The principle of distinction

The starting point in a chapter on civilian status is the principle of distinction. It is crucial to determine who is a civilian, because the parties to all armed conflicts must abide to the rule that civilians may never be the objects of attack. This principle of distinction is fundamental in IHL and can be found in treaties applying to IACs as well as NIACs. The principle is also part of customary international law. The rule was first set forth in the St Petersburg declaration of 1868, which preamble holds that “[…] the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy”. Following the St Petersburg declaration, the principle of distinction came to be incorporated in several treaties applying to

114 See e.g. AP I art. 48 and AP II art. 13.
116 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration of 1868), preamble.
IACs.\textsuperscript{117} For the purposes of NIACs, treaty regulation of the principle came a lot later. AP II art. 13.2 explicitly prohibits making civilians the object of attack, and this rule can also be found in treaties applicable in NIACs regarding prohibited weapons.\textsuperscript{118} Several states, including Sweden, have stated in their military manuals that civilians should at all time be distinguished from combatants, whereas only the latter may be targeted.\textsuperscript{119} ICJ has also expressed in its Nuclear Weapons advisory opinion that the principle of distinction constitutes ”a cardinal principle”.\textsuperscript{120} In addition, the UN Security Council has adopted a resolution with the same view on the subject; deliberate targeting of civilians in all types of armed conflicts is strongly condemned.\textsuperscript{121}

Taken together, there is thus no doubt that the principle of distinction is part of treaty law as well as customary international law pertaining to both IACs and NIACs. ICRC has emphasized the importance of upholding the principle of distinction in all armed conflicts. This applies both to combatants, who must distinguish themselves from the civilian population, but also to civilians who, for some reason, decide to take part in hostilities. In order to ensure protection for civilians who do not take part in hostilities, it is important that the parties to the conflict know who is a legitimate target, and this assessment becomes complicated if directly participating civilians blend in with non-participating civilians.\textsuperscript{122}

\textbf{5.2 The term “civilian”}

\textbf{5.2.1 “Civilian” in treaty law governing NIACs}

Although the term civilian is used in several provisions governing NIACs,\textsuperscript{123} treaty law is unclear regarding how the term should be understood. In NIACs, there is no such

\textsuperscript{117} See ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005, rule 1, pp. 5-6.
\textsuperscript{118} See ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005, rule 1, p. 5.
\textsuperscript{119} Ibid., rule 1, p. 4.
\textsuperscript{120} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 1996, para. 78.
\textsuperscript{121} United Nations, S/RES/1269.
\textsuperscript{122} ICRC DPH Guidance, foreword, p. 6.
\textsuperscript{123} See for instance AP II art. 13-15 and 17-18.
provision as exists for IACs, where “civilian” is a negative definition of not being a combatant.\textsuperscript{124}

Armed non-state actors in NIACs are not part of a state’s armed forces. This could easily be understood, as the non-state actor often operates with the intention to subvert the current government (and consequently also the army fighting on behalf of the government). Hence, in situations where an armed force of a state engages in hostilities against a non-state actor, it does not fight against combatants as defined for the purposes of IACs. The corollary to this is that if a state’s army is fighting against people not members of a state’s army, and the conflict is non-international in its character, the fighting is between regular combatants and civilians.\textsuperscript{125}

As regards the treaty regulation of NIACs, it could first be concluded that the term civilian is not mentioned anywhere in CA 3. In AP II, however, the term is used in several articles.\textsuperscript{126} In the making of AP II, the initial plan was to include a definition with the effect that a civilian is any person not belonging to a state’s army or to an organized armed group.\textsuperscript{127} This plan was abandoned last second, with the result that the term civilian is used in NIACs without being defined in a treaty.\textsuperscript{128} Neither does customary international law provide a clear definition of who is a civilian in NIACs. It is clear that a state’s armed forces are not civilians, but there is disagreement as to whether a member of another armed group is liable to attack only by virtue of that membership, or if immunity is lost only in case of direct participation in hostilities.\textsuperscript{129}

\textsuperscript{124} AP I art. 50.1 states that “[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of [GC III] and in Article 43 of [AP I]. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” This reference means that the armed forces of a party to the conflict consist of all organized armed forces, groups and units, which are under a command responsible to that party for the conduct of its subordinates, and has crystalized into customary international law, see ICRC, \textit{Customary International Humanitarian Law, Volume I: Rules}, 2005, rule 4, p. 14.
\textsuperscript{125} Civilians taking part in hostilities are sometimes called “combatants” when engaged in fighting, as to distinguish them from civilians not taking part in the fighting. This has no legal implications in terms of e.g. POW-status.
\textsuperscript{126} See AP II art. 13-15 and 17-18.
\textsuperscript{128} Ibid.
\textsuperscript{129} Ibid.
5.2.2 “Civilian” as defined in ICRC’s DPH Guidance

To cast some light on the matter and clarify existing law, ICRC undertook the work to put together the DPH Guidance, taking into account treaty law as well as customary international law. According to this Guidance, there is an important difference between civilians who only spontaneously participate in the conflict, and those who belong to an organized armed group. Whereas the former are “real” civilians, albeit taking part in hostilities, the latter have due to their membership in the organized armed group a “continuous combat function”, which makes them liable to attack at all times.\textsuperscript{130}

Important to note, however, is that the continuous combat function does not mean that the person in question becomes a combatant as defined in GC III.\textsuperscript{131} This means, for instance, that the person does not enjoy prisoner of war-status if captured, and does not have immunity from prosecution for having taken part in fighting.

The legal ground for the view that some people are not civilians although not being part of a state’s armed forces is held to be CA 3, which provides that “each Party to the conflict” shall be bound to apply the rules there stated, and AP II art. 1, which provides that the Protocol applies to all armed conflicts between a state party’s armed forces and dissident armed forces or other organized armed groups. The effect of these legal provisions is, according to ICRC, that non-state parties in NIACs do not consist of civilians. Put another way, for the purposes of NIACs, “civilians” should be understood to encompass all people not belonging to the State’s armed forces or to a dissident armed force or any other organized armed group. According to ICRC, it would be wrong to conclude that just because someone who fights does not belong to the state’s armed forces, that person is a civilian although continuously taking a direct part in hostilities.\textsuperscript{132}

Doing this would be a problem since it would undermine the principle of distinction – if one party to an armed conflict consisted in its entirety of civilians (however fighting), then serious difficulties would arise when distinguishing between who is a legitimate target and who is not.\textsuperscript{133}

\textsuperscript{130} ICRC DPH Guidance, part 2, pp. 33-34.
\textsuperscript{131} Ibid., part 2, p. 33.
\textsuperscript{132} Ibid., part 2, pp. 27-28.
\textsuperscript{133} Ibid., part 2, p. 28.
With these remarks as a background, ICRC has lined out a rule in the Guidance stating that "[f]or the purposes of the principle of distinction in [NIACs], all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In [NIACs], organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function")."\textsuperscript{134}

5.2.3 “Civilian” as a corollary to not being member of an organized armed group

Since it has been suggested by ICRC that membership in an organized armed group leads to the “status” of an individual having a continuous combat function (as separated from civilians which still affords immunity under IHL), the basis for such a membership should here be further examined.

As noted above, CA 3 and AP II contain provisions regarding the parties to a NIAC. AP II is narrower in its scope of application, but is instead much more detailed than CA 3. Since the threshold for application of AP II is substantially higher than for CA 3, one must bear in mind that ICRCs observations about the implications of membership in organized armed groups could lack in relevance. In the Protocol, non-state actors involved in NIACs are defined as “dissident armed forces” and “other organized armed groups”. A dissident armed force comes into existence when members of a state’s regular armed force decide to separate from it and instead turn against the government. In these cases, members of the dissident armed forces will no longer be combatants as defined in GC III, but neither will they become civilians merely because they have turned against their government. As long as they remain organized, they will be party to the conflict, and members will consequently not be classified as civilians.\textsuperscript{135}

\textsuperscript{134} ICRC DPH Guidance, part 1, rule II: The Concept of Civilian in Non-International Armed Conflict

\textsuperscript{135} Ibid., part 2, p. 32.
Deciding membership in an “organized armed group” other than a dissident armed force is more complicated. Members in armed groups are primarily recruited among the civilian population, and these groups are rarely formalized through constitutive acts that gives guidance in deciding who is a member of the group and who is not. In addition, members of armed groups do normally not have an established practice for the wearing of uniforms or insignias etc. According to ICRC, membership must therefore be decided upon an individual basis where the actual functions of the person in question is taken into consideration. Having a “continuous combat function” means that a person has a lasting connection to the organized armed group, and is carrying out acts amounting to direct participation in hostilities on behalf of that group. Even the arming and training of such a person could amount to continuous combat function, although no hostile acts have yet been carried out. Persons who support the organized armed group with other means than military, such as administration, recruitment, financial support, propaganda campaigns, etc., are not considered to have a continuous combat function as long as their continuous support does not amount to direct participation in hostilities. Accompanying the armed group and providing it with intelligence and weapons does, according to ICRC, not amount to having a continuous combat function as long as it is not directly connected to a specific military operation.

The now said raises some important questions. What ICRC has sought to achieve is that the parties to a NIAC should be easily defined, so that everyone involved will know who is under protection and who is not. This, however, is based on a case-by-case evaluation of each and every person who is assumed to belong to an organized armed group. Since the question of membership is only briefly discussed by ICRC, how is this evaluation to be done? As will be seen in chapter 6 below, there is a problem of civilians “opting in and opting out” in hostilities, which creates an undesirable revolving door-effect, but in what way would the membership approach solve this problem? Is it not just as possible for a civilian to walk in and out of a certain group, that it is to sporadically walk in and out on different premises in order to deploy IEDs? The point here is: there still needs to be a case-by-case evaluation of every single person allegedly being a member of an organized armed group. And, furthermore, this requires that the armed group has reached a certain level of organization, which will not always

136 ICRC DPH Guidance, part 2, pp. 32-33.
137 Ibid., part 2, pp. 34-35.
be the case. It is a very good aspiration to seek a simple, well functioning membership-based approach in NIACs, but until there is further guidance on how this should be done, it will probably be just as hard to establish membership in a group that it will be to establish direct participation in hostilities on a case-to-case basis. What is gained by the membership approach, however, is the much clearer distinction between civilians that in practical terms could be compared with combatants (albeit not in the legal sense), and civilians who have nothing to do with the conflict. In that sense, the suggestion by ICRC is a welcomed contribution.

5.2.4 The civilian as “unlawful combatant”

Before moving on to the subject of direct participation in hostilities, something should here be said about the term “unlawful combatant”. The term is a non-legal one and does not exist in any convention, but has been used in the literature, and occasionally by courts, to describe civilians who are directly participating in hostilities. The term implies that civilians do not have a right to take part in combat, and if they do, they lose their immunity from being targeted or captured. Put another way, an unlawful combatant is any person who is not part of a state’s regular military force but is nevertheless engaging in the conflict.\(^\text{138}\)

The reason why the term unlawful combatant is not mentioned in any convention is mainly due to the assumed risk that this would create a loophole in IHL. If there were something in between combatants and civilians, the fundamental principle of distinction would be blurred; IHL can provide effective protection only when civilians and combatants can be told apart. In addition, states have been reluctant to regulate this area because there is no common understanding of the term.\(^\text{139}\) What should be unlawful and what should not is subject to political considerations, and hence a sensitive topic.

For the purposes of NIACs, the notion of unlawful combatancy is perhaps of less interest than in IACs, because any person not belonging to the state’s armed forces will


\(^\text{139}\) Ibid., pp. 386-387.
be considered to carry out unlawful activity if directing hostile acts against the state.\textsuperscript{140} Since this person is not a combatant under domestic law, he or she is by definition an “unlawful combatant” seen from the state’s point of view. To avoid confusion, the term unlawful combatant will not be used in the following, but instead “member of organized armed group” or “civilian taking direct part in hostilities” when intending someone who is fighting against a state party to a NIAC.

\textsuperscript{140} In IACs, the terminology is more accurate since it is there relatively clear from both parties point of view who can and cannot be lawfully participating in combat: lawfulness is governed by membership in the armed forces. In NIACs, the non-state actor will consistently be denied combatancy status.
6 Direct participation in hostilities

Since direct participation in hostilities might lead to the civilian losing immunity under IHL, it is necessary to further examine the concept. This chapter will start by giving a background to the subject, and then go on to examine which acts that amounts to direct participation. After this, the temporal scope of direct participation in hostilities will be discussed.

6.1 The legal background

Direct participation in hostilities constitutes an exception to the fundamental rule that civilians shall be protected from violence in armed conflicts. CA 3 p. 1 states that “persons taking no active part in the hostilities […] shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, birth or wealth, or any other similar criteria.” Following the paragraph, certain acts are recited as explicitly prohibited: (a) violence to life and person; (b) taking of hostages; (c) outrages upon personal dignity; and (d) the passing of sentences and carrying out of executions without a fair trial. Of special interest here is the fundamental rule in (a), which prohibits violence against people taking no active part in hostilities, a rule which later was restated in AP II art. 4. This article is more extensive than CA 3 and also covers a wider area of prohibited acts.

Chapter IV in AP II contains provisions pertaining to the civilian population and enumerates fundamental protective rules. Art. 13.1 states that “civilians shall enjoy general protection against the dangers arising from military operations”, and, to this end, “the civilian population as such, as well as individual civilians, shall not be the object of attack” (art. 13.2, first sentence). Further, “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited” (art. 13.2, second sentence). However, this protection can only be enjoyed by civilians “unless and for such time as they take a direct part in hostilities” (art 13.3).

It is thus clear that treaty law contains provisions prohibiting violence against non-participating civilians in NIACs. ICRC is of the opinion that this rule has conformed
into customary international law and is thereby binding on all states regardless of the state being a party to the protocol or not.\textsuperscript{141} The other side of the coin is that the use of violence against civilians who take a direct part in hostilities is allowed, which is also held to be in accordance with state practice and customary international law.\textsuperscript{142}

The term direct participation in hostilities is not defined in GC or the Additional Protocols. This is an inadequacy in IHL that of course risks creating uncertainty in military operations in civilian environments. On the other hand, the subject is hard to regulate in detail since numerous acts could be qualified as participation, and, in addition, states have a hard time enough reaching consensus in even the most basic formulations of rules pertaining to armed conflicts. Given this, the DPH Guidance, which will be discussed below, is a welcomed contribution serving as help for interpretation.

Having established that civilians are liable to attack when taking a direct part in hostilities, and bearing in mind that participation is not defined in treaty law, one must thus go on to a practical case-by-case evaluation of for what period of time and under which circumstances immunity is lost. What was mentioned in chapter 5 above, regarding who is a civilian and who is having a continuous combat function, is of interest when now discussing the subject of direct participation in hostilities. The continuous combat function is based on the supposition that the civilian is continuously carrying out acts amounting to direct participation in hostilities. If accepting ICRC’s suggestion, then the following chapter will provide guidance of who has such a continuous combat function. If not, then it will still be of interest when determining if a civilian has temporarily lost immunity and thereby becomes liable to attack.

6.2 The material scope of direct participation in hostilities: what amounts to participation?

First of all, direct participation in hostilities refers to a specific act: ”[t]he notion of direct participation in hostilities refers to specific acts carried out by individuals as part

\textsuperscript{142} Ibid., rule 6, p. 21.
of the conduct of hostilities between parties to an armed conflict.”\textsuperscript{143} The qualification of an act as direct participation in hostilities does not have anything to do with the status of the person involved; civilians as well as members of armed forces can directly participate. The requirement that an act needs to be specific means that only factual participation counts – not merely intended acts. It should also be noted that direct participation in hostilities should be interpreted in the same way in both IACs and NIACs.\textsuperscript{144}

In its DPH Guidance, ICRC presents a list of three cumulative criteria that must be met in order for an act to be qualified as direct participation in hostilities:

”[i]n order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. 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 (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).”\textsuperscript{145}

These three criteria will now be discussed in order. It is important to establish which acts qualify as direct participation in hostilities since this have serious implications for civilians affected by military operations, for instance when it comes to targeting (which will be dealt with in the following chapter). It should be stressed that even if established that a person is directly participating in hostilities, IHL rules regarding conduct of operations must still be complied with.

\textsuperscript{143} ICRC DHP Guidance, part 1, rule IV: Direct Participation in Hostilities as a Specific Act
\textsuperscript{144} Ibid., part 2, p. 43.
\textsuperscript{145} Ibid., part 1, rule V: Constitutive Elements of Direct Participation in Hostilities
6.2.1 Threshold of harm

The first criterion regards threshold of harm, and reads: "[i]n order to reach the required threshold of harm, a specific 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."\(^{146}\)

The meaning of the above provision is that a specific act must either be likely to adversely affect military operations, or be likely to harm persons or objects protected under IHL, provided that there is belligerent nexus. Those acts could be infliction of death or injury on military personnel or civilians, destruction of military or civilian objects, sabotage, attacks on military communication systems, etc. Other acts, which do not have a connection to military operations, and do not harm protected people and objects, fall outside the scope of direct participation in hostilities. Examples of such acts could be the building of fences, interruption of electricity, restrictions on water and food supplies, etc.\(^{147}\)

6.2.2 Direct causation

As concerns direct causation, the second criterion reads: "[i]n order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part."\(^{148}\)

The above provision means that not merely indirectly participation through general contribution to the war effort counts as direct participation in hostilities. Examples of this could be the building of roads, ports and railways, or the manufacturing of weapons or food to the military. Neither does war-sustaining contribution such as economically

\(^{146}\) ICRC DHP Guidance, part 2, rule V.1: Constitutive Elements of Direct Participation in Hostilities, p. 47.

\(^{147}\) Ibid., part 2, pp. 47-50.

\(^{148}\) Ibid., part 2, rule V.2: Constitutive Elements of Direct Participation in Hostilities, p. 51.
or politically supporting one side of the conflict amount to direct participation in hostilities.\textsuperscript{149}

It is thus important to distinguish between direct and indirect participation in hostilities. If even indirect participation could lead to the civilian losing immunity under IHL, anyone contributing to the general war effort could be liable to attack. The act must therefore have a close and uninterrupted link to a specific military operation. Providing a general access to a network would therefore not be direct participation in hostilities, whereas transmitting certain intelligence over the network to assist in a specific operation would be.

There must also be a causal, temporal, and geographic proximity to constitute a direct causation of harm to the enemy. As an example, ICRC takes the driving of ammunition. Driving a truck loaded with ammunition to an active firing position would constitute direct participation in hostilities. The truck would be considered a military objective and the civilian would lose immunity from attack under IHL. However, driving the same truck to a harbor where a ship will take the ammunition overseas would be participation of an indirect character, and although the truck is still a military objective, the adversary would need to take careful precautions in attack in order to avoid any civilian casualties. Firing against the truck would therefore not be an option if established that the driver is a civilian not directly participating in hostilities.\textsuperscript{150}

\textbf{6.2.3 Belligerent nexus}

Regarding belligerent nexus, the third criterion stipulates that "[i]n order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."\textsuperscript{151}

Belligerent nexus exists when there is an objective intent to harm the enemy during ongoing armed conflict. Acts that lack belligerent nexus are, e.g., individual self-

\textsuperscript{149} Ibid., part 2, pp. 51-52. Compare chapter 4.3.1.2 above.
\textsuperscript{150} Ibid., part 2, pp. 55-56.
\textsuperscript{151} Ibid., part 2, rule V.3: \textit{Constitutive Elements of Direct Participation in Hostilities}, p. 58.
defense; the lawful exercise of administrative, judicial, or disciplinary authority on behalf of a party to the conflict; civil unrest, such as demonstrations and riots; and inter-civilian violence, which is not specifically intended to support one of the parties.¹⁵²

6.3 The temporal scope of direct participation in hostilities: “for such time”

AP II art. 4 could be used as the starting point for deciding the temporal scope of direct participation in hostilities; it applies to “[a]ll persons who do not take part or who have ceased to take part in hostilities.” The effect of this provision is that civilians are immune from attack whether or not having participated in the conflict at an earlier stage, as long as they have ceased with the behavior when a military operation is carried out. The same view is expressed in AP II art. 13.2, which contains that civilians shall not be the object of attack unless and for such time as they take a direct part in hostilities.

Direct participation in hostilities is thus the period of time from when a person commences with the hostile act until the time of cessation of the same act. Put another way, as soon as the person in question is no longer directly participating in hostilities, the “protective shield” is, or should be, restored. It is therefore crucial to establish when direct participating starts and when it ends.

It was mentioned above that direct participation in hostilities refers to a specific act. Now, when determining the starting and ending point of participation, this specific act must be the basis for the assessment. ICRC has held that “[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.”¹⁵³ According to this provision, not only the deployment of a specific act, but also any preparatory measures and the return after execution should be considered to be one and the same act. These different stages of participation will now be dealt with in order.

¹⁵² Ibid., part 2, pp. 58-64.
¹⁵³ Ibid., part 1, rule VI: Beginning and End of Direct Participation in Hostilities
6.3.1 Preparatory measures

What constitutes a preparatory measure is depending on a number of situational factors and could not be described here in a comprehensive manner. According to ICRC, preparatory measures corresponds to what is stated in AP I art. 44.3: combatants are to distinguish themselves from the civilian population not only during an attack, but also “in a military operation preparatory to an attack”.

The decisive element is whether a link can be established between the preparatory measure and the (intended) final attack, in a way that makes the preparatory measure seem as an integral part of the future act. There is no need for the preparations to be made in close geographical or temporal proximity to the attack, as long as they are aiming at carrying out a specific hostile act. Loading explosives onto a ship for transportation overseas, where a specific attack is planned, is thus to be seen as a preparatory measure to attack. Conversely, if the loading of explosives does not have anything to do with a planned attack, but for instance is a commercial export, then the act is not a preparatory measure although the explosives might be used in future attacks.

6.3.2 Deployment and return

As with any preparatory measures, deployment and execution must constitute an integral part of a specific attack. The return from an attack is seen as a military withdrawal, not surrender or placement hors de combat. Anyone having engaged in hostilities is liable to attack until laying down arms or otherwise physically separating from the operation in question. ICRC’s view on when civilians regain immunity from attack has been contested in IHL literature. There is disagreement about the “revolving door”-effect of granting immunity to a person who has laid down arms, or otherwise ceased with hostile behavior, but still is committed to carry out further hostile acts. As Schmitt puts it: “[c]an an individual be a guerilla by night and a farmer by day? Do

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154 Ibid., part 2, pp. 65-66.
155 Ibid., part 2, pp. 66-67.
[civilians engaged in hostilities] regain their immunity from direct attack whenever they successfully return from an operation, only to reenter the fray at a later time?156

There is thus a serious problem of determining the temporal scope of when a person is directly participating in hostilities, and therefore also to foresee the consequences of such participation. An effect of this is that civilians may get a weakened protection because when terrorists and insurgents constantly are “opting in and opting out”, people that have nothing to do with the conflict runs the risk of being seen as potential terrorists as well. Coombes has suggested that the revolving door-effect could be avoided by interpreting “for such time” in a liberal way: when a civilian has a strong connection to a military wing of a non-state actor, then it could be justified to see that membership of the group as a factor for losing protection.157 This is in line with ICRC’s view on continuous combat function discussed above in 5.2.3, but still does not remedy the problem of deciding what is a sufficient connection to a group, in particular because one of the fundamental tactics in asymmetric warfare is to not distinguish oneself as an adversary.

7 Responding to asymmetric warfare

"[R]esponse is difficult. It is a problem in essence because Western security structures and military organizations were designed to deal with threats that were not quite so asymmetrical in nature."158

The asymmetric methods used by non-state actors have led to an acute need to find adequate responses to the threats posed. The problem is, though, that most states’ armies are trained to confront a military equal opponent, and not isolated terrorist attacks. This chapter deals with the controversial subject of targeted killings and detentions of civilians who have directly participated in hostilities, which are two state responses to hostile acts from non-state actors. First, however, some general remarks on certain difficulties that are connected to state response.

7.1 State response and the need to accurately qualify the conflict and people involved

7.1.1 Qualification of the conflict

As was discussed in chapter 3 above, the first question that must be posed before any military operations are carried out is how the conflict should be qualified and, consequently, which rules are applicable. The outcome of the evaluation depends on several factors such as the conflict’s level of intensity, the parties’ level of organization, whether there are any international elements etc. The so-called war on terrorism has created legal confusion as it falls somewhere between IACs and NIACs, and occasionally outside the scope of armed conflict at all. A case-by-case approach must therefore be taken when assessing the situation at hand. However, in the following, the discussion will focus not so much on whether IHL applies or not, but rather on the scope of application and effect of the relevant rules when having established that there is in fact an ongoing armed conflict between a state and a non-state actor.

7.1.2 Combating terrorists

Terrorists do not have the status as combatants if they are not part of the state’s army. But, as has been discussed above in chapter 5 on the definition of civilian, it would seem strange to conclude that organized terrorists carrying out sustained hostile acts are to be considered as civilians. Kretzmer argues that “[t]he logical conclusion of the definition of a [NIAC] as one between the armed forces of a state and an organized armed group is that members of both the armed forces and the organized armed group are combatants.”159 He continues by stating that “[w]hile these combatants do not enjoy the privileges of combatants in an [IAC], they may be attacked by the other party to the conflict. This is indeed the view adopted in the ICRC Commentary on AP II, which states that ‘[t]hose who belong to armed forces or armed groups may be attacked at any time’. According to this view, if an armed conflict exists between the United States and al-Qaeda, active members of al-Qaeda are combatants who may be targeted. Similarly, if an armed conflict exists between Israel and Hamas, Islamic Jihad and the Fatah/Tanzim in the West Bank and Gaza, active members of these groups are combatants who may legitimately be attacked.”160 Kretzmer’s view is thus similar to that of ICRC, that active members (or, in ICRC’s terms, civilians having a continuous combat function) may be attacked at all times.

The U.S. view, at least under the Bush administration, has been that terrorism will be fought wherever found in the world, with or without consent from the state where the terrorists reside.161 The consequence of this is that there is a perceived state of war between the U.S. on the one hand and “terrorists” on the other, with the result that IHL application becomes a mess. If the detention or killing of a civilian takes place outside the context of an armed conflict as defined in IHL, it is highly problematic to defend from a legal point of view. The war on terrorism is endless in its nature; terrorism has always existed in one form or another and is likely to exist henceforth. This means that the detention of a civilian deemed as a terrorist risks becoming endless as well.162 In a decision from the U.S. Supreme Court in 2004, the detention of “enemy combatants” at

160 Ibid.
162 Ibid., p. 4.
Guantanamo Bay in Cuba was examined with the result that the individuals held in custody there cannot be indefinitely deprived of their liberty and access to justice.\(^{163}\)

In the ICRC commentary to GC IV, it is expressed that “[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.”\(^{164}\) The same holds true in NIACs, there is no intermediate status between being a combatant and being a civilian. Therefore it is interesting that ICRC has introduced the concept of continuous combat function, as was discussed in chapter 5.2.2 above. Although this concept does not introduce a “third status”, it can be discussed if it helps more than it confuses the operation of establishing direct participation in hostilities. If continuous combat function is determined based on membership in organized armed groups rather than on a specific conduct, it only means that focus shifts from analyzing the act itself towards determining (a) what is an organized armed group, and (b) what amounts to membership thereof?

According to Akande, it would probably have been better if ICRC had stated that anyone that is a member of an organized armed group is not a civilian, and then focus the discussion on the criteria for such a membership.\(^{165}\) What ICRC’s DPH Guidance has led to is a new type of analysis side by side with the assessment of direct participation in hostilities. The effect is not groundbreaking, but it leads to some (perhaps unmotivated) differences between civilians that only sporadically take part in hostilities, and civilians that are members of organized armed groups. Whereas the former regain their immunity as soon as they cease with their participation, the latter is liable to attack at all times for as long as they have a continuous combat function. This risks leading to an unequal situation between the parties, where the state party will have a difficult time establishing who is party to the opposing armed group. Because civilians


directly participating in hostilities have the “benefit of the doubt”, i.e. they should not be attacked if there are any doubts regarding their status or participation, there is a risk that reciprocity is lost when someone is or has been carrying out hostile acts without the adversary being able to respond. A discussion about reciprocity will follow in chapter 8.2 below.

### 7.1.3 Kill or capture?

The question if a civilian who is directly participating in hostilities may be targeted instead of captured is subject to different interpretations. According to ICRC, there is an obligation to use the less harmful means to disable a threat, which in principle means that parties to an armed conflict should capture rather than kill. This is stated in the DHP Guidance under section IX, “restraints on the use of force in direct attack”: [i]n addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.” However, ICRC goes on by stating “[…] the fact that a particular category of persons is not protected against offensive or defensive acts of violence is not equivalent to a legal entitlement to kill such persons without further considerations. At the same time, the absence of an unfettered ‘right’ to kill does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances.”

It is obvious that ICRC, due to its humanitarian mission, would have an interest in establishing a “capture rather than kill”-policy. However commendable the aim, IHL is already balanced between military necessity and humanitarian considerations, and therefore, it could be argued, if the criteria for using lethal force are fulfilled (e.g. when a person has lost immunity due to direct participation in hostilities), there are no further restraints other than those already part of existing IHL (e.g. the principle of necessity).\(^\text{166}\)

\(^{166}\) Ibid.
7.2 Targeted killings

Every time a person dies as a consequence of a military attack the question arises whether or not this could be justified under IHL. The right to life is one of the most fundamental of all human rights, and is found in several treaties governing international human rights law (IHRL), as well as in the UN Charter and other major conventions. The meaning of this right is that no one can be arbitrarily deprived of the right to life, and, therefore, the question of targeted killings is controversial. The definition of targeted killings is the deliberate killing of a person who has participated in hostilities. This leads back to discussion in chapter 5 and 6 above.

There has been much debate regarding the relationship between IHL and IHRL as to which body of law takes precedence when a conflict arises. The prevailing view, confirmed by ICJ in the Nuclear Weapons case, is that IHRL should be seen as lex generalis and IHL as lex specialis. IHRL is thus applicable in both times of peace and war, whereas the much more comprehensive set of rules that is IHL applies only in times of armed conflict.

Those in favor of preventative targeted killing argue that the end justifies the means. As Luft puts it, "[f]ighting terror is like fighting car accidents: one can count the casualties but not those whose lives were spared by prevention." The reasoning behind this view is that when successfully targeting leaders of terrorist organizations, it creates uncertainty and confusion among terrorists, leading to fewer attacks and thereby saving the lives of innocents. Critics of targeted killings claim that it poses a threat to the human rights of life and judicial proceedings before a court of law. When using targeted killing as a means to combat terrorism, the state could be considered to enforce an extrajudicial punishment that is irrevocable and has not been sanctioned by an impartial court.

169 Luft, The Logic of Israel’s Targeted Killing, 2003, p. 3.
170 Ibid.
Regardless of the moral considerations surrounding the subject of targeted killings, the state undertaking a targeted attack must comply with IHL in terms of proportionality, distinction, and precautions in attack. Also, if not entirely clear whether or not liable to attack, there is a presumption for the person in question being a civilian.\textsuperscript{171} This means that the state must carefully assess the situation and the status of the person in question prior to any attack.\textsuperscript{172}

According to Thornton, killing as many asymmetric adversaries as possible can never be an end in itself. Such a policy would require excessive force and inevitably lead to the death of innocent civilians and destroyed infrastructure.\textsuperscript{173} Excessive force would possibly also lead to more people supporting the asymmetric adversary’s cause, and thereby lead to new recruitments. Therefore, before any military engagement, careful precaution in attack must be taken. If the attack is presumed to lead to the death of an adversary, this must be justified by military necessity.\textsuperscript{174} ICRC’s view on the matter is that there are clear restraints on the use of lethal force: “[w]hile combatants cannot be required to subject themselves or the civilian population to additional risk in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her the chance to surrender where there manifestly is no need for lethal force to be used.”\textsuperscript{175}

Not all states would agree with ICRC’s view as stated above. One example of a state using targeted killings to fight terrorism is Israel. Since 2000, hundreds of people have been killed in both successful and unsuccessful strikes. Several unsuccessful attempts of targeted killings have led to collateral damage where civilians have been wounded or killed.\textsuperscript{176} This policy led to a petition being filed before the Israeli Supreme Court and the much-debated judgement, the “Targeted killings-decision”, came in December

\textsuperscript{171} See ICRC DPH Guidance, p. 76, note 206: "For situations of international armed conflict, this principle has been codified in art. 50 [1] ap i. With regard to non-international armed conflicts, see also Commentary AP (above n 10), § 4789, which states that, “in case of doubt regarding the status of an individual, he is presumed to be a civilian.”.\textsuperscript{172} Coombes, Balancing Necessity and Individual Rights in the Fight Against Transnational Terrorism: "Targeted Killings" and International Law, 2009, p. 316.\textsuperscript{173} Thornton, Asymmetric Warfare: Threat and Response in the Twenty-First Century, 2007, p. 159.\textsuperscript{174} Compare AP I art. 52. For a definition of military objectives, see 1.5 above.\textsuperscript{175} ICRC, Direct Participation in Hostilities: Questions and Answers, 2009, http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm last accessed on 20 November 2012.\textsuperscript{176} Even-Khen, Can We Now Tell What "Direct Participation in Hostilities" is?, 2007, pp. 213-214.
2006.\textsuperscript{177} As a starting point, the Court stated that there is an armed conflict between Israel “and the terrorist organizations in the area”, and that this conflict is to be qualified as an IAC.\textsuperscript{178} This view has been criticized, since an IAC does not come into existence simply because a terrorist organization poses an international threat and might have military capacities resembling that of a state, as was held by the Court.\textsuperscript{179} Since Israel is not party to AP I (or AP II for that matter), the Court uses customary international law as the basis for the legal assessment. The conclusion made by the Court is that Israel’s targeted killings are “conducted ‘inside’ the law, with tools that the law places at the disposal of democratic states.”\textsuperscript{180} Furthermore, although Israel must comply with the principles of necessity and proportionality, collateral damage could be military justified in the fight against terrorism.\textsuperscript{181} The judgment does not have any implications for IHL other than serving as interpretative guidance in similar cases,\textsuperscript{182} but is nevertheless interesting when discussing the controversial subject of targeted killings.

The U.S. has also employed targeted killings on several occasions, and the killing of al Qaida leaders has perhaps attracted most attention – but has at the same time been left relatively unquestioned. One example of this is the U.S. killing of an al Qaida leader in Yemen in 2002; most states remained silent after this attack, and not even Human Rights Watch condemned the killing.\textsuperscript{183} Should this be taken as a quiet acceptance of reprisals? Since treaty law gives no clear answer on the legality of targeted killings, and because most states that in fact employ these killings are not parties to the relevant treaties, the question is whether the operations could be justified by customary international law or a persistent objection to it.\textsuperscript{184} The question would not arise if the conflict qualifies as an IAC, since the targeting of combatants as military objectives would be lawful. The same would be the case for detentions, which will be dealt with below. The fact that major military powers such as the U.S, the U.K., and France have made reservations to rules on prohibition of civilian reprisals is, according to Osiel,

\textsuperscript{177} Ibid.
\textsuperscript{178} HCJ 769/02, The Public Committee Against Torture in Israel v. the Government of Israel, 11 December 2006, para. 21.
\textsuperscript{179} Ibid. For criticism of the judgment, see Even-Khen, Can We Now Tell What “Direct Participation in Hostilities” is?, 2007, pp. 220-222.
\textsuperscript{180} HCJ 769/02, The Public Committee Against Torture in Israel v. the Government of Israel, 11 December 2006, para. 61.
\textsuperscript{181} Ibid.
\textsuperscript{182} Compare art. 38 (d) in the Statute for the International Court of Justice (1945).
\textsuperscript{184} Ibid., p. 57.
enough to conclude that the rule has not conformed into customary international law.\textsuperscript{185} And even if so, having persistently objected to the formation of such rule would make the states not bound to it.\textsuperscript{186}

The above thus gives that there is no clear-cut answer to the question if targeted killings are lawful or not; it depends, as in most legal matters, on the situation at hand and on the states involved. In sum, the legal situation for NIACs could be described as following: if a civilian is found to be directly participating in hostilities, then immunity is lost for such time as participation lasts and lethal force may be used if justified by military necessity. If established that the civilian is member of an organized armed group (i.e., the armed force of the non-state actor), he or she may be targeted at all times. In both situations, however, the least harmful means should be employed and collateral damage should at all times be avoided.

\textit{7.3 Detentions}

Rules pertaining to detention of combatants in IACs are found in GC III, which regulates prisoners of war (POWs). The convention is rather comprehensive and sets out rules regarding fundamental humanitarian guarantees as well as daily matters. GC III could be seen as a corollary to the basic rule that combatants cannot be prosecuted merely for having taken part in hostilities. Being captured and detained by the adversary during ongoing hostilities is not the same thing as having committed a crime, but a way for the one party to numerically weaken the other party’s armed forces. As mentioned above, the aim is not to kill as many as possible but to weaken the adversary. If this can be obtained by capture and detention, it is to be preferred according to the principle of necessity.

Since lawful participation in hostilities is not a crime \textit{per se}, POWs should not be treated as criminals, and they are to be released when the armed conflict has ceased. For the purposes of this thesis, the now said raises an important question: if a civilian takes

\textsuperscript{185} Ibid., pp. 55-57.
\textsuperscript{186} Ibid.
a direct part in hostilities during a NIAC, which rules then become applicable upon capture and during a possible detention?

As civilians in NIACs do not become combatants if directly participating in hostilities, they will not automatically be treated as POWs if captured. On the contrary, most states have the view that terrorism, insurgency, or guerilla warfare conducted by individuals is a serious criminal behavior subject to the domestic law enforcement system.

If the person in question is a civilian, and the threshold for NIAC is met, customary and conventional rules pertaining to protection of civilians apply.\(^{187}\) It is therefore crucial how the conflict at hand is qualified,\(^{188}\) and, consequently, which status the participants have under IHL. One complex example is the U.S. detentions of alleged “unlawful combatants” having taken part in hostilities in Afghanistan and Iraq. As already mentioned, the U.S. view is (or at least has been in the aftermath of the 9/11 attacks) that there is an ongoing war against terrorism, and that individuals can be detained if posing a threat to security.\(^{189}\) The Bush administration lined out a very broad definition of direct participation in hostilities, which was based on membership in terrorist groups rather than on conduct.\(^{190}\) Although having sought to narrow the scope of the definition, the Obama administration has retained a broad interpretation – perhaps still too broad to be in line with IHL. A memorandum on the U.S. government’s authority to detain persons who are now being held at Guantanamo Bay was presented in 2009 with the following conclusion: "[t]he President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person

\(^{187}\) Even if someone has lost immunity for having taken a direct part in hostilities, fundamental guarantees for humane treatment still apply.
\(^{188}\) See chapter 3 and 7.1 above.
who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.”

This statement is based on the view that states have a right to self-defense against armed attacks, not only from other states but also from non-state actors, with art. 51 of the UN Charter as the legal basis. In the same memorandum, it is held that the use of force includes the power of detention. Further, the membership-based (rather than conduct-based) interpretation of direct participation in hostilities is supported; the memorandum explicitly rejects the argument that only those directly participating in hostilities can be detained. Although being in line with ICRC’s introduction of the continuous combat function, which also is based on a membership-approach, it does not solve the problem of the endless nature of fighting terrorism – and thereby the endless nature of detentions having terrorism as a ground. In addition, it is problematic to adopt a holistic view on all people having connection to hostile acts against the U.S. For instance, before the Taliban regime was overthrown, the conflict qualified as an IAC (with the U.S. and Afghanistan as parties to the conflict), which would assign POW status to anyone having fought on behalf on the former Afghani Taliban government. This in turn would lead to POW rights being granted to combatants captured under this stage of the conflict, but not to those having fought for the Taliban after the new Afghani government having left consent to U.S. operations. The legal situation is thus not as black or white as some states are inclined to see it, neither is it as grey as some states may prefer to see it when suiting their needs.

8 Challenges for international humanitarian law

This chapter will focus on three areas that are especially problematic as regards application of IHL in contemporary warfare. Treaty regulation for NIACs is lacking, when at the same time customary international law is in parts unclear. It further lies in the definition of NIAC that one of the parties to the conflict is not a state; this becomes problematic in terms of reciprocity, one of the cornerstones IHL was founded upon. Lastly, traditional battlefields have played out their role and hostilities are today taking place mostly in urban environments. This inevitably leads to an increased risk for the civilian population as well as civilian objects being harmed.

8.1 A body of law designed for international armed conflicts

Given that most armed conflicts today are NIACs, there seems to be a discrepancy between the existing body of rules and the environment where most conflicts takes place. Even though many rules drafted for the purposes of IACs today are the same for NIACs by application of customary international law, the area is not entirely developed and codified. Attempts have been made by ICRC to produce a comprehensive collection of customary rules applicable in NIACs, however, not all of these rules have gained acceptance worldwide, and the scope of application is therefore debatable.\(^\text{192}\) This uncertainty hits hardest against those in most need of protection.

The question is whether today’s IHL is satisfactory when “traditional wars” are becoming less and less common. As Pfanner puts it: “[a]symmetrical wars do not fit in with either Clausewitz’s concept of war between basically equal parties or the traditional concept of international humanitarian law. It is debatable whether the challenges of asymmetrical war can be met with the current law of war. If wars between States are on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well.”\(^\text{193}\)

Is there a need for new treaty rules governing NIACs, then? It would certainly be helpful when assessing rights and duties for people taking part in hostilities as well as civilian by-standers, but is it realistic? Current treaty regulation of NIACs is sparse, much due to the fact that states have difficulties agreeing even upon the most basic rules. As concerns AP II, the threshold for application is high, and, in addition, military powers such as the U.S. and Israel has not ratified the protocol. In the most crucial parts of IHL governing NIACs, there seems to be no general consensus as to which rules have become customary international law. This is clearly manifested for instance when it comes to ICRC’s view on direct participation in hostilities vis-à-vis the U.S. and Israeli governments’ targeting and detention policies. States have generally little incentive to broaden the scope of rules governing NIACs, since they want to retain their competence to deal with internal matters.\textsuperscript{194} In a world that is constantly changing and where more and more light is cast on the humanitarian situation in e.g. the MENA-region,\textsuperscript{195} but also in great military powers such as Russia and China, it is not surprising that states by all means seek to keep their ability to suppress any future or ongoing domestic uprising tendencies.

According to Osiel, asymmetric warfare presents challenges to IHL that should be met by revising the treaties concerned: “[I]ike any other body of law, the Geneva Conventions have been regularly revised in light of novel challenges in warfare. In fact, major revisions have occurred about every twenty-five to thirty years. By that standard, the world is now due for another such reassessment.”\textsuperscript{196} However, given that major military powers have not ratified either AP I or II, and that states have not agreed on even some of the most basic concepts in IHL, it would seem like an overwhelming undertaking to revise the conventions to cover problems arising in contemporary asymmetric conflicts. Although soft instruments such as ICRC documents do not have the status as binding law, it is a way for states to find compromises that can lead to future change. Rather than seeking to revise the IHL conventions, it would probably be more helpful trying to line out if, and in that case, which rules has crystalized into

\textsuperscript{195}The Middle East and North Africa-region, including countries such as Syria, Libya, Libanon, Israel, Egypt, Iran, Irak, Jordan, Saudi Arabia, etc.
\textsuperscript{196}Osiel, \textit{The End of Reciprocity: Terror, Torture, and the Law of War}, 2009, p. 43.
customary international law, not only for traditional, purely internal NIACs, but instead especially in cases where a NIAC has certain international elements etc. Although armed conflicts from a strict legal point of view either are qualified as IACs or NIACs, maybe the time has come to adopt a more pragmatic view.

8.2 The lack of reciprocity

One of the first important steps towards reciprocity in armed conflicts came with the Peace of Westphalia in 1648. In the declarations made by that time, the territorial integrity of states, the principle of non-intervention, and sovereign rights to decide over internal matters were stressed and agreed upon. Although the same principles hold true today, the actors engaged in armed conflicts now look significantly different, and the reciprocity that for centuries has been seen as a precondition in military engagements between opponent states is now being blurred by new actors on the arena. The famous quote by Rousseau, that “[war] is not […] a relationship between man and man, but between State and State”\textsuperscript{197} is no longer as accurate as it once was: today war is perhaps more of a relationship between State and man.

IHL is based upon the assumption that both sides have equal rights. However, both sides also have equal responsibilities, and those remain even if one party would break the rules. This means for instance that if one party uses prohibited weapons, the other party is still under an obligation not to do so.\textsuperscript{198} It therefore lies a legal dilemma in the contemporary situation where states seek to fight transnational asymmetric armed groups: no states are willing to grant these groups the legal status equal that of a state in an armed conflict, yet they all want the armed group to comply with IHL. According to Lauterpacht, “[i]t is impossible to visualize the conduct of hostilities in which one side would be bound by the rules of warfare without benefiting from them and the other side


\textsuperscript{198} This fundamental principle is reflected in Common articles 1 and 3 to the Geneva Conventions, which stipulates that the parties to the convention are obliged to respect the rules ”in all circumstances”. This rule reflect customary international law and applies also in NIACs, see ICRC, \textit{Customary International Humanitarian Law, Volume I: Rules}, 2005, rule 140, pp. 498-499.
would benefit from them without being bound by them.” This is as true today as it was in 1953, and well before that.

The strategy employed by non-state actors in asymmetric warfare constitutes a big challenge for IHL. From the non-state actor’s point of view, the targeting of civilians and civilian objects is often seen as a necessary mean to obtain a certain goal, which means there is a deliberate non-compliance of IHL. The greater the damage, the greater the chance to win the conflict, and therefore soft targets (i.e. unarmed civilians, unprotected buildings etc.) becomes the objects of attack.

Although non-state actors often deliberately deviate from IHL as a strategy to win the war, there are also examples of when non-state parties to armed conflicts voluntarily make unilateral undertakings to comply with IHL, such as the case for ANC in South Africa, PKK in Turkey, and Mujahedin in Afghanistan. The reason for this might be that the parties aspire for governmental power or self-determination, which makes it important for the party to appear respectable. However, a declaration that a party will abide to IHL weighs lightly if the party in question does not comply with it in practice.

What should also be borne in mind is that humanitarian and military interests do not always oppose each other. For instance, there is a need for rules protecting combatants who no longer take part in the conflict. The rules in GC III, and other rules pertaining to prisoners of war, serves as a fundamental guarantee for humane treatment of captured persons. However, the rules are also based on the military interest of not losing manpower and capacity – which would be the case if the adversary killed the captured people instead of detaining them. These rules are based upon reciprocity, because the parties to an armed conflict have an equal interest of knowing that humane treatment will follow upon capture. But the rules are also based on the presumption that both sides to a conflict have equal values, which not always would be the case. It has been suggested that reciprocity in war cannot be obtained when fighting terrorist groups with religious motives. As Osiel exemplifies it, “[s]uicide bombers do not value their lives in

200 On soft targets, see 8.3 below.
secular ways that would deter them by threat of death.” Even if this is a very general assumption, many asymmetric adversaries probably have different values that are not reflected accurately in contemporary IHL.

A special problem furthermore arises when reciprocity is interpreted as a “right” to revenge. Al Qaida, for instance, uses an “eye for an eye”-rhetoric, and means that reciprocity can only be achieved by reciprocating the violence used by the U.S.

Following this logic, when the U.S. denies detainees access to court proceedings, al Qaida denies adversaries proper IHL treatment if captured. This is the backyard of reciprocity and an effect of the changed nature of warfare.

8.3 The city as battlefield

“The worst policy is to attack cities. Attack cities only when there is no alternative.”

A non-state actor seeks to avoid an open battle on a conventional battlefield, because the opponent state will have both a qualitative and quantitative military advantage. Conventional armies are trained to operate in large units to strike against enemies that are assembled in one place, and that fight on the same conditions with the same type of weaponry. Non-state actors, on the other hand, are trained to operate in small units that strike against individuals rather than groups, and to dissolve quickly afterwards.

To be able to dissolve quickly, the venue for the fight is important for the non-state actor. It is advantageous to carry out fights in cities and urban settings, where it is easy to blend in with the civilian population and get protection in civilian buildings after any engagement. Fighting in cities also means forcing the adversary to split up larger units and thereby creating a more symmetric relationship between forces.

Cities provide camouflage and lends a possibility to operate under cover. The adversary’s maps may be inaccurate, private buildings may contain ammunition

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202 Ibid., p. 40.
204 Sun Tzu, The Art of War, Ch III, Offensive Strategy § 7.
205 Fowler, Amateur Soldiers, Global Wars: Insurgency and Modern Conflict, 2005, p. 65.
storages, and a restaurant may serve as headquarter for strategic planning. The daily life of civilians will slow down the adversary’s operations, as careful considerations to prevent collateral damage must be taken prior to any attack.206

Further, fighting in cities means that attention will be drawn to the cause of the non-state actor. Most non-state actors have a political agenda and want to attract as much publicity as possible in order to achieve their goals. This would not be possible to the same extent if fights were taken place in rural areas far away from media, politicians, and the civilian population. People who are affected by the conflict will be more likely to take a side, and, ultimately, support the party who is considered to have a legitimate cause. When the non-state actor is not able to control territory or authority, increasing support is key to future change. If fights are sustained over a longer period of time, there might be local as well as global reactions forcing the opposing state to withdraw due to political pressure. When the legitimacy of fighting no longer can be explained, it is time to leave the battlefield.207

The methods used by non-state actors in asymmetric conflicts are various and often adapted to the specific setting. Typical for the methods are that they require few participants and are low in cost.208 They also strike against soft targets, i.e. targets that have low survivability if not protected. People are soft targets, in particular when unarmed or not military trained. Any object that is not reinforced or armored, or protected by armed soldiers, is also to be considered a soft target.209 One can only imagine the large quantity of soft targets within a city inhabited by thousands or even millions of people. This development poses a huge challenge for IHL, and calls for states rethinking their focus on “conventional warfare”.

206 Ibid., pp. 65-66.
207 Ibid., p. 60.
208 Ibid., p. 58.
209 Ibid., p. 59.
9 Concluding remarks

Asymmetry between parties to armed conflicts is as old as warfare itself. However, what have come to change in recent years are the means and methods used by weaker non-state actors to such conflicts. The world has witnessed how civilians become increasingly involved in hostilities, both as participants and as innocent by-standers. The question is therefore how states should respond to hostile acts carried out by more or less organized civilians in a way that does not jeopardize the protection of those that take no direct part in hostilities, or have ceased to do so.

In this thesis, three specific challenges in contemporary IHL are lined out: the fact that most armed conflicts today are non-international in character whereas most rules pertaining to armed conflict governs international armed conflicts means that regulation becomes unclear due to diverse interpretation. Further, when non-state adversaries use means and methods not in line with IHL, it leads to a downward reciprocal spiral where reprisals become an unwelcomed element of warfare. Lastly, when warfare is taking place in urban environments rather than on traditional battlefields, the risk is apparent that innocents will be affected by hostilities, as those who participate in the conflict blend in with the civilian population and use civilian objects as a cover for operations.

Who is considered to be directly participating in hostilities is a main question in this thesis, and the discussion is based on ICRC’s Guidance on Direct Participation in Hostilities. One important question in the Guidance is how to determine the temporal and material scope of participation, and how to avoid the “revolving door”-effect of civilian participation in hostilities. The answer to this question is important since great military powers such as the U.S. and Israel seek to fight terrorism by the targeting and detaining of individuals that are deemed to pose a security risk. These policies require due assessment of whether the person in question has lost immunity under IHL.

As a fundamental rule, civilians cannot be targeted unless and for such time as they participate in hostilities. Combatants can be targeted at all times, but in several contemporary armed conflicts, which are neither entirely international nor entirely internal, there lies a great difficulty in assigning the status of “combatant” to irregular
fighters and terrorists. This means that there is a need for examining the legal situation and to come up with solutions for how these problems should be addressed. ICRC has through its Guidance and other documents presented its view on when a person is directly participating in hostilities and thereby loses immunity under IHL. The Guidance suggests that members of organized armed groups that are carrying out a continuous combat function should be liable to attack at all times; in purely practical terms being seen as combatants belonging to a non-state actor’s armed force without having any combatant rights as do members of a state’s armed forces. Although criticized in parts, this is a well-reasoned and compromised solution, but does not remedy the problem of establishing when someone is liable to attack; instead it suggests another type of assessment.

It is today perhaps more important than ever that IHL serves as protection in armed conflicts. On our daily news, we see insurgencies and terrorist attacks getting more and more common, leading to devastating effects for those affected. New instruments governing these types of conflicts in more detail would certainly be helpful, but since it is a very long way to go before such instruments would see daylight, it would be a helpful first step if states could start agreeing upon fundamental definitions and unite against the increased violence directed towards innocent civilians.
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