MASTER´S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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Analysing Non-State Armed Groups' Internal Communications: Recognising Principles of International Humanitarian Law

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Abstract:

Although the majority of global armed conflicts occur within national borders, most international humanitarian laws address situations of international armed conflict. Non-international armed conflict is regulated by a limited number of laws, and one of the most important players on the international plane in an armed conflict context, the non-state armed group, struggles with legal recognition due to the state-centric nature of the international law system. Therefore, it is vital that the law applicable to non-international armed conflict is adhered to as well as possible. This role is under international law awarded to the International Committee of the Red Cross, an organisation that under the premise of being the 'guardian of international humanitarian law' is conferred upon the responsibility to further disseminate and educate international actors on the laws applicable to situations of armed conflict.

In order to increase the effectiveness of such activities, this thesis seeks to contribute to the operationalisation of education efforts by recognising the existence of a core set of principles that can be discerned from non-state armed groups' internal communications. By researching these often easily neglected soft law documents, namely codes of conduct, internal manuals, oaths, international commitments and so on, and comparing them and analysing them in light of the laws applicable to non-international armed conflict, namely Common Article 3 of the Geneva Conventions, customary international humanitarian law, and Additional Protocol II to the Geneva Conventions, a body of 'customary non-state armed group law' has been recognised.

By researching these soft law documents and analysing them according to abovementioned international humanitarian law instruments, five principles of international humanitarian law can be recognised. The principle of distinction, the prohibition of looting, the use of anti-personnel mines, the use of child soldiers, and the humane treatment of prisoners all find widespread support in non-state armed groups internal communications and can therefore undoubtedly be said to belong to customary non-state armed group law. These findings further advance the dissemination of international humanitarian law by specifying which rules that are less known or adhered to by non-state armed groups need to lie at the centre of the International Committee of the Red Cross' dissemination and education efforts.

Keywords: International Humanitarian Law, Non-State Armed Groups

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Chapter 1: Introduction

1.1 Introduction

From the Mongolian horde riding West to conquer the European nations in the thirteenth century, to the French defeating Henry V at Agincourt, to the numerous conflicts between Japan and China, to Nazi-Germany succumbing to the Allies: throughout history, the vast majority of wars has been fought out between states. Soldiers were fighting in the name of their country, and battles took place in set pieces determining which nation became the victor.

Throughout the centuries and all over the globe, different versions of rules of warfare regulating such wars have existed to a certain extent.[1] The Battle of Solferino in 1859 turned out to be the catalyst that led to the development of the modern version of International Humanitarian Law (IHL).[2] In order to regulate the conduct that was allowed in armed conflicts, states together created rules to determine who could be targeted, what weapons could be used, and what happened in case of injury or capture. Because of the inter-state nature of these conflicts, and the state being the key and until fairly recently, only legal subject of international law, IHL was developed which regulated wars between states.

The Second World War proved a turning point for international warfare. Global inter-state violence decreased rapidly due to numerous reasons, including the existence of nuclear weapons, international economic interdependence, and the emergence of the 'age of reason and enlightenment'.[3] However, this pacifistic success is heavily overshadowed by the increase of intra-state warfare in the post-World War II period, which constituted the vast majority of armed conflicts in the second half of the twentieth century, sometimes attributing for over 95% of global conflicts.[4] To put this into perspective, as recently as 2014 there was only one truly international conflict - between India and Pakistan - with as many as 39 conflicts happening within the boundaries of the state, meaning 97.5% of all conflicts.[5]

These conflicts are often fought out between forces of the government and different types of dissident armed groups, so-called Non-State Armed Groups (NSAGs). The International Committee of the Red Cross (ICRC), the leading organisation in the development and dissemination of, and ensuring compliance with IHL has identified 614 armed groups of

[1] Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 *The European Journal of International Law* 109, 111-112.
[2] *ibid* 112.
[3] Human Security Report Project, 'Human Security Report 2013: The Decline in Global Violence: Evidence, Explanation, and Contestation' (*Simon Fraser University Canada* 2013) 1, 20-34.
[4] Therése Pettersson and Peter Wallensteen, 'Armed Conflicts, 1946-2014' (2015) 52 *Journal of Peace Research* 536, 539.
[5] *ibid* 537.

global humanitarian concern in 2020, which together execute government-like functions over an estimated 60 to 80 million people worldwide, showing that NSAGs operate on an immense scale and as such, cannot be underestimated and are deserving of proper attention in both international legislation and legal research. [6]

The existence of such groups inherently clashes with international law and the state-centric Westphalian system, and as such, they occupy a peculiar position within the international community, which finds it difficult to situate any non-state actors within the existing international legal system. However, as discussed, throughout the years they have increasingly occupied a greater fragment of the armed conflicts in the world and thus, the international system and international legislation cannot ignore them, as their conduct poses a threat to the existence of the state and civilians, and national, regional, and global security. As such, throughout the decades, states have been able to regulate this conduct to a certain extent.

However, the development of legislating internal conduct is hampered by the reluctance of states to provide any legal possibilities for other states to interfere in their domestic affairs, a sentiment rooted in Westphalian interpretations of sovereignty and the inviolability of state borders. In addition, fears to provide NSAGs with any form of legal recognition which might strengthen them in their contra-state objectives only contribute to this reluctance. As such, the vast majority of IHL regulates international conflicts, and only a mere handful of instruments concern themselves with Non-International Armed Conflict (NIAC). The famous Geneva Conventions of 1949 include over 400 articles outlining forbidden and permissible conduct, rights and obligations for states and individuals being involved in international armed conflicts (IACs), whereas merely a single article regulates NIACs.[7] This lonesome Article 3, common to all four Geneva Conventions, is nonetheless dubbed a 'convention in miniature' as its importance to regulate NIAC is widely recognized.[8] In the years following the conclusion of the Geneva Conventions, NIACs increasingly found themselves the subject matter of international legislation efforts, in addition to the recognition of NSAGs being bound by customary international law.[9] Treaties such as the Convention for the Protection of Cultural

[6] ICRC, 'ICRC Engagement with Non-State Armed Groups: What, How, For What Purpose, and Other Salient Issues' (March 2021) *ICRC Position Paper* 1, 2.
[7] The Geneva Conventions of August 12 1949 (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Conventions).
[8] David A. Elder, 'Historical Background of Common Article 3 of the Geneva Conventions of 1949' (1979) 11 *Case Western Reserve Journal of International Law* 37, 68-69.
[9] Ezequiel Heffes, 'Compliance with IHL by Non-State Armed Groups: Some Practical Reflections at the 70th Anniversary of the 1949 Geneva Conventions' (*EJIL: Talk!,* August 2019) <https://www.ejiltalk.org/compliance-with-ihl-by-non-state-armed-groups-some-practical-reflections-at-the-70th-anniversary-of-the-1949-geneva-conventions/> accessed 4 March 2021.

Property in the Event of Armed Conflict and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons are evidence of a slow increase in the amount of rules regulating NIACs.[10]

However, a persistent problem in international law is compliance, and IHL is no exception.[11] The establishment of rules is a welcome development, but if one of the most important parties to conflicts does not comply with such rules, it becomes problematic. As such, one of the most important tasks and objectives of the ICRC is to ensure that NSAGs are aware and accept norms of IHL, to guarantee that all parties to an armed conflict play by the same rules.[12] In order to achieve compliance, the ICRC seeks to engage in dialogue with NSAGs and educate them on the rules of war by organising training sessions and distributing relevant materials.[13] The ICRC has stated that 'adherence to IHL norms could be promoted through reference to local beliefs, legal traditions, customs and practices that encapsulate similar norms…'.[14] In order to promote IHL, which is the only body of international law that undoubtedly binds NSAGs, the ICRC has thus identified that internal norms of NSAGs contribute to IHL compliance.[15] In order to further increase the knowledge of IHL and achieve further obedience by NSAGs, it can thus be reasoned that the efforts of the ICRC should lie with those rules which are undeniably a part of IHL, but which have the least amount of recognition by NSAGs. This thesis will seek to recognize which rules and norms of IHL are already a part of the internal rules of NSAGs, which consequently identifies which rules are less crystallized in NSAGs customs and as such, could benefit the most from efforts by the ICRC to educate NSAGs on these rules.

1.2 Research Questions

In order to do so, a look will be taken at NSAGs' internal communications, which, albeit not being authoritative legal sources, do give a rare glimpse into the convictions and internal rules

[10] Michelle Mack and Jelena Pejic, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflict' ICRC (2008), 9.
[11] Helen Durham, 'Strengthening Compliance with IHL: Disappointment and Hope' (*Humanitarian Law & Policy,* 14 December 2018) <https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/> accessed 25 March 2021.
[12] ICRC 'ICRC Engagement' (n 6) 8.
[13] *ibid.*
[14] *ibid.*
[15] *ibid.*

of NSAGs and can serve to identify which norms of IHL have already been widely endorsed by NSAGs.[16] The overall research question guiding this thesis will be as follows:

Which principles of International Humanitarian Law can be considered inherently binding for Non-State Armed Groups and are therefore widely endorsed and included in their internal communications?

In order to answer this question, first the framework in which this research will be conducted must be established, meaning a clarification on methods, terms used, source material, and its limitations.

Subsequently, Chapter 2 will seek to answer the following question: *How can the difficult position of Non-State Armed Groups in the international legal system be understood?* In order to answer the main research question, it is vital to first understand the difficult relationship that exists between NSAGs, IHL, the ICRC, and states. In order to recognize which principles are inherent to NSAGs, it must first be established why they interact with IHL differently than states, and how the complexities of their legal status and position in the international legal system contribute to a political and legal complications.

In order to answer the main research question, three different sources of IHL will be explored. In each of the following three chapters, the following question will be answered: *What principles of the assessed source are recognized and endorsed by Non-State Armed Groups in their internal communications?*

Firstly, Chapter 3 will concern itself with the only universal treaty law applicable to NIACs, namely Common Article 3 to the Geneva Conventions. Because it is universally binding, its laws undoubtedly bind NSAGs and therefore, there is no armed group that operates on a territory of a state that is not bound by its provisions. Therefore, its provisions will be explored in great detail as its principles are foundational to IHL and as such, their recognition in NSAGs' internal communications will be confirmation of their inherent nature.

Chapter 4 will take a similar approach, but with a focus on customary international humanitarian law. As the customary international law discussed in this chapter is based on a study by the ICRC, its contents are based on a huge amount of data and years of extensive

[16] Sandesh Sivakumaran, 'Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War' (2011) 93 *International Review of the Red Cross* 463, 464-465.

research. In addition, customary international humanitarian law is also universally applicable and therefore it also binds all NSAGs.

Lastly, Chapter 5 will concern itself with Additional Protocol II to the Geneva Conventions (APII), which is only applicable to those armed groups operating on states that have signed and ratified the Additional Protocol. As its provisions are not universally applicable, its provisions are not binding on all NSAGs and therefore it will be assessed after the two aforementioned universally applicable sources.

This hierarchical structure was chosen over a thematic separation between the principles as in that case, the sources of IHL would be assessed together to find evidence of the endorsement of a principle, whilst in reality, certain laws might not even be applicable to the NSAG due to their operations happening on the territory of a state which is not a party to the treaty. In the current structure, evidence of principles of IHL are weighted according to the source they are derived off and therefore, principles endorsed by NSAGs that are derived from universally applicable sources can truly be said to be evidence of a NSAG' *opinio juris*, whereas for example principles derived from Additional Protocol II or even smaller treaties would be evidence of a specific law as opposed to truly foundational principles of IHL. The potential downside to this structure is that certain principles and laws might see some repetition, but the overall argument sees benefits from this structure.

Chapter 6 will analyse the findings of the preceding chapters and outline which norms of IHL are endorsed by NSAGs and which could benefit most from education and dissemination efforts by the ICRC, in order to better streamline them and improve their effectiveness.

Chapter 7 seeks to summarize the findings of this research in the form of a conclusion, accompanied by recommendations based on the results.

1.3 Methodology and Limitations

For this thesis, the legal-dogmatic research method will be used. Legal-dogmatic research can be described as 'research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view of solving unclarities and gaps in the existing law.'[17] In conducting this research, Smits recognizes three essential components, discussed below to recognize how this thesis fits into legal research.

[17] Jan M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (September 2015) *Maastricht European Private Law Institute Working Paper No.2015/06* 1, 5.

Firstly, it is an essential feature of the method that it adopts an internal perspective.[18] What this means is that the source material is analysed to disseminate the correct interpretation of the law from the inside of the legal system.[19] In this current research, this is done by taking the applicable law to NIAC as a starting point, namely the Geneva Conventions, Additional Protocol II (as Additional Protocol I is only applicable to situations of IAC), and customary international humanitarian law, treating it as the indisputable applicable norms that actors should adhere to.

Secondly, it is crucial that the law is seen as a system.[20] It is essential to 'make connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from the inchoate mass of primary materials.'[21] In the present research, this is done by aiming towards the operationalisation of the law by extracting these general principles from soft law documents in order to enhance hard law compliance. Treating soft law documents as part of the system is realistic and the opposite would leave out a major component of the actual system of law in circulation.

Lastly, the research should systematise the present law.[22] The currently applicable IHL will be tested against customary NSAGs norms. This is not to say that it cannot point towards the direction the law could or should progress towards to better reflect the realities of NIACs; it merely takes the *lex lata* as a starting point for analysis. The system of the applicable law is derived from art. 38 of the Statute of the International Court of Justice (ICJ), which has famously established the authoritative sources of international law as being treaties, international custom, general principles of law and subsidiary writings by scholars.[23] Although some disagreement exists on the subject matter of hierarchy between these sources,[24] the Rome Statute of the International Criminal Court applies in its judication firstly its founding Statute, secondly 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict, and lastly general principles of

[18] *ibid.*
[19] *ibid.*
[20] *ibid* 6.
[21] *ibid.*
[22] *ibid* 7.
[23] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 23 March 1945) 59 Stat. 1031, art. 38.
[24] See for example Francisco Forrest Martin, 'Delineating a Hierarchical Outline of International Law Sources and Norms' (2001) 65 Saskatchewan Law Review 333, 359 who states that 'Treaties generally have less authority than customary international law because treaties cannot violate customary international law'; Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014), 129-133 states that treaties and customary law are usually considered equal in stature.

law.'[25] General principles of law, as a source recognised in art. 38 of the ICJ Statute, will in this current research not be considered. There exists some discrepancy on which exact principles could be considered general principles of law, and the source is only used sporadically by the ICJ to fill legal vacuums. Customary international law and treaty law on the other hand will be assessed thoroughly as they are both considered norm-generating sources and as such can be tested against NSAGs soft law commitments.[26]

Where the current research might divert from mainstream legal-dogmatic research is the focus on soft law documents. Soft law is generally described as being 'quasi-legal instruments that have no legal force, such as non-binding resolutions, declarations, and guidelines created by governments and private organisations.'[27] Especially soft law instruments from non-authoritative actors in the international legal system such as NSAGs are not awarded sufficient attention in international legal scholarship, even though they are a reflection of the integration of IHL into NSAGs' conduct.[28] An often used argument that is used to discard these sources too easily is their classification as being merely intended for public relations purposes.[29] Although there are some examples of this statement being true, the exact same can be said for states signing treaties or issuing declarations of intent. Unfortunately, many states still intentionally act contrary to the obligations under IHL treaties they themselves chose to be bound by.[30] A fundamental feature of the legal-dogmatic method is to take the *lex lata* as a starting point and interpreting it the applicable and valid law; there is no reason this cannot be extended to soft law instruments, as they serve a similar purpose to NSAGs as IHL treaties do to states, indicating a set of rules they agreed to that outlines which norms and principles they adhere to in their conduct.

However, they constitute a vital view into the workings of one of the most important actors in global armed conflict and the one that most needs to comply with international norms; neglecting the semi-legal documents that guide non-state actors would mean to look away from the reality of armed conflict and would be counterproductive in achieving one of the most essential goals of international law and more specifically IHL: compliance. Therefore, this thesis will assess these documents in depth.

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[25] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art. 38.
[26] Thirlway (n 24) 93-94, 111.
[27] Bryan H. Druzin, 'Why Does Soft Law Have any Power Anyway?' (2017) 7 *Asian Journal of International Law* 361, 361.
[28] Sivakumaran 'Lessons' (n 16) 464.
[29] Olivier Bangerter, 'Reasons why Armed Groups Choose to Respect International Humanitarian Law or Not' (June 2011) 93 *International Review of the Red Cross* 355.
[30] *ibid.*

The assessed sources are derived from NSAGs. Sivakumaran, who has focussed most of his work on the law applicable to armed groups, categorized the commitments of armed groups in four main categories, with three additional categories encompassing documents that do not constitute commitments as such, but give some insights into humanitarian norm compliance by NSAGs.[31] Unilateral declarations, ad hoc agreements, codes of conduct and internal regulations, and legislation constitute the four main categories, whereas responses to reports of fact-finding missions, press releases and ad hoc statements, and expressions of motivations for taking up arms do not quite fulfil the legality of constituting a commitment.[32]

All of these types of communications will be assessed but due to the inherent closed and private nature of most NSAGs, some of the materials to be assessed are not widely available, and as such, some differences in quantity per category are unfortunately unavoidable.[33] However, in assessing 58 documents, including 38 codes of conduct and internal regulations, the current research tries to discern which norms and principles of IHL can generally speaking be considered to be adhered to and endorsed, and which ones are not as widely recognized or disregarded. With 'generally speaking' both a quantitative and qualitative assessment will be made to decide whether a principle has been endorsed, meaning that both the vast majority of NSAGs must make reference to the principle and additionally, its inclusion must be virtually uniform, and the essence of the principle must be recognisable in the wording of the NSAG across the board.

To avoid regional, religious, political and any other form of bias, the selection of the assessed NSAGs and their documents was based on several factors that sought to create a fair representation of global armed groups. Taking into account different continents, timeframes, regions, religions, political views, and organisational structures, this thesis seeks to attach general conclusions to NSAGs as a whole, without being heavily influenced by a majority of any of the factors mentioned above. This being said, due to the limited availability and often secretive nature of these documents, unfortunately some decades and types of groups might be represented to a larger extent than others.

Because NSAGs from different decades are being assessed, some of these internal communications and the armed groups themselves were in existence prior to the conclusion of the Geneva Conventions, the codification of certain rules of customary international

[31] *ibid* 465.
[32] *ibid* 465–469.
[33] Olivier Bangerter, 'Internal Control: Codes of Conduct within Insurgent Armed Groups' (2012) *Small Arms Survey* contains the vast majority of the assessed codes of conduct.

humanitarian law, and the conclusion of APII. However, what is being researched is whether there have been principles recognised by NSAGs' internal communications. In other words, whether certain foundational norms can be extracted from NSAGs' internal communications to discover evidence of the *opinio juris* of a sort of 'customary NSAG law'. That some principles that had only been officially codified in 1947 surface in codes of conduct prior does not disrupt the timeline of assessment.

1.4 Terminology

It is important to clarify exactly what a Non-State Armed Group is, as there exist some differing definitions of the concept, and since the concept lies at the foundation of this thesis, some clarifying words are in order. The entity can be described as armed groups, armed non-state actors, non-state actors, or violent non-state actors.[34] These variations are minor and insignificant and in theory could be used interchangeably, but for the sake of consistency, in this thesis 'Non-State Armed Group' will be used predominantly, with some reference to simply 'armed groups'.

Only two distinguishing features are important to clarify. Firstly, the concept of 'armed group' differentiates violent actors from other international actors that are independent from the state, but pursue different objectives, such as Non-Governmental Organisations (NGOs). Secondly, the inclusion of 'Non-State' seeks to emphasize the independent nature of such groups, as this anti-governmental sentiment is vital in placing the conduct of such groups under the conflict of internal armed conflicts. Private military companies for example are 'armed groups' but can be employed by governments and as such are not 'Non-State'. The term 'Non-State Armed Group' is thus used in the current research to distinguish these types of organisations from two slightly comparable organisations to avoid confusion.[35] As such, it includes organisations fighting for freedom, terrorist groups, smaller terrorist bands, networks, and any such organisation that is non-state and focused on achieving their goals through violent tactics. In addition, this is the term used by the ICRC and as such, the term enjoys widespread use in international legal discourse.

It is easy to disregard the use of NSAGs' documents as seeing them merely as 'terrorist propaganda' and portraying their members as immoral people without norms and values that only understand violence. It is however important to note that 'one man's terrorist is another

[34] Peter G. Thompson, *Armed Groups: The 21st Century Threat.* (Rowman & Littlefield Publishers 2014), 56.
[35] *ibid.*

man's freedom fighter.'[36] The relationship between NSAGs and governments is highly asymmetric, where the legitimacy of NSAGs is often delivered to the general public by governments, who will, due to the general anti-government nature of armed groups, try to portray them as immoral and illegal terrorists, to try to avoid the garnering of any support for such groups by the public.[37] Of course, many such groups are known to engage in some grave crimes, but many also represent part of the population that is discontent with the current government for various reasons that has been suppressed for sometimes decades and have to resort to drastic tactics to achieve any degree of progress.[38] All this is merely to say that often, NSAGs are built on a desire to develop conditions for a part of the population, and as such, their internal communications should not be pushed aside based on the idea that 'terrorist groups' merely use them as propaganda sources.

[36] Michael V. Bhatia, 'Naming Terrorists, Bandits, Rebels and Other Violent Actors' (2005) 26 *Third World Quarterly* 5, 7.
[37] Nicolas Florquin and Elisabeth Decrey Warner, 'Engaging Non-State Armed Groups or Listing Terrorists? Implications for the Arms Control Community' (April 2020) 1 *Non-State Armed Groups* 17, 18.
[38] Max Abrahams, 'Why Terrorists Are Misunderstood' (*This View of Life,* 19 February 2020) <https://thisviewoflife.com/why-terrorists-are-misunderstood/#comments> accessed 12 March 2021.

Chapter 2: Non-State Armed Groups and International Humanitarian Law

2.1 The Legal Status of Non-State Armed Groups under Public International Law

International law was founded by states, and primarily deals with their reciprocal relations. States are the main architects of international legislation, and its provisions seek to regulate their conduct in relation to each other.[39] As such, international law is based on the sovereign equality of states, placing them on equal footing with each other.[40] Our Westphalian state-centric system partially explains the awkward position that non-state actors occupy within this framework. However, state-centric does not mean that international law solely deals with states; over recent decades, other international actors have gained (limited) attention in international legislation, such as individuals, NGOs and supranational organisations such as the European Union and the United Nations (UN).[41]

However, any argument that seeks to place such actors on equal footing with states cannot be considered embedded in reality.[42] States still dominate the international system, and it is them allowing non-state actors a position under international law that provides these actors with any degree of legal personality. The international legal order presents the state as the entity without which it cannot exist.[43] However, it is for this present research essential to explore the precise position that NSAGs occupy in the international framework, in order to recognize the effects this subsidiarity vis-à-vis the state has on the relationship between NSAGs and international legislation. To situate NSAGs within the wider international legal system, a closer look must first be taken at what exactly entails being a legal subject of international law, and more specifically, the concept of international legal personality.

Up until the end of World War II, states were considered by many to be the only legal subjects of international law.[44] The concept of international personality originated from the law between states, as the law regulating their conduct provided every state with rights and obligations, transforming their status to that of an international person or entity.[45] The concept

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[39] Zakaria Daboné, 'International Law: Armed Groups in a State-Centric System' (June 2011) 93 *International Review of the Red Cross* 395, 395.
[40] Charter of the United Nations (adopted 26 June 1945, entered into force 23 March 1945) 59 Stat. 1031 (UN Charter) art. 2(1).
[41] Cedric Ryngaert, 'Non-State Actors: Carving out a Space in a State-Centred International Legal System' (July 2016) 63 *Netherlands International Law Review* 183, 186-188; ICJ, *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) ICJ Reports 1949 (*Reparations for Injuries*), 179.
[42] Marco Sassòli, 'Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality Between Armed Groups and States?' 93 *International Review of the Red Cross* 426, 427.
[43] Daboné (n 39) 395-396.
[44] Hans Aufricht, 'Personality in International Law' in Fleur Johns (eds), *International Legal Personality* (Ashgate Publishing 2010) 35.
[45] Gus Waschefort, 'The Pseudo Legal Personality of Non-State Armed Groups in International Law' (2011) 36 *South African Yearbook of International Law* 226, 227.

thus boils down to who is considered to be an actor in the international legal system.[46] Because there is no universally agreed upon definition established in international treaty law (unlike treaty interpretation according to the Vienna Convention on the Law of Treaties for example) or a set of criteria developed which if fulfilled constitute possessing such personality, the problem arises as to what the requirements are for being considered an international legal person.[47]

Because of this, there is a discrepancy in the academic literature regarding the precise build-up of the concept. For example, Shaw describes personality as 'participation plus acceptance',[48] making the recognition of the legal status of the entity a requirement for its legal personality. However, case law has shown that this requirement is rejected, and it is rather objective factors which are decisive, not subjective recognition.[49] Little disagreement exists over the fact that international legal personality includes the capability of being endowed with rights, obligations and capacities under international law.[50]

Additionally, in his monograph dedicated solely to the question of international legal personality, its (proposed) criteria and its applicability to armed groups, Murray concludes that three additional criteria deserve serious consideration, one of which, namely the capacity to bring an international claim, ultimately cannot be said to constitute a criterion of international legal personality but rather a direct consequence of being considered an international legal entity.[51]

The two criteria that complete the international legal personality definition then are that an entity must exist independently, and that an entity must be in actual possession of aforementioned rights, obligations and capacities.[52] These three proposed criteria of existing independently, having the capability of being endowed with rights, obligations and capacities under international law, and being in actual possession of these rights, obligations and capacities, seem to be supported widely in the literature and are embedded in international case law and therefore, this current research will make use of these criteria.

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[46] Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) 24.
[47] Treaties are to be interpreted according to the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT); Murray (n 44) 48.
[48] Malcolm N. Shaw, *International Law* (8th edition, Cambridge University Press 2017) 156.
[49] Murray (n 46) 125.
[50] Anna-Karin Lindblom, *The Legal Status of Non-Governmental Organisations in International Law* (Uppsala Universitet 2001) 78; Jan Klabbers, 'The Concept of Legal Personality' in Fleur Johns (eds), *International Legal Personality* (Ashgate Publishing 2010) 14-15.
[51] Murray (n 46) 46-47.
[52] *ibid* 47-48.

Although this definition initially seemed to apply exclusively to states, in 1920 this changed with the founding of the League of Nations. Because the building blocks of the League of Nations were solely states, the only logical conclusion one could draw is that a collection consisting of exclusively international legal persons would also constitute an international legal entity on its own, albeit with its own specific rights, obligations, and competences.[53] As states are the ones that create and develop international law, it follows logically that states therefore have the competence to create new subjects of international law, a position confirmed by the ICJ in the *Reparations For Injuries Case*, which recognized the UN as an international person.[54] The importance of possessing international legal personality was highlighted in this case, as it suggests that without it, the UN would not be able to bring a claim against Israel. Bringing a claim in front of an international court is not a criterion of possessing legal personality, but rather the result of possessing such legal personality.[55] According to the ICJ, international legal personality is thus a *conditio sine qua non*, or an essential condition that precedes the ability to act or bring a claim to an international court.[56]

In recent decades, international legal personality has been asserted by other international organisations such as the International Committee of the Red Cross (ICRC), and to a lesser degree individuals, who can be said to possess rights only indirectly, as they still can only claim these rights through the state which in turn is a party to the international legislation.[57] It seems clear that international legal personality cannot be obtained without the consent of the state. Hence, NSAGs occupy a peculiar position in international law, as their mere existence clashes with the state-centric system and in most - if not all - cases their primary objectives threaten the established boundaries of the state on which territory they operate on.[58] An obvious problem becomes clear: for an NSAG to have legal personality under international law, it can only do so via the state, the entity they seek to break up. However, if states accept NSAGs as an international legal person, international law itself does not inherently prohibit the granting of legal status to such groups.[59] It seems apparent however that states would not place NSAGs on equal footing to themselves, meaning that a conclusion can be drawn that NSAGs cannot obtain a similar degree of international legal personality as states. Although international legal

[53] Waschefort (n 45) 227.
[54] Lindblom (n 50) 116; *Reparations for Injuries* (n 41) 178-179.
[55] Murray (n 46) 47.
[56] Klabbers (n 50) 20-21.
[57] ICJ, *LaGrand Case (Germany v United States of America)* (Judgment) ICJ Reports 2001, paras. 77, 89, 124(3), 124(4); Waschefort (n 45) 228-230.
[58] Daboné (n 39) 397.
[59] Lindblom (n 50) 68.

personality is an absolute threshold that an entity either does or does not possess, there still exist different degrees of personality after this boundary has been transcended, meaning that some entities have more rights and others may have more obligations in relation to others.[60] Looking at the components of international legal personality, the diminished status of NSAGs in relation to the state becomes evident, attributing to them a 'defective form of legal personality'[61] or that of an 'imperfect' international person.[62] Below, an analysis will be made to conclude the degree of legal personality NSAGs have based on the aforementioned three criteria of existing independently, having the capability of being endowed with rights, obligations and capacities under international law, and being in actual possession of these.

Firstly, an entity must exist independently. This entails that an armed group must not be an extension or part of another entity. In the domestic domain, this means that once the state on which territory the armed group is operating cannot be said to subject the group to its will, the NSAG is acting independently.[63] This threshold is derived from the traditional international law approach to insurgency, where the state of rebellion can still be considered as occurring under the state's normal internal rule of law mechanisms, meaning the police force can act and the judicial system can still judge the rebels.[64] However, when rebellion escalates to insurgency, and the regular mechanisms available to the state are not sufficient and recourse has to be made to some international regulation, the state can be said to have lost the power to subject the entity to its will, and the entity can be said to be acting independently.[65]

In defining whether a conflict has reached the threshold of an insurgency, one of the criteria is that the situation dictates that third states take a stance on the conflict, thereby indirectly dictating that internal conflicts of a certain severity are by definition the concern of the international community.[66] If an armed group is operating on the territory of a state which has lost control over it, but the group is under the direct control of a third state, the armed group is merely considered as constituting an organ of the state which controls it and therefore it is that state that possesses the international legal personality.[67] Mere financial or logistical support is not enough to fulfil this threshold; the relationship must be one of 'complete dependence'. In the *Nicaragua Case*, even though the insurgent *contras* were heavily reliant on United States

[60] Klabbers (n 50) 5; Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999) 75.
[61] Waschefort (n 45) 235-236.
[62] Lassa Francis Oppenheim, *International Law: a Treatise* (2nd edition, Longmans 1912) 107.
[63] Murray (n 46) 138.
[64] *ibid* 138-139.
[65] *ibid* 139-140.
[66] *ibid.*
[67] *ibid* 8.

aid, the amount of control exercised was not 'complete control', and the *contras* could not be said to be acting on the United States Government's behalf.[68]

Secondly, NSAGs must be capable of being endowed with rights and obligations under IHL. This capability boils down to being in possession of a responsible command. An NSAG with leaders and an established hierarchy takes the form of an organisation, instead of a loose collective of fighters, and official leadership results in a group's ability to ensure compliance with its rules and orders.[69] The capacity to control territory and to carry out an attack are direct consequences of having a working organisational structure, and as such having a responsible command makes that a NSAG is seen as an organisation and can thus have the capacity to have rights and obligations endowed upon them.[70]

Lastly, it seems evident that NSAGs are in actual possession of these rights, obligations, and competences under international law.[71] Under Common Article 3 to the Geneva Conventions and Additional Protocols, NSAGs are deliberately addressed as 'each Party to the Conflict', thus meaning subjects that are not states. Under these articles, upon them are imposed obligations vis-à-vis hostilities, the civilian population, and even sentencing and judicial issues.[72] Additionally, customary international law also provides armed groups with obligations such as principle of distinction and the equality of belligerents.[73] From the Geneva Conventions NSAGs also derive their rights, as their recognition as an actor in the conflict imposes upon the state that they are fighting with the same obligations under IHL. As such, NSAGs' wounded are cared for, their fighters are to be treated humanely, and they are not to be tortured or subjected to degrading treatment.[74] It is thus not difficult to realize that NSAGs have rights and obligations, especially due to their inclusion in international legislation dealing with non-international armed conflict. However, because of their subordinate position, NSAGs do not have the possibility to participate in the law-making process, cannot actively decide to which rules to adhere, and do not have the ability to enforce compliance of the law of their opponents.[75]

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[68] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment) ICJ Reports 1986 *(Nicaragua Case),* para 109-110.
[69] Murray (n 46) 71-72.
[70] *ibid* 72-75.
[71] Vincent Bernard, 'Editorial: Understanding Armed Groups and the Law' (June 2011) 93 *International Review of the Red Cross* 261, 266.
[72] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI), art. 3 (Common Article 3).
[73] ICRC, *Customary International Humanitarian Law: Volume 1: Rules* (Cambridge University Press 2009).
[74] Common Article 3 (n 72).
[75] Waschefort (n 45) 235.

It can thus be concluded that NSAGs have some type of international legal personality that is subordinate to that of the state. As Gus Waschefort describes: 'if it is accepted that NSAGs have a limited form of legal personality, they have the legal personality of the worst kind.'[76] With this he implies that although NSAGs are considered an international legal person, this brings with it mainly negative consequences such as being subject to all the rules that other entities decide for them. Many of the positive sides, such as contributing to the development of the law, creating treaties and other international rules, and being taken seriously as a party to a conflict are still missing for NSAGs. As such, they have a defective legal personality.

To conclude, NSAGs are to be considered legal actors on the international plane and subsequently are deserving of adequate attention, both to their conduct and the soft law instruments regulating their behaviour.

2.2 Why is National Armed Conflict Regulated by International Law?

A second question that deserves some brief attention is why the relationship between the state and NSAGs is regulated by international law at all, as one could argue that this is an internal situation which is solely for the state to regulate without any external interference.

The UN possesses international legal personality as argued by the ICJ in the *Reparations for Injuries Case* and discussed in the previous section, and therefore its activities regarding the gradual increase in certain matters elevating from an exclusively internal affair to an international concern is of importance. The discussion of the previous section outlines how international law developed from being purely state focused to a system that gradually expanded into including other non-state actors such as international organisations, NGOs and individuals. This development was accompanied by (or possibly caused by) an expanse of the involvement of international law into areas which were formerly exclusively the internal domain of the state.[77] The unviability of the interference in another state's internal affairs is outlined in article 2(7) of the UN Charter, which stipulates that the UN is prohibited from intervening in matters which are essentially within the domestic jurisdiction of any state.[78]

However, an exception to this prohibition of interference can be found in article 39, which provides the Security Council with the possibility to determine the existence of a threat to the peace and can take measures accordingly.[79] This article was utilized by the Security

[76] Waschefort (n 45) 235.
[77] Daboné (n 39) 396–397.
[78] UN Charter (n 40) art. 2(7).
[79] *ibid* art. 39.

Council to set certain grave human rights issues occurring on the territory of a member state on the international agenda. For example, in the years following World War II the UN General Assembly adopted multiple resolutions condemning South Africa and their regime of apartheid, claiming that 'the United Nations and the international community have a special responsibility toward the oppressed people of South Africa and their liberation movements…', which led to the adoption of certain measures such as the establishment of a special committee on apartheid, boycotts, the breaking off of diplomatic relations, arms embargoes and the UN urging South Africa to end their regime of apartheid.[80] Thus, the UN has recognized certain domestic issues as being grave enough to be considered an international concern on which the international community must act.

Additionally, the UN recognized civil war in itself as an international concern. In *Prosecutor v. Tadić,* the International Criminal Court for the former Yugoslavia (ICTY) argued its jurisdiction based on the fact that even if the Yugoslavia conflict was an internal issue, it would 'constitute a threat to the peace according to the settled practice of the Security Council and the common understanding of the United Nations membership in general'.[81] It argued that it has been established in the history of the UN that threats to the peace on which the UN may act, includes internal armed conflicts.[82] It sees internal conflict as a potential threat to international harmony as it can have a great impact on world peace and human rights, and any conflict can transcend boundaries and cause refugee crises or have an impact on surrounding states.[83] As the policeman of the world, keeping an eye on domestic situations to prevent them from escalating and becoming an international issue is the responsibility of the UN.

However, most important is the fact that states together agreed to officially document that internal conflicts are of such an importance and grave concern to be regulated by international rules, thus partially giving up their sovereignty to have other states have a say in how they are to handle their internal struggles. This transition was unthinkable up until much of the twentieth century, when states considered war-making capacities to be an absolute power attributed to the state and thus, situations of internal conflict were to be considered the *domaine*

[80] 'United Nations and Apartheid Timeline 1946-1994' (*South African History Online*, 27 August 2019) <https://www.sahistory.org.za/article/united-nations-and-apartheid-timeline-1946-1994> accessed 23 October 2020; see for example UNGA Res 1761 (November 1962) UN Doc A/Res/1761(XVII); UNSC Res 311 (February 1972) UN Doc S/Res/311.
[81] ICTY, *Prosecutor v. Tadić* (Decision of the Appeals Chamber) (October 1995) para. 30.
[82] *ibid.*
[83] Ruth Gordon, 'UN Intervention in Internal Conflicts: Iraq, Somalia and Beyond' (1994) 15 *Michigan Journal of International Law* 519, 525-526.

réservé of the state and its own responsibility to regulate.[84] The gradual change in this position was due to two main factors: the role of the ICRC and the elevated status of human rights.

In numerous international conferences leading up to the Geneva Conventions of 1949, the ICRC had submitted draft articles that included clauses to make internal armed conflict the responsibility of the international domain and have it be subject to the same rules as international armed conflict.[85] Initially met with fierce opposition by states, throughout the decades this resistance slowly melted away as many wars were fought across Europe, exposing the suffering of civilian populations involved in conflict and the massive infringement on their rights and breaches of international law by the state.[86] The concern for human rights and the view that the rights of the state are not to be placed above humanitarian considerations finally led states to agreeing that humanitarian laws should at least extend part of their benefits to non-international conflicts, leading to the adoption of Article 3 Common to the Geneva Conventions, which famously paved the way for a more extensive legislation regarding non-international armed conflicts.[87] The importance of this one article is not to be understated, as it was famously described a 'convention in miniature'.[88]

One of biggest obstacles to the adoption of any regulations dealing with armed conflict not of an international character proved to be the legal status of the non-state parties involved in internal armed conflict. The main fear expressed by states was that any mentioning of insurgent parties in international law would provide such groups with legitimacy, supporting their cause and hindering the state's ability to restore internal order.[89] To this avail, the last sentence of Common Article 3 reads that 'the application of the preceding provisions shall not affect the legal status of the Parties to the conflict', a sentence that was considered a *conditio sine qua non*, or essential condition for even starting to discuss international regulation of non-international armed conflicts.[90] It makes it clear that this article was born out of humanitarian concerns and not political, and that recognition of an internal conflict does not alter the legality of the insurgent group in any way. Although the concern of states of legitimizing NSAGs is understandable, from a legal point of view being a subject of international law does little to

[84] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 9; Elder (n 8) 38.
[85] Sivakumaran 'Law' (n 84) 30–39.
[86] *ibid* 40–42.
[87] *ibid.*
[88] Jean S. Pictet, *Commentary to the I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross Geneva 1952) 48.
[89] *ibid* 43-44, 60-61; Murray (n 46) 34.
[90] Common Article 3; Elder (n 8) 68.

alter a group's legitimacy.[91] A legal subject of international law can still be an illegitimate entity: the concepts of legitimacy and international legal personality are not to be confused. Attributing international legal personality to NSAGs merely recognizes the reality of internal situations and acknowledgment of who the actors are on the international plane.[92] Additionally, it makes the law more embedded in reality and therefore operational; it does not in any way alter the legitimacy of armed groups.

In short, it has taken time for NIACs to be regulated by international law, as the concern over the committed human rights violations grew and the international community felt the need to establish rules and obligations to which states and other parties must hold themselves accountable regarding internal conflict. This relatively late acceptance also explains why the law of NIACs is underdeveloped vis-à-vis the more heavily regulated international armed conflict. The development of the law regarding NIAC does not stop with the Geneva Conventions and Additional Protocol II. Whereas it used to be only included in IHL, increasingly aspects of international human rights law are also applicable to NIAC.[93]

2.3 How are Non-State Armed Groups Bound by International Humanitarian Law?

How is an entity that is fundamentally opposed to the state bound by the rules agreed upon by that very same state, without having any input as to the specific regulations? Understanding the legal relationship between NSAGs and international legislation is essential for this research. The view that IHL binds armed groups is to a large extent accepted.[94] The question that remains is on which legal basis this view is based. Multiple arguments can be made to explain how NSAGs are legally bound by IHL, five of which deserve serious consideration.

The first argument is that NSAGs are bound by IHL because the rules contained therein belong to customary international law, therefore being applicable to NSAGs on the basis that no ratification of a state intermediary was necessary anyway; they are bound purely on the rules' customary status. Customary international law binds all entities with international legal personality under international law.[95] In addition, the ICRC itself explicitly states that customary international law is applicable to NSAGs.[96] This argument seems to be true for

[91] Murray (n 46) 35–36.
[92] *ibid.*
[93] Sivakumaran 'Law' (n 84) 2.
[94] *ibid* 236; *Nicaragua Case* (n 68) para. 216-220; Jann K. Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (June 2011) 93 *International Review of the Red Cross* 443, 443.
[95] Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (April 2006) 55 *International and Comparative Law Quarterly* 369, 373.
[96] 'Customary Law' (*International Committee of the Red Cross*) <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law> accessed 8 December 2020.

provisions which seem to be of such nature. For example, the rules contained in Common Article 3 have obtained customary status, being applicable globally regardless of ratification.[97]

The problem with this argument arises when one considers international rules that are not as widely accepted, such as certain provisions of Additional Protocol II.[98] The ICTY has stated in *Tadić* that they are authorized to apply treaties which were binding on the (state) parties at the time of offence, including those that contain rules not of a customary nature.[99] Provisions of APII, or other (future) new treaties dealing with NSAGs would therefore never be binding upon these groups, which defeats the very purpose of concluding the treaty and agreeing upon new rules. Therefore, NSAGs must be bound by non-customary rules of international law by other means.

The second legal argument uses a similar line of reasoning as the one above, except that the binding effect of IHL stems from another source of international law, namely general principles. Like customary international law, general principles are directly derived from the international law sources recognized in article 38 of the ICJ Statute.[100] Because the rules regulating non-international armed conflict are derived from certain general principles of international law, such as the principle of humanity, distinction and proportionality, the rules themselves are also general principles – or so the argument goes.[101] However, more specific rules are built upon the general principle, which transforms their function in that of a specific rule, and thus ceasing to be a mere 'general principle'.[102] General principles, as a source of law included in article 38 of the ICJ statute, should be mainly be seen as filling the vacuum of unregulated sections of international law, not as being the source which covers the whole area of international law.[103] Even though certain rules of IHL could be binding to NSAGs due to their status as general principles, just as with customary law, not every rule has achieved such status and therefore, this argument could not be the reasoning for all rules.

A third argument seeks to derive the applicability of IHL to NSAGs via the treaties concluded by the state on which territory the armed group is operating on. Only states can accede to treaties, and the rules on how to interpret treaties are codified in a treaty of their own, namely the Vienna Convention on the Law of Treaties (VCLT). The argument extends the rules included in the VCLT regarding third parties to non-state actors, by taking the customary rules

[97] Sivakumaran, 'Binding' (n 95) 372.
[98] *ibid* 372–373; Kleffner (n 94) 455.
[99] *Prosecutor v. Tadić* (n 81) para. 143.
[100] Statute of the International Court of Justice (n 23) art. 38.
[101] Sivakumaran, 'Binding' (n 95) 376-377.
[102] *ibid.*
[103] Thirlway (n 24) 111.

the VCLT itself was based on as a starting point, which provides that treaties create effects for any international subject (so not just states).[104] Notwithstanding the fact that this line of reasoning is already based on an Utopian view of how states would treat NSAGs, the fact remains that NSAGs would need to agree to being bound by IHL.[105] Armed groups that do not express their consent to be bound would still be free from any IHL obligations, and it is exactly those groups who do not wish to play by the rules that the international community wants to be bound by IHL the most.[106] And thus, this argument cannot be the main line of reasoning as to why the whole body of rules governing armed conflict is applicable to NSAGs.

Another argument tries to argue that NSAGs are bound by the treaties that the state signed because their existence is derivative of that same state. When a state signs a treaty, it binds the state and its (future) subjects, not that particular government.[107] It thus stands to reason that when a NSAG claims to be the continuation of the state that signed international legislation, this new state is bound by its obligations. This argument was used as the main reason for the applicability of Common Article 3 to NSAGs when doubts were expressed as to whether this article could bind NSAGs at all.[108] This argument based on the principle of secession is rejected by writers because of the fact that most NSAGs do not wish to be associated with the state they fought against, and see themselves as a new separate entity.[109] Thus, this line of reasoning can only be applicable to those NSAGs that claim to be a new government merely replacing an old one, ruling over the same state in question, which does not cover the majority of NSAGs.[110]

The last argument, which seems to have the most legal support behind it, is based on the principle of legislative jurisdiction.[111] It entails that non-state actors are bound by IHL because they operate on the territory of the state which ratified international legislation.[112] A person is bound by the treaties concluded at the moment of conclusion, stemming from them being a national living on the territory of that state. Even if a collective of these individuals later rebels

[104] Antonio Cassene, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (April 1981) 30 *International and Comparative Law Quarterly* 416, 423; Cedric Ryngaert, 'Non-State Actors in International Humanitarian Law' in Jean d'Aspremont (eds), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Taylor & Francis Group 2011) 284, 287-288.
[105] Cassene (n 104) 425–426.
[106] Sivakumaran, 'Binding' (n 95) 377–379.
[107] *ibid* 379.
[108] Pictet (n 88) 51.
[109] Raphaël van Steenberghe, 'Non-State Actors from the Perspective of the International Committee of the Red Cross' in Jean d'Aspremont (eds), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Taylor & Francis Group 2011) 217; Sivakumaran, 'Binding' (n 95) 379-380.
[110] Pictet (n 88) 51; Sivakumaran, 'Binding' (n 95) 380.
[111] Kleffner (n 94) 445.
[112] Ryngaert, 'Non-State Actors' (n 104) 285-286.

against that same state, this does not relieve them of their international obligations: it stems from the territory of the state, not the government itself.[113] After all, law binds men, not abstract entities, as is also exemplified by the establishment of the International Criminal Court, which prosecutes persons responsible for international crimes, not states themselves.[114]

The main criticism of this argument seems to focus on states that have a dualist approach to international law, which entails that international law has to be actively transformed into domestic law for it to generate legal effects for individuals. However, the International Law Commission has stated in the Nurnberg trials that international law imposes its rules on individuals regardless of whether these obligations have been transformed into domestic law.[115] For example, the prohibition on spying and sabotage as included in IHL treaties does not exempt individuals from undertaking such activities on the argument that it only concerns the state.[116] Individuals themselves, just as the state, must adhere to rules of international law such as the obligation not to target civilians, the prohibition of taking hostages, and the inviolability of medical and religious personnel and so on. The ICRC also endorses this legal argument, based on state practice.[117] For example, the ICRC held that the *National Liberation Front* for South Vietnam was bound by the Geneva Conventions because they were operating on the territory of Vietnam, which in turn had ratified these treaties.[118] This argument thus seems to explain best how NSAGs are bound by IHL without having a part in its conclusion itself.

This is not to say that NSAGs wholeheartedly agree with this position. Therefore, as Ryngaert argues, the international community should seek to secure the consent of NSAGs to be bound to IHL, as it is imperative for them to be able to express their desire to follow humanitarian rules.[119] This can either be done through direct expressions to be bound to IHL by NSAGs, as the ICJ recognized in the *Nuclear Tests Case* that unilateral acts of states can be considered sources of international law, or through direct accession to treaties by NSAGs.[120]

Thus, there is not one answer that explains why NSAGs are bound by IHL. However, the theory based on legislative jurisdiction carries the most widespread support and is based on sound legal reasoning. Therefore, it can be concluded from the foregoing that NSAGs possess international legal personality, and because they operate on the territory of a state that has the

[113] Sivakumaran, 'Binding' (n 95) 381.
[114] ICC Rome Statute (n 25) arts. 22-33.
[115] Sivakumaran, 'Binding' (n 95) 385; Ryngaert, 'Non-State Actors' (n 104) 286-287.
[116] *International Military Tribunal Nuremberg*, 'Trial of The Major War Criminals before The International Military Tribunal '(1947, Nuremberg) Vol. 1, 223.
[117] Van Steenberghe (n 109) 213-216.
[118] *ibid* 215.
[119] Ryngaert, 'Non-State Actors' (n 104) 289-292.
[120] *ibid.*

power to impose obligations on the people residing on its territory, they are bound by IHL concluded by that state.

2.4 Legal Right of Existence for Non-State Armed Groups

The discussion above has outlined the peculiar position that NSAGs occupy within the international system. Additionally, NSAGs are often portrayed as illegitimate nuisances which serve only to challenge the authority of the state. However, NSAGs are often born out of real discontent with many different factors which are the responsibility of the state, such as the neglect of basic human amenities, human rights, or active suppression of minority groups. Therefore, a look must be taken at whether under international law there exist some justifications for the existence of NSAGs.

The illegality of NSAGs comes from their resort to violence to achieve their means. After all, political movements working to pursue independence from a nation are in most instances legal and rather common all over the world, such as the Basque and Catalan independence parties in Spain, the *Parti Québécois* in Canada pursuing the independence of Quebec, the *Kirat Janabi Workers Party* aiming to secede from Nepal, the multiple political parties seeking an independent Balochistan, and so on. Once secessionist movements resort to violent means to achieve their goals, the state they are trying to secede from, as the monopoly to use force rests with any government, has the legal right to suppress such violent conduct. However, there exist two possible – and disputed – possibilities under international law under which the conduct of NSAGs could be considered legal, namely the right to self-determination and the right to rebel.

NSAGs often seek to cut a new territory out of existing states, such as *ISIL*'s attempt to create an Islamic State out of parts of Iraq and Syria, the *PKK* attempting to form a united Kurdistan out of Iran, Iraq, Syria and Turkey, or the *KLA* pursuing an independent Kosovo breaking away from Yugoslavia and Serbia. Whether such a practice is legal under international law has been an issue for decades which started with the inclusion of article 1(2) of the UN Charter, which sought to provide oppressed peoples with the legal basis to seek independence in the form of self-determination.[121]

Self-determination was from its first inclusion in international legal doctrine a revolutionary and ambiguous concept.[122] Initially intended to be the legal basis for countries

[121] UN Charter (n 40) art. 1(2).
[122] Martti Koskenniemi, 'National Self-determination Today: Problems of Legal Theory and Practice' (April 1994) 43 *International and Comparative Law Quarterly* 241, 241.

under colonial rule to seek freedom from their colonial oppressors, the question quickly became whether there existed a right of self-determination for peoples seeking independence outside of the colonial context. Self-determination offers a principal basis on which political entities can be constituted to encompass a 'people' or 'nations', which thus works contradictory to the territorial integrity of the state as also included in the UN Charter.[123] The fairly recent example of Kosovo seceding from Serbia has not given a conclusive answer whether it is allowed, and the famous landmark case *Reference Re Secession of Quebec* pointed towards the right of people to pursue internal self-determination, meaning self-determination within the existing framework of the state.[124] The Canadian Supreme Court in that case stated that it was unclear whether a right to secession existed in cases where internal self-determination was frustrated, but felt that tackling that question was outside of the scope of their consideration.[125]

There thus seems to exist no legal right to pursue self-determination through the use of force for NSAGs, but as Ben Saul describes, 'they do not breach international law by using force defensively against its forcible denial.'[126] However, in practice, to pursue independence through means of force is often met with severe retaliation by the state. Saying that the right to self-determination enables NSAGs to gain independence would clash with the harsh reality, which is that any act that seeks to break up the state's territorial integrity is met with severe resistance from the government. The reluctance of confirming the existence of the right to self-determination outside of the colonial context is made difficult by the fact that on the international stage only state actors have the power to define what is legal and what is not.[127]

Then, possibly, does there exist a right to rebel under international law which permits the resort to violence in certain cases? Megret has identified four areas where *jus insurrectionis* might be justified under international law: resistance to colonization and imperialism, resistance to aggression and illegal occupation, resistance to international crimes and atrocities, and resistance to tyranny and totalitarianism.[128]

The first is accepted especially under the right of self-determination, and the second has an international character to resist a foreign power. The last two categories however can ideally

[123] *ibid* 246; UN Charter (n 40) art. 2(4).
[124] *Reference re Secession of Quebec* (1998) 2 SCR 217 (CA), para. 126.
[125] *ibid,* 134-135.
[126] Ben Saul, 'Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law (2006) 25 *Australian Year Book of International Law Online,* 177, 184.
[127] Klaus Schlichte and Ulrich Schneckener, 'Armed Groups and the Politics of Legitimacy' (2015) 17 *Civil Wars* 409, 414.
[128] Frédéric Mégret, 'Causes Worth Fighting For: Is There A Non-State Jus Ad Bellum?' in Aristotle Constantinides and Nikos Zaikos (eds), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa* (Martinus Nijhoff Publishers 2009) 171, 185.

be justifications for NSAGs to use force in cases human rights violations by oppressing governments. As is the case with self-determination, the ambiguity regarding the status of the existence of such a right is not surprising considering the authoritative status of the state. However, many modern-day states are born out of rebellions which retrospectively are celebrated and taken as cases exemplifying the power of the people over the state. The Dutch Revolt against the Spanish in 1568 marked the beginning of the present-day Netherlands, the American Revolution of 1765 is celebrated as a justified revolt to gain independence over the British, and the French Revolution of 1789 is globally perceived as a just course of action by the people. More recent examples pointing towards the confirmation of the existence of the right are the Russian Revolutions after World War I, the Unification of Germany in 1989, the Ukrainian uprisings of 2004, and the Arab Spring in the early 2010s. The opposition towards the right to rebel however can also be extracted from these examples, as governments always strike down at the revolutionaries accusing them of acting illegally against the state.

The possible legal basis for the right to rebel can be found in the preamble of the Universal Declaration of Human Rights (UDHR), which reads 'it is essential, if man is not compelled to have recourse as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.[129] This provision points towards a right to rebellion to be used as a last resort where human rights are oppressed by the government. Rebellion can never be used where other (non-violent) means of securing justified aims are available.[130] The core duty of the state is to care for its subjects, and when it is in such serious and sustained breach of this duty which results in a breach of the contract between subject and state, there seems to be no option but to employ the last resort tactic of rebellion.[131] However, the UDHR is not a legally binding document, and as such, it does not contain a right that can be directly relied upon, and subsequent international legislation has unsurprisingly not included such a direct reference, as such an inclusion could potentially lead to the overthrow of democratically elected governments or lead to political destabilisation.[132]

Thus, international law does not positively grant the right to rebel, whilst simultaneously not specifically prohibiting them either.[133] This compares to the responsibility to protect doctrine, an equally ambiguous legal justification for states to intervene in the affairs of another

[129] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), preamble.
[130] Tony Honoré, 'The Right to Rebel' (Spring 1988) 8 *Oxford Journal of Legal Studies* 34, 54.
[131] *ibid* 53.
[132] Annyssa Bellal, 'What Are 'Armed Non-State Actors'? A Legal and Semantic Approach' in Ezequiel Heffes et al. (eds), *International Humanitarian Law and Non-State Actors* (T.M.C. Asser Press 2020) 21.
[133] *ibid.*

country if grave human rights violations are at stake, famously employed in Libya in 2011. It seems that under international law resistance towards a government based on human rights violations finds itself in a legal limbo, awaiting more practical situations that can be analysed to determine a clearer legal status.

2.5 The Role of the International Committee of the Red Cross

Because this thesis seeks to increase IHL compliance by NSAGs by further increasing the effectiveness of ICRC efforts, some legal questions regarding the ICRC must be answered. In the following section, certain questions regarding the ICRC's activities and legal mandate will be explored, in order to establish a firm basis for this research. Because the conclusions of this thesis are ultimately aimed at the ICRC, it is vital to firmly establish where its activities originate from. Therefore, this section will answer the questions of where the ICRC's obligation to disseminate IHL comes from, what exactly is included in its legal mandate, and lastly, whether, because of the specific application of IHL to situations of armed conflict, the ICRC's can continue its activities outside of this context. All these questions will be answered to ensure that the conclusions of this thesis can be fully used to develop the goal it has set out to do: increase NSAG' compliance with IHL.

Firstly, the ICRC is a unique organisation in many ways. It was founded in 1863 by the Swiss Henri Dunant, who witnessed a complete lack of care or medical attention for wounded soldiers at the battle of Solferino, inciting him to starting an international campaign establishing private aid societies focussing on providing care for those injured in armed conflicts.[134] In protecting those left vulnerable by armed conflict, the ICRC quickly made it its goal to strive for greater protection for such victims, both through direct medical aid and in assisting in the development of a comprehensive legal framework.[135] From its foundation, the ICRC and IHL have been intrinsically linked and intertwined with one another, with the law being mainly developed by the efforts of the ICRC, which simultaneously has taken on the role of 'the guardian of IHL'.[136] It was the ICRC that urged states to come together and agree on a set of rules applicable in armed conflict, which ultimately resulted in the adoption of the Geneva Conventions.

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[134] David P. Forsythe and Barbara Ann J. Rieffer-Flanagan, *The International Committee of the Red Cross: A Neutral Humanitarian Actor* (2nd edition, Routledge 2016), 1.
[135] *ibid* 47.
[136] *ibid* 44; International Committee of the Red Cross, 'The ICRC: Its Mission and Work' (March 2009) *Policy* 7.

The unique character and classification of the ICRC can also be recognized in the Geneva Conventions themselves, where the organisation is directly conferred upon obligations and is provided with a legal mandate to fulfil its objective. It is extremely rare and unique that an organisation is directly given rights and obligations in a set of state-concluded treaties. The organisation established by Henri Dunant is a private association founded under Swiss law, but unlike other companies or NGOs which have their origins in domestic law, the ICRC is directly addressed by the international community of states through treaties and as such, can be said to fall somewhere between an NGO and intergovernmental organisations such as the UN.[137] In addition, the ICRC in its statutes, describes itself as 'enjoying a status equivalent to that of an international organisation and has international legal personality in carrying out its work.'[138] The Swiss origin of the ICRC which is up to this day being upheld, and the fact that it is not being influenced by states, is considered a useful requisite and even necessary for the effective performance of its functions and in safeguarding its core principles of neutrality, impartiality and confidentiality.[139]

Additionally, this shows why the international community of states decided to provide the ICRC with a specific mandate under the Geneva Conventions. The part of this mandate relevant for the current research, which can be found in the Geneva Conventions, is summarized by the ICRC itself as follows: 'In Non-International Armed Conflicts, the ICRC enjoys a right of humanitarian initiative recognized by the international community and enshrined in Article 3 Common to the Four Geneva Conventions'.[140] This provision reads that 'an impartial body, such as the International Committee of the Red Cross, may offer its services to the Parties to the Conflict', leaving open what exactly is meant by 'services'.[141]

At first sight, this open-ended provision seems to provide a thin legal basis to base all ICRC activities on. Jean Pictet, in the official commentary on the Geneva Conventions, describes this paragraph as 'appearing at first sight to be merely decorative and without any real significance.'[142] However, as he continues, 'it is of great moral and practical value. Although it is extremely simple, it is adequate, and the International Committee itself asks for nothing

[137] Els Debuf, 'Tools to do the Job: the ICRC's Legal Status, Privileges and Immunities (June 2015) 97 *International Review of the Red Cross* 319, 323.
[138] International Committee of the Red Cross, 'Statutes of the International Committee of the Red Cross' (adopted 21 December 2017, entered into force 1 January 2018), article 2(2).
[139] ICTY, *Prosecutor v. Simić et al* Case No. IT-95-9 (Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness) (27 July 1999) paras 72-74.
[140] 'The ICRC's Mandate and Mission' (*International Committee of the Red Cross*) <*https*://www.icrc.org/en/mandate-and-mission> accessed 8 April 2021.
[141] Common Article 3 (n 72).
[142] Pictet (n 88) 58.

more.'[143] The implications this mere sentence has on the activities of the ICRC is found in the fact that the activities of the ICRC in NIAC are often met with resistance, viewing the organisation as interfering in the internal affairs of the state. With the adoption of Common Article 3, the ICRC is now legally entitled to offer its services, and parties to a conflict can no longer view the involvement of the ICRC as an unfriendly act or external interference, applying to both the state and NSAGs.[144] This legal right is called the right of initiative.[145]

Not only the Geneva Conventions provide the ICRC with its humanitarian mandate. The organisation's founding statutes include reference to maintaining and disseminating the fundamental principles of the Movement, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality, the tasks incumbent upon it under the Geneva Conventions and to work for the faithful application of IHL applicable in armed conflicts, and to endeavour at all times to ensure the protection of and assistance to military and civilian victims of armed conflicts.[146] Most importantly, although the founding statutes of the organisation cannot be considered an international treaty as such, they are binding upon all states parties to the Geneva Conventions, as states explicitly recognised the existence of the International Red Cross and in doing so, that body's statutes are applicable to the states parties in their entirety.[147] Therefore, all states acknowledge the role of the ICRC in armed conflicts.[148]

In addition, the ICRC's education and dissemination efforts can also be discerned from this legal basis. Article 47 of the First Geneva Convention imposes upon the High Contracting Parties, meaning states, the obligation to disseminate the text of the Geneva Conventions as widely as possible in their respective countries, so that the principles thereof may become known to the entire population, in particular the armed forces.[149] However, it is international organisations, led by the efforts of the ICRC, that actively work towards the dissemination of the law and have set up extensive education and training programmes. This function stems from abovementioned legal basis and can be said to fall within the core function of the ICRC as the

[143] *ibid.*
[144] *ibid*; Steven R. Ratner and Rotem Giladi, 'The Role of the ICRC in the Enforcement of the Geneva Conventions' (June 2015) 15-11 *Hebrew University of Jerusalem Legal Research Paper* 1, 13.
[145] Nishat Nishat, 'The Right of Initiative of the ICRC and Other Impartial Humanitarian Bodies' in Andrew Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 495, 496.
[146] ICRC 'Statutes' (n 138) arts. 4(a), 4(c) and 4(d).
[147] François Bugnion, 'Red Cross Law' (1995) 308 *International Review of the Red Cross* 491, 501-502.
[148] Anne Quintin and Marie-Louise Tougas 'Generating Respect for the Law by Non-State Armed Groups: The ICRC's Role and Activities' in Ezequiel Heffes et al (eds), *International Humanitarian Law and Non-State Actors* (T.M.C. Asser Press 2020) 353, 357.
[149] GC1 (no 7) art. 47.

'guardian of IHL' and generating respect for IHL.[150] In its statutes, which as discussed above are binding on all states, the ICRC describes firstly the right of initiative; 'the ICRC may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary….'[151] This right of initiative, both in Common Article 3 and the ICRC's statutes, do not specify or limit the kinds of services which may be offered, and the practice of the ICRC has shown that such activities include maintaining dialogue with all parties to a conflict with a view of addressing violations of IHL, which includes IHL dissemination, training, and education.[152] As such, the educational activities of the ICRC in NIAC seem to be grounded in a firm legal basis.

Abovementioned article 4(2) also provides the basis for the ICRC's activities outside of an armed conflict context. In practice, the ICRC has done so, and the practice of states has shown that this conduct is accepted.[153] It would also be contrary to the principles of the ICRC and incompatible with its role as the guardian of IHL if it had to cease its efforts in times where armed conflict was not occurring. Additionally, article 5(1) of the ICRC's statutes directly includes the obligation of the ICRC to ensure further respect for IHL: 'The ICRC … with the National Societies … shall cooperate in matters of common concern, such as their preparation for action in times of armed conflict, respect for and development and ratification of the Geneva Conventions, and the dissemination of the Fundamental Principals of the Movement and international humanitarian law.'[154]

As such, the ICRC has a clear legal basis found in both the Geneva Conventions and its founding statutes that allow for educational and dissemination efforts with NSAGs, both within and outside of an armed conflict context. Establishing exactly what the mandate of the ICRC is serves to ensure that the conclusions of this thesis can be used effectively to further NSAG' IHL compliance.

2.6 Incentives to Follow International Humanitarian Law by Non-State Armed Groups

Although the foregoing sections have shown that NSAGs are bound by IHL, unfortunately this does not mean that NSAGs perfectly adhere to all its rules and regulations. Adherence by NSAGs is still seen as a key objective of the Security Council, the ICRC, and NGOs like Geneva

[150] Quintin and Tougas (n 148) 357; for an example of the ICRC's efforts to prevent violations of IHL, see Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' ICRC (2004) 1.
[151] ICRC 'Statutes' (n 138) art. 4(2).
[152] Nishat (n 145) 505.
[153] *ibid* 506.
[154] ICRC 'Statutes' (n 138) art. 5(1).

Call.[155] But adherence to IHL is not a top-down approach forced solely by the state upon armed groups. NSAGs themselves also have incentives to adhere to IHL, which will be discussed in this section. These incentives to follow IHL are derived from interviews, discussions, and codes of conduct from NSAGs and as such, there is no real legal weight to be attached to them. Additionally, because of the nature of armed groups, this area of research is underdeveloped, a gap in which this research seeks to position itself.[156] Knowing why NSAGs adhere to IHL can seek to increase further adherence, as understanding what factors are important to NSAGs in respecting the law can lead to better compliance in the future.[157] Understanding a problem is the first step to solving it.

The decision for armed groups to decide to respect IHL can be divided into three main arguments. Firstly, NSAGs adhere to IHL because of who they are and how they want to be perceived. Although many people and especially governments tend generalize all NSAGs as being 'terrorists' and 'war criminals', this is not the case (see section 1.4).[158] NSAGs can have legitimate aims, such as attempting to further the position of their repressed ethnic or religious group, and want to be seen as the 'defender of the defenceless'.[159] Adhering to IHL and its provisions dealing with civilian populations is thus in line with the objective of NSAGs, incentivizing their respect to it.[160] Additionally, NSAGs follow IHL because of their own convictions, meaning the principles they believe in based on personality, religion, ethnicity, morality, or ideology. If IHL codifies these principles, adherence to IHL seems logical.[161] For example, laws based on the Bible, Koran or Torah and IHL have very similar provisions dealing with civilians and recognize the vulnerable position of women and children alike.[162] Another factor that influences adherence based on how NSAGs wish to be perceived is their concern for their external perception. Avoiding violations of IHL and being perceived as playing by the

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[155] UNSC Report of the Secretary-General on the Protection of Civilians in Armed Conflict (May 2009) Un Doc S/2009/277, 8-10; ICRC, 'IHL and Non-State Armed Groups' in ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions* (2020); 'What We Do' (*Geneva Call*) <https://www.genevacall.org/what-we-do/> accessed 26 October 2020.

[156] Due to the underdevelopment of this field of study, the following information can largely be credited to a single work by Olivier Bangerter, 'Reasons why Armed Groups Choose to Respect International Humanitarian Law or Not' (June 2011) 93 *International Review of the Red Cross* 353.

[157] Bangerter (n 156) 354.

[158] *ibid* 358.

[159] Ashley Jackson, 'In Their Words: Perceptions of Armed Non-State Actors on Humanitarian Action' (May 2016, *Geneva Call*), 12.

[160] Bangerter (n 156) 358–359.

[161] *ibid* 359–360.

[162] ICRC, 'The Operational Impacts of Islamic Law with Dr. Ahmed Al-Dawoody' (*Intercross the Podcast*, 2019) <https://open.spotify.com/episode/00vfhUdNlKeG889C54KCj0?si=UOJl0MBjQJaCRftepQb4bA> accessed 17 October 2020.

rules increases legality of the group and avoids being seen as a terrorist group or the 'bad guys', and can create more respect, support and understanding from the public, aiding the objectives of most NSAGs.[163]

The second main argument is that NSAGs will adhere to IHL because they can use it to their own advantage. Since armed groups are often at a disadvantage due to their (il)legal status, and their main enemy being the state, they seek to maximize their military advantages. IHL should not merely be seen as a set of rules that limits what a party to a conflict can do, it can work advantageously.[164] A set of rules sets a certain standard that creates a chain of positive effects. IHL creates discipline under the troops, which leads to less illegal activities such as looting or sexual violence. This in turn can increase the morale of the troops, for treating the civilian population humanely creates more support.[165]

This has as an additional effect that this loyalty and logistical, financial and moral support by the local population leads to an increase of the legality of the struggle of the armed group, which contributes to the insurgent group's chances of survival.[166] Moreover, adherence to IHL means treating captured government soldiers humanely. This can lead to a weakening of the enemy, as government soldiers who fear for how they are going to be treated by the NSAG are more inclined to fight to the death or use more gruesome tactics to keep out of the hands of the NSAG. If they know that their enemy treats them well, they will thus surrender more easily, which thus leads to a military advantage for the armed group.[167] This has the additional benefit of increasing the chances of better conditions for insurgent fighters captured by the government, as the government might act reciprocally vis-à-vis the treatment of their soldiers.[168] The last advantage is that respect of IHL can increase the likelihood of the NSAG's objectives being fulfilled. Talks of peace are easier to conduct when both parties played by the rules, and atrocities and grave civilian population treatments decrease the chances of peace and of NSAG possibly being awarded more internal self-determination or autonomy.[169]

Lastly, adherence to IHL also occurs because of what it is and what it represents. It is accepted universally because of its civilized and moral nature. IHL is seen as what is acceptable in the world and has as its goal to protect vulnerable people and objects, a concept that is inherent to human nature, meaning that actively disrespecting IHL norms seems a contradictory

[163] Bangerter (n 156) 360–361.
[164] *ibid* 361.
[165] *ibid* 362.
[166] *ibid* 362–364.
[167] Bangerter (n 156) 365.
[168] *ibid* 366.
[169] *ibid* 365-366.

act.[170] Many of the rules in the Geneva Conventions are codifications of customary rules, meaning rules that society as a whole has accepted as being the norm, developed not from just from societal but also regional, tribal and religious principles.[171] Certain values have developed independently of each other in different cultural circumstances, showing how they are intuitive to human nature. [172] Respect for IHL should thus be the normal and natural course of action.

To conclude, often there is little nuance in classifying NSAGs. Their supporters often view them as noble freedom fighters, whereas governments and other states see them as outlaws, terrorists, or savages. In reality, the diversity between NSAGs shows that both exist. There are groups with reasonable goals that share similar values and principles as governmental forces. Although their adherence to IHL is far from perfect, neither is the track record of states' adherence to IHL. This is not to defend the position that NSAGs are exempt from complying with IHL; it is merely to say that the non-compliance argument wielded by governments cannot be the sole reason for painting NSAGs as terrorists and disregarding them. That NSAGs can adhere to international norms is exemplified by NGO Geneva Call's *deeds of commitment*, which resulted in a wide range of NSAGs voluntarily signing a total ban on anti-personnel mines.[173]

For states, there seems to exist an engagement dilemma: they do not want to provide NSAGs with a seat at the table to help create and monitor IHL in danger of attributing them any legality, but by leaving NSAGs out of the equation IHL adherence will always lack.[174] As Ryngaert explains, 'one can only be subject to the writ of the law, and be expected to comply with the law, if one has participated, however indirectly, in the formation of this law.'[175]

2.7 Incentives to Disregard International Humanitarian Law by Non-State Armed Groups

In addition to the reasons why NSAGs choose to adhere to IHL, there are also reasons why these groups choose not to adhere to the law. Again, this is important because it better positions the current research into the field of study of NSAGs and IHL by recognizing all their considerations and to better adjust IHL compliance efforts with the considerations of NSAGs. Just like the arguments used in favour of IHL used above, these arguments can be deployed by certain groups. The discussion below will collect the reasonings used most often by NSAGs.

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[170] ICRC 'Operational Impacts' (n 162).
[171] Bangerter (n 156) 367–368.
[172] ICRC 'Operational Impacts' (n 162).
[173] Stefanie Herr, 'Binding Non-State Armed Groups to International Humanitarian Law – Geneva Call and the Ban on Anti-Personnel Mines: Lessons from Sudan (2010) *Peace Research Institute Frankfurt, PRIF-Report No. 95*, 5-6.
[174] *ibid* 4.
[175] Ryngaert 'Non-State Actors' (n 104) 285.

There are five main overarching themes that capture what NSAGs' underlying reasons are for disregarding IHL. Firstly, as used as a positive argument above, the reasoning of 'who we are' can also be utilized as reasons for non-compliance with IHL. Many NSAGs exist to fight against the current system and seek to position themselves outside of the status quo, attempting to restructure the international legal system. These 'noble goals' to fight for a repressed part of a nation seemingly provides NSAGs with a license to put current rules and norms next to it in justification of a noble end of freedom and the end of repression.[176] In addition, arguing for increasing the dissemination efforts of IHL, a lack of knowledge of what precisely is prohibited under IHL is also recognized as a reason not to follow it.[177] Especially when realizing under which circumstances many NSAGs operate, in secrecy and without access to lawyers or international aid, often non-compliance stems from simply a lack of knowledge.[178]

The second main argument deployed is that by nature NIAC is asymmetrical, heavily favouring governmental forces with their access to resources and manpower. This leaves NSAGs to have to treasure and utilize every small advantage they can get and as such, a lack of restrictions on the use of weapons and tactics is often taken at the expense of IHL. The use of children for example is explicitly prohibited by IHL, but unfortunately this prohibition is often disregarded by NSAGs because they need to make up for their lack of soldiers in some way to be able to pursue their goals and resist the governmental forces. However, using these immoral practices often loses NSAGs any support they might have had with the local population, further decreasing their access to vital resources.[179]

Thirdly, NSAGs are often a last resource tactic and as such, have nothing left to lose and are willing to take immense risks that violate norms of both domestic and international laws in a last attempt to accomplish change. In addition, there is little incentive for NSAGs to adhere to IHL once they have been put in the corner of rebels, terrorists, or guerrilla fighters. Once the label has been attached to them, not even IHL compliance can raise their status and as such, it decreases the incentive to comply to IHL.[180] In essence, compliance with IHL only limits what NSAGs can do, and brings them no advantages.[181]

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[176] Bangerter (n 156) 368.
[177] Marco Sassòli, 'Challenges Faced by Non-State Armed Groups as Regards the Respect for the Law Governing the Conduct of Hostilities' in E. Greppi and G.L. Beruto (eds), *Conduct of Hostilities: The Practice, the Law and the Future* (San Giuliano Milanese: FrancoAngeli 2014) 171, 172.
[178] Bangerter (n 156) 369–370.
[179] *ibid* 370–372.
[180] Florquin and Decrey Warner (n 37) 18-20; Bangerter (n 156) 377–379.
[181] Sassòli 'Challenges' (n 177) 172.

Fourthly, armed conflict is often born out of a series of events where both parties assign responsibility to the other party for starting the hostilities. It is often a chicken and egg story, where one party claims that the conduct of their adversary led them to retaliate, and the other party declaring that that particular action was the real spark that started the conflict. In a similar vein, violations of IHL often occur in a response to a party experiencing that the other party is acting in violation of IHL. This leads them to adopt a rhetoric of 'if they are not following IHL, why would we', which in turn leads the other party to mirror their conduct to that of the adversary. In this sense, NSAGs often disregard IHL out of a sense of revenge for the lack of adherence to IHL by warring parties.[182]

The last argument used to not adhere to IHL is not due to any external factors or ideas: it is disregard for the law because NSAGs choose to do so based on what IHL is or what it represents. Some might see IHL as the invention of lawyers that think too idealistically or see it as a creation of Western states or international organisations that NSAGs do not want to comply with.[183] Because IHL is founded by states, and NSAGs by nature are often opposed to the state, they will often view the rules made by the latter to be irrelevant or not binding on them, as they hardly mention NSAGs and are state-centric.[184]

To conclude, the foregoing two sections have collected arguments used by NSAGs to give possible justifications for why they do or do not choose to adhere to IHL. Understanding these reasons can further increase IHL compliance by recognising the considerations made by NSAGs in their relationship with IHL.

[182] Bangerter (n 156) 379–380.
[183] *ibid* 380–382.
[184] Sassòli 'Challenges' (n 177) 171; Jackson (n 159) 13.

Chapter 3: Common Article 3

3.1 Introduction

3.1.1 Adoption

Common Article 3 to the Geneva Conventions has been universally ratified and as such, it forms the basis of rules regulating non-international armed conflict. As discussed in section 2.2, Common Article 3 was the result of decades of consideration and a difficult trade-off between states not willing to give up sovereignty and risk external interference in their internal affairs, and an increasing need to prevent grave human rights violations by the state vis-à-vis their insurgent subjects. The latter concern proved pressing enough to pave the way for the adoption of Common Article 3 in 1949, which provided situations of internal armed conflict to be subject to certain minimum standards of humanity. Because it is the outcome of deliberations between all states and is globally ratified and applicable, its standards are the codification and embodiment of truly foundational principles of both armed conflict and humanity in general.

Because of the minimal scope of the article, those provisions that have been included should not be distant norms to NSAGs, and their inclusion in their internal communications points towards a truly global respect for these rules and obligations in the sense that it is not just states that recognise them as such but groups and individuals as well. Therefore, a very close look will be taken at the provisions of Common Article 3 and the acknowledgment of its norms in NSAGs' internal communications will be assessed in detail.

3.2 Non-International Armed Conflict

3.2.1 Non-International Armed Conflict in Common Article 3

Common Article 3 firstly provides the definition of an internal conflict by defining what it is not – an international conflict. The article is applicable 'in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties', from which two separate elements can be derived. The territorial criterion included in this provision is in a way redundant because of the universal ratification of the Geneva Conventions and as such, there is no territory in which they are not applicable.[185] Even in the very unlikely event of withdrawal from the Geneva Conventions or discovery of new territory, the ICJ in *Nicaragua* recognized the customary status of the article, rendering it applicable even in these cases.[186]

[185] 'States Parties to the Following International Humanitarian Law and Other Related Treaties as of 9-Nov-2020' (*International Committee of the Red Cross,* 9 November 2020) accessed 17 November 2020.
[186] *Nicaragua Case* (n 68) para. 218.

The second criterion requires an armed conflict to exist for this article to be applicable, leaving the question open as to what exactly is to be considered an armed conflict. This term is open to interpretation, and as Commentator to the Geneva Conventions Jean Pictet describes, 'the more specific a list tries to be, the more restrictive it becomes',[187] meaning that the more criteria a definition includes, the more specific cases will fall outside of the scope of such a definition Being specific creates many exceptions. As such, this definition should be effective in encompassing all conflicts that it seeks to include.

However, because the main subject of the article, the state, is to determine the existence of an internal armed conflict, it is often hesitant to bind itself to the norms included in Common Article 3. The open-endedness of the definition then becomes its weakness; the state argues that the vagueness and lack of clear criteria places this specific conflict outside of the scope of the article and thus prevents it from being bound by its norms.[188] To prevent this from happening and to provide a clearer idea of when a conflict can be classified as an non-international armed conflict, in the years following the adoption of the Geneva Conventions, certain criteria were developed by academia and International Courts, of which two have emerged as key criteria.[189]

Firstly, a criterion that meets little opposition is that NSAGs must possess some degree of organisation, distinguishing them from individual looters or rioters, which through such sporadic actions could not be considered a party to the conflict.[190] Organisation is important because it ensures that a party to a conflict is capable of carrying out the obligations imposed upon them by Common Article 3.[191] Organisation entails a responsible command structure, disciplinary rules, military lines and a capacity to exercise authority over the subordinates.[192]

The second key criterion is that a situation must reach a certain degree of intensity to be considered an internal armed conflict. Intensity can mean an increase in amount or seriousness of attacks, involvement of combatants, or even attention by the UN.[193] This requirement seeks to distinguish internal armed conflict from other domestic situations such as riots or spontaneous actions. These two factors were endorsed, confirmed and developed upon by the ICTY. In the 1995 *Tadić* case, the Court gave its own definition of a NIAC, namely 'a situation

[187] Pictet (n 88) 54.
[188] Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002) 33-34.
[189] Jann K. Kleffner, 'The Legal Fog of an Illusion: Three Reflections on 'Organization' and 'Intensity' as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict' (2019) 95 *International Law Studies* 161, 165.
[190] Moir (n 188) 36.
[191] *ibid.*
[192] Moir (n 188) 36; Kleffner (n 185) 168-169.
[193] Kleffner (n 189) 165; ICTY, *Prosecutor v. Boškoski and Tarčulovski,* Case No. IT-04-82-T (Trial Chamber II Judgment) (10 July 2008) para. 177.

of protracted armed violence between governmental authorities and organized groups or between such groups within a state.'[194] In subsequent cases, more extensive detailed situations were described to test whether the threshold of intensity and organisation had been met, but these are additions to these two key criteria and as such, considering the scope of this research, will be left outside of the current considerations. Organisation and intensity as criteria for NIAC have been endorsed by national military manuals, the ICRC, and the ICC, and as such seem to be guiding in the determination of the existence of a NIAC.[195]

3.2.2 Non-International Armed Conflict and Non-State Armed Groups

The applicability of Common Article 3 to NIACs is thus reliant on the nature of the conflict, on the organisation of the NSAGs, and the intensity of the conflict. As explained above, the state ultimately decides whether the threshold of a NIAC has been reached and as such, it would be to the benefit of NSAGs to remove any ambiguity as to their status, as not being recognized as being a party to the conflict would result in their conduct not being regulated by international law and them being fully subject to domestic legislation, which often is not lenient towards secessionists.[196] As such, fulfilling the criterion of organisation would ensure the applicability of IHL to NSAGs. To be recognized as being 'organised', the ICTY in *Boškoski* identified a number of indicators which point towards the fulfilment of the criterion, meaning that not all the requirements have to be fulfilled to qualify for organisation, but they provide indications towards this.[197] These indicators are the existence of a command structure, the military capacity of the armed group, the logistical capacity of the armed group, the existence of an internal disciplinary system and the ability to implement IHL, and the armed group's ability to speak with one voice.[198]

Across the assessed documents, many rules concern themselves with hierarchy, subordinacy, military discipline and so on. Almost all instruments assess at least one of the abovementioned criteria. The vast majority of them make some reference to the existence of a command structure, which can be recognized in rules such as the *Viet Cong* rule 'I will obey

[194] *Prosecutor v. Tadić* (n 81) para. 70.
[195] Kleffner (n 189) 164-165; *Prosecutor v. Boškoski and Tarčulovski* (n 193) para. 175.
[196] See for example: Santiago Cabanas Ansorena, 'Spain Isn't Imposing Excessive Punishment on Catalonia's Leaders. It's Enforcing the Law.' (*Foreign Policy,* 14 November 2019) accessed 20 February 2021.
[197] *Prosecutor v. Boškoski and Tarčulovski* (n 193) para. 193.
[198] *ibid* paras. 194-203; Rogier Bartels, 'The Organisational Requirement for the Threshold of Non-International Armed Conflict applied to the Syrian Opposition' (*Armed Groups and International Law,* 9 August 2012) <https://armedgroups-internationallaw.org/2012/08/09/the-organisational-requirement-for-the-threshold-of-non-international-armed-conflict-applied-to-the-syrian-opposition/> accessed 8 March 2021.

the orders from my superiors under all circumstances',[199] the *Sudan People's Liberational Army's* 'The lower ranks of the SPLA shall obey the higher ranks and the higher ranks shall respect the lower ranks',[200] or the *FARC'*s explicit listing of all ranks in their forces, from Candidate for Commander to Commander in Chief of the Central High Command.[201]

In addition, the sworn loyalty and obedience to the orders of higher ranked soldiers is included in most of the codes, oaths and standing orders. A form of military capacity, meaning the control of territory, the use of military tactics and division of territory into zones, is addressed occasionally, such as the *Armée de Libération Nationale's* 'encourage the troops to move as much as possible, to regroups whenever they have been scattered, and to engage in offensive moves as often as they can',[202] or the 'every officer, cadre or militant must strive to master military science in order to gain more capability so that we are in a position to defend the people more efficiently' by the *National Resistance Army.*[203]

Similarly, logistical capacity, meaning the ability to train and recruit troops and have in place working supply chains is also difficult to distinguish, although some reference to the training regulations in place can be recognized in rules such as the regulations from the *Moro Islamic Liberation Front* who outline standards and training policies, and sporadic reference to marches or other trainings.[204] Some documents refer to internal disciplinary systems, ranging from more formal regulations such as the Unit Disciplinary Committee from the *National Resistance Army,*[205] the *Kosovo Liberation Army's* 'immediate measures of isolation, disarmament and escort to the KLA organs of military justice are to be undertaken against the perpetrators of criminal offences or violations of military discipline',[206] to the more unsophisticated *Irish Republican Army's* 'breaches of the guerrilla code – must be severely dealt with on the spot'.[207]

Although the explicit mention to IHL does not, under this indicator, point towards an ability to implement it, it does show a willingness, such as the *Local Coordination Committee's*

[199] 'II.3. Viet Cong, Vietnam, no date'.
[200] 'III.4 Sudan People's Liberation Army (SPLA), Sudan, 2003'.
[201] FARC 'Belligerence' (2005) <https://web.archive.org/web/20050204145424/http://farcep.org/pagina_ingles/documents/beligerence.html> accessed 10 December 2020'; 'I.2. Conseil National de Libération (CNL), Democratic Republic of the Congo, 1963'.
[202] 'II.1. Armée de Libération Nationale (ALN), Algeria, 1956'.
[203] 'II.6. National Resistance Army (NRA), Uganda, 1982'.
[204] 'V.6. Moro Islamic Liberation Front (MILF), Philippines, 2000'; 'V.2. African National Congress (ANC), South Africa, 1985'; 'II.5. Sendero Luminoso (Shining Path), Peru, possibly 1981'.
[205] 'II.6. National Resistance Army (NRA), Uganda, 1982'.
[206] 'IV.5. Kosovo Liberation Army (KLA), Kosovo, 1998'.
[207] 'II.2. Irish Republican Army (IRA), Northern Ireland, 1956'.

'I will respect … the international laws governing human rights',[208] the *Moro Islamic Liberation Front'*s adherence to specific international legislation such as the Optional Protocol to the Convention on the Rights of the Child and UN Security Council Resolutions,[209] or Colombia's *FARC* and *ELN* obliging their leaders and combatants to study and comply with the rules of IHL that are applicable to their revolutionary war.[210] Lastly, the armed groups ability to speak with one voice, meaning that the leaders can speak for the members, seems to be derived from the numerous pledges of complete loyalty to the chiefs, leaders or commanders of the NSAGs.[211]

Thus, internal communications of NSAGs across the board seek to establish their organisational structure, but it is unclear whether they intentionally do this to fulfil this organisational criterion, or whether it is done out of a necessity to preserve organisation and discipline within the group. Because the primary function of these documents is to regulate the conduct of the members of the organisation, an increase in the number of rules relating to organisational structures can point towards an effort to decrease ambiguousness as to their status and increase their legitimacy. Internal communications can thus serve as evidence as to the existence of a solid organisational structure that fulfils the 'organisation' criterion of being regarded a party to the conflict under the first provision of Common Article 3.

3.3 Affected Persons

3.3.1 Affected Persons in Common Article 3

Common Article 3 continues with a provision taking the principle of distinction into account. It states:

> 'persons taking no part in the hostilities, including members of armed forces who have laid down their arms, and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all cases be treated humanely, without any adverse distinction founded on race, colour, religion, or faith, sex, birth or wealth, or any other similar criteria.'

[208] 'V.8. Moro Islamic Liberation Front (MILF), Philippines, 2010'.
[209] 'IV.7. Local Coordination Committees, Syria, 2012'.
[210] 'V.10. Fuerzas Armadas Revolucionarias de Colombia (FARC) and Ejército de Liberación Nacional (ELN), Colombia, 2009'.
[211] See for example 'IV.6. Mouvement des Nigériens pour la justice (MNJ), Niger, possibly 2006'; 'V.4. Revolutionary United Front (RUF), Sierra Leone, no date'; 'IV.1. Haganah, Israel, 1920'.

The Geneva Conventions of 1949 are the first codified instruments allocating civilians a special status under public international law.[212] It sought to codify the rules applicable to armed conflicts whilst creating separate rules for those who fight and those who do not, creating the problem of how to exactly distinguish between the two.[213] However, modern warfare has evolved in such a way that this distinction had become increasingly vague. Battles up until the end of the nineteenth century were very distinguishable events, with professional armies fighting each other at a distinct location for a period of time. This created a very clear distinction between armies and civilian populations, a concept that became much more blurred in the twentieth century which saw wars evolve into more constantly ongoing events which involved the civilian population much more directly.[214] As a result, even though the 1949 Geneva Conventions codified the principle of distinction, the specific separation of the two groups of combatants and civilians remains vague.

This distinction is even more problematic in the case of non-international armed conflicts, as fighters belonging to armed groups have no professional status as a combatant due to their illegitimacy according to the state. Therefore, the distinction between civilians and combatants is blurred to such an extent in these conflicts that the legal status of combatant ceases to exist, stripping NSAG fighters from combatant privilege and prisoner of war status.[215] But treating those taking up arms against the governments as civilians would pose an obvious problem in that state combatants would not be able to target them, meaning they cannot actively target NSAG fighters. Some argue that belligerent fighters can only be targeted as long as they exercise their 'continuous combat function', and once they lay down arms, they resort back to being civilians.[216] However, in recognizing the practical application of IHL and realizing the realities of NIAC, it would be counterproductive to not recognize combatant status in NIAC. Treating NIAC not as an armed conflict between two groups of armed forces undermines the reality of such situations and additionally, creates an unbalanced set of rules for different parties.[217]

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[212] Helen M. Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press 2011) 112.
[213] *ibid* 113.
[214] Jann K. Kleffner, 'From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference' (2007) *Netherlands International Law Review* 315, 317.
[215] *ibid* 321-322.
[216] Geoffrey Corn and Chris Jenks, 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts' (2011) 33 *University of Pennsylvania Journal of International Law* 313, 316.
[217] *ibid* 362.

Although indirectly, Common Article 3 does seem to recognize the existence of a dissident combatant, but like the definition of what constitutes a non-international armed conflict, the concept of a combatant seems to be derived from what a civilian is not.[218] Civilians are also not directly mentioned in the article, but 'persons taking no part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause …' cannot be targeted, respecting the principle of distinction and the inviolability of non-combatants. This can be concluded from reading this provision in conjunction with a), which prohibits them from being subjected to violence of life and person, which an active targeting of such person would amount to. The status of combatant can be derived from this provision as well, as 'members of armed forces who have laid down their arms' implies the legal existence of armed forces who have not laid down their arms, meaning active fighters.[219]

The second part of this provision reads that all those 'civilians' mentioned are to be treated humanely. In addition, it provides that there cannot be discriminated on 'race, colour, religion or faith, sex, birth or wealth ….' These possible reasons for discrimination were felt to be necessary to be included, as international armed conflicts have the inherent division between parties of nationality, whereas internal dividing factors are often race, religion, or political ideology.[220] The inclusion of 'any other similar criteria' serves to leave no possible justification on the table, ensuring that no legal loophole to justify discrimination on another factor can be successful.[221] The requirement of humane treatment entails the absolute minimum standards that humans are to be treated by and distinguishes them from animals or objects, taking into account principles of humanity and dignity.[222] Although this concept is seemingly straightforward and not expanded upon in the other international legal instruments, it is considered the leitmotiv of the Geneva Conventions.[223] Humane treatment is highly dependent on the specific situation, taking into account sex, age, culture, physical and mental state, religion and other similar factors.[224] In addition, the following section of the articles includes acts that are specifically prohibited to ensure humane treatment.

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[218] *ibid* 318.
[219] Kleffner (n 214) 324.
[220] Pictet (n 88) 55.
[221] *ibid.*
[222] Lindsay Cameron et al, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) 194.
[223] Cordula Droege, 'In Truth the Leitmotiv': The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law' (2007) 89 *International Review of the Red Cross* 515, 516.
[224] Cameron et al (n 222) 193.

3.3.2 Affected Persons and Non-State Armed Groups

Although there exists some ambiguity as to exactly when a dissident fighter can be targeted, the fact remains that some form of the principle of distinction distinguishing between civilians and combatants can be derived from Common Article 3. However, this is more important for the targeting of belligerent fighters, meaning those that belong to a NSAG. For the NSAGs themselves, the principle of distinction is much clearer, as the majority of NIAC occur between NSAGs and government forces. To what extent do NSAGs endorse the principle of distinction in their internal communications?

Almost every examined document addresses the principle of distinction in some way. This is not surprising given the nature of most NSAGs. Resistance against the government is often done out of the name of 'the people of the country', describing them as 'brothers' or 'friends', or to relieve the suppression of the oppressing force on the people of the country.[225] It is often said that winning the hearts and minds of the people is essential in gaining their support to conduct operations against the government, because NSAGs need amenities that local civilians can provide such as shelter, food, and supplies.[226] Actively focusing civilians would defeat that purpose and hinder the capabilities of NSAGs to fight against government forces. As such, it becomes apparent from the assessed documents that often an active distinction is made between innocent civilians and active fighters, the latter only being allowed to be targeted.

Although this principle is addressed across all communications, the exact prohibitions and permissions range from extremely clear to ambiguous and open to interpretation. For example, the *National Transitional Council* very clearly states to 'only target Qadhafi forces … permissible targets include fighters, building, facilities … used for a military purpose.'[227] Another clear example is used by the *United Jihad Council*: 'each constituent group will ensure its Mujahideen shall not target any non-combatant; non-Muslim men, women and children',[228] or the by the *Mouvement des Nigériens pour la justice,* which took an oath and swore on the Koran that they 'will never harm or attack

[225] See for example 'IV.1. Haganah, Israel, 1920'; 'IV.4 Ejército Guerrillero de los Pobres (EGP), Guatamala, possibly 1983'; 'Taliban Issues Code of Conduct' (Al Jazeera, 28 Jul 2009) <https://www.aljazeera.com/news/2009/7/28/taliban-issues-code-of-conduct> accessed 20 May 2021.
[226] Vincent Bernard, 'Interview with Ali Ahmad Jalali' (June 2011) 93 *International Review of the Red Cross* 279, 284-285; FARC 'Belligerence' (2005) <https://web.archive.org/web/20050204145424/http://farcep.org/pagina_ingles/documents/beligerence.html> accessed 10 December 2020.
[227] 'V.11. National Transitional Council (NTC), Libya, 2011'.
[228] 'III.7. United Jihad Council (UJC), Pakistan-India (Kashmir), 2005'.

civilians.'[229] Some also adhere to more specific rules of IHL which prohibit the targeting of persons placed *hors de combat*, such as China's *People's Liberation Army:* 'our army will not kill … any Guomingdang soldiers and officers who have laid down their arms',[230] or '[our objective] … is directed only against fighting troops and not to non-fighting personnel.'[231]

The majority of instruments include some reference to the principle of distinction, albeit in a more cryptic manner open to interpretation, although they still seem to have as a goal to not hurt civilians and only focus efforts on targeting and weakening enemy military targets. Basic rules often proclaim that it is forbidden to attack, kill, abuse or target civilians, where others go further and extend this to the prohibition of improper behaviour, insults, shouting, or even annoying civilians.[232] Other examples highlight the other side of the principle of distinction, meaning the active targeting of enemy combatants, for example in the *ALN's* 'pursue the destruction of enemy forces,'[233] or the previously mentioned *National Transitional Council* example.[234] Another interesting example is the motivation for the *IRA's* change in their interpretation of who can be targeted: 'in September 1969 the existing conditions dictated that the Brits were not to be shot, but after the Falls curfew all Brits were to the people acceptable targets.'[235]

Some references take the principle of distinction into account, although more in an indirect manner. The *Taliban* for example has as a rule that 'who has killed civilians during the Jihad may not be accepted into the Taliban movement',[236] implying that acting contrary to the principle of distinction comes with negative consequences.

It is impossible to distinguish between targeting combatants and civilians if weapons or tactics used are unable to discriminate between the two. For example, the *ELN* includes that 'military operations shall be carried out against enemy forces in such a way as to avoid

[229] 'IV.6. Mouvement des Nigeriéns pour la justice (MNJ), Niger, possibly 2006'.
[230] 'I.1. Workers' and Peasants' Red Army/People's Liberation Army (PLA), China, 1947'.
[231] 'V.7. Moro Islamic Liberation Front (MILF), Philippines, 2006'.
[232] See for example: 'III.6. Lord's Resistance Army, Uganda, 2005'; 'II.6. National Resistance Army (NRA), Uganda, 1982'; III.4. Sudan People's Liberation Army (SPLA), Sudan, 2003'; 'I.4. Sendero Luminoso (Shining Path), Peru, possibly 1981'; 'I.2.Conseil National de Libération (CNL), Democratic Republic of the Congo, 1963'; 'III.5. Ejército Zapista de Liberación Nacional (EZLN), Mexico, 2003'; 'IV.7. Local Coordination Committees, Syria, 2012'.
[233] 'II.1. Armée de Libération Nationale (ALN), Algeria, 1956'.
[234] 'V.11. National Transitional Council (NTC), Libya, 2011'.
[235] 'Text of Irish Republican Army (IRA) 'Green Book' (Book I and II)' <https://cain.ulster.ac.uk/othelem/organ/ira/ira_green_book.htm> accessed 18 December 2020.
[236] 'A New Layeha for the Mujahideen' (*signandsight.com*, 29 November 2006) <http://www.signandsight.com/features/1071.html> accessed 13 March 2021.

indiscriminate attacks',[237] and the *MILF's* prohibition to use anti-personnel mines due to their inherent indiscriminate nature.[238] Although the *MILF* has the explicit mention to this prohibition in their internal communications, the NGO *Geneva Call* has facilitated a *Deed of Commitment* banning such landmines signed by thirty-six non-state actors from thirteen different countries.[239]

The principle of distinction is thus adhered to and endorsed by NSAGs. Almost all NSAGs include some rules as to who can be targeted and who should be actively protected. Civilians and 'the people' are not to be targeted, and military efforts should be focussed against enemy combatants. As such, NSAGs can be said to be fully aware of the principle of distinction and endorse this principle in their conduct.

3.4 Specifically Prohibited Acts

3.4.1 Specifically Prohibited Acts in Common Article 3

Sub-paragraphs (a) to (d) include specifically prohibited acts vis-à-vis the persons mentioned in the first provision of this article. Sub-paragraph (a) prohibits 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture'. Violence to life and person entails committing acts harming either the physical and mental integrity of a person, including violence, starvation, or not providing medical care.[240] Murder is mentioned specifically, and the addition 'of all kinds' serves to ensure that disparities in national laws which have different criteria regarding murder or wilful killing do not result in specific cases falling outside of the scope of this provision.[241] 'Mutilation, cruel treatment and torture', meaning the permanent disfiguration of persons, a serious mental or physical attack upon human dignity, and the intentional infliction of severe pain or suffering with the object of obtaining information or a confession.[242]

Sub-paragraph (b) prohibits the 'taking of hostages', meaning the seizure, detention or otherwise holding of a person accompanied by the threat to kill or injure that person in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release, safety or well-being of the hostage.[243] It is important to note that it

[237] 'III.3. Ejército de Liberación Nacional (ELN), Colombia, possibly 1998'
[238] 'V.6. Moro Islamic Liberation Front (MILF), Philippines, 2000'.
[239] Geneva Call, 'The Third Meeting of Signatories to Geneva Call's *Deeds of Commitment'* (November 2014) *Summary Report.*
[240] Cameron et al (n 222) 204–205
[241] *ibid* 206–207.
[242] *ibid* 208-222.
[243] *ibid* 223.

can occur that persons are first lawfully detained, and once the criteria of the definition are fulfilled during the detention it can transform into a situation of hostage-taking.[244] Hostage-taking is prohibited explicitly because the practice goes against the modern idea of justice in that it is based on the principle of collective responsibility for crime.[245]

Sub-paragraph (c) seems to reiterate the general obligation of humane treatment and repetition of the prohibition of cruel treatment of sub-paragraph (a). It reads that 'outrages upon personal dignity, in particular humiliating and degrading treatment' are prohibited. However, this provision focusses more on the intent behind an act, being humiliation, degradation or any other attack on human dignity, leading to any reasonable person being outraged.[246] Prohibited acts can again both be physical or mental, and include the performance of sexual acts or being subjected to sexual violence, to act as human shields or trench diggers, or other acts that have a high impact on the respect and dignity of a person.[247]

Lastly, sub-paragraph (d) prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all of the judicial guarantees which are recognized as indispensable by civilized people.' It seeks to ensure that no judgment is passed without a fair trial and by an independent and impartial court.[248] Due to the nature of NSAGs and to ensure that this provision can be adhered to in practice, ad-hoc courts or general courts constituted by armed groups can issue judgments in accordance with this provision if they are established in accordance with the laws of the NSAG.[249] NSAG cannot realistically be expected to issue justice through state courts, and if only those courts would be allowed under Common Article 3 to issue fair trials, compliance by NSAGs would be difficult to obtain.

3.4.2 Specifically Prohibited Acts and Non-State Armed Groups

The specifically prohibited acts included in Common Article 3 outline some of the most basic prohibitions under NIACs. To what extent do NSAGs' internal communications conform to these provisions?

Firstly, subparagraph (a) prohibits, in relation to the persons mentioned previously in the article, the 'violence to life and person, in particular murder of all kinds, mutilation, cruel

[244] *ibid* 224.
[245] Pictet (n 88) 54.
[246] Cameron et al (n 222) 226.
[247] *ibid* 228-229.
[248] Pictet (n 88) 54.
[249] Cameron et al (n 222) 235-237.

treatment and torture.' This provision is included in most of the assessed instruments in a very indirect manner, as the prohibition to hurt civilians is found all across. However, some specific reference is also made to the prohibition of murder and torture. The *FARC* and *ELN* establish 'murder and any kind of proven outrages committed against the population'[250] as a crime, as does the *Libyan National Liberation Army*, which also includes the prohibition of torture.[251] The *Local Coordination Committees* also prohibit torture and mutilation.[252] However, seen in conjunction with the principle of distinction as seen above, it is evident that NSAGs prohibit the explicit targeting of civilians and as such, their murder should be implicitly prohibited. However, it is noteworthy that very little explicit prohibition of the specifically prohibited acts in Common Article 3 is made.

Secondly, subparagraph (b) prohibits the taking of hostages. However, only two of the assessed NSAGs explicitly prohibit this practice. Syria's *Local Coordination Committees* pledged in 2011 to 'not take any person hostage for ransom',[253] and in the same year, the *Libyan National Liberation Army* took a similar stance, issuing that the taking of hostages was 'totally prohibited in all situations'.[254] Although none of the other documents explicitly state that hostage taking is a deployable tactic, conduct by groups such as *Boko Haram* kidnapping schoolboys and girls in Nigeria to discourage western education, or a coalition of more than twenty armed opposition groups taking over 200 hundred people hostage has displayed that it does not seem to be a condoned practice.[255] Famously, the *FARC* utilized the taking of hostages for exerting pressure on the Colombian government, adopting the kidnapping of civilians, soldiers and political figures as official policy, often in exchange for ransom to finance their activities.[256] In 2012 however, the armed group issued a statement renouncing the practice, issuing a complete ban, and stated that they sought to

[250] 'V.10. Fuerzas Armadas Revolucionarias de Colombia (FARC) and Ejército de Liberación Nacional (ELN), Colombia, 2009'.
[251] 'III.10. Libyan National Liberation Army, Libya, 2011'.
[252] 'IV.7. Local Coordination Committees, Syria, 2012'.
[253] *ibid.*
[254] 'III.10. Libyan National Liberation Army, Libya, 2011'.
[255] Danielle Paquette, 'Boko Haram Claims the Kidnapping of More than 300 Boys in Nigeria, Marking an Alarming Move West' (*The Washington Post,* 15 December 2021) <https://www.newstimes.com/news/article/Boko-Haram-claims-the-kidnapping-of-300-boys-in-15802276.php> accessed 10 March 2021; Human Rights Watch, 'Syria: Executions, Hostage Taking by Rebels: Planned Attacks on Civilians Constitute Crimes Against Humanity' (*Human Rights Watch*, 10 October 2013) <https://www.hrw.org/news/2013/10/10/syria-executions-hostage-taking-rebels> accessed 10 March 2021.
[256] Steven Grattan, 'Colombia's ex-FARC Leaders Admit Kidnapping and Other Crimes' (*Al Jazeera,* 30 April 2021) <https://www.aljazeera.com/news/2021/4/30/colombias-ex-farc-leaders-admit-kidnapping-and-other-crimes> accessed 19 May 2021.

'resort to other forms of funding and political pressure.'[257] Thus, the prohibition of taking hostages does not seem to be fully endorsed by NSAGs.

Thirdly, subparagraph (c) prohibits outrages upon personal dignity, in particular humiliating and degrading treatment. As outlined above, prohibited acts include the performance of sexual acts or being subjected to sexual violence, to act as human shields or trench diggers, or other acts that have a high impact on the respect and dignity of a person. Some reference is made to the prohibition of such acts. The *ELN* explicitly includes that 'civilians shall not be used as human shields during combat',[258] the *MILF* states that 'any cruel, inhuman or degrading practices … are prohibited in all circumstances',[259] and the *Libyan National Liberation Army* obliges soldiers to 'treat … all persons … with humanity in all situations without unfair discrimination',[260] as well as prohibiting any 'attempts on the life, health, physical, or mental integrity of persons, by murder, torture, mutilation, or rape, inhuman or humiliating penalties or coercive operations; all attacks on human dignity'.[261] The *Local Coordination Committees* pledge to their people that they will refrain from any behaviour undermining human dignity, and refrain from torturing, raping, mutilating or engage in degrading treatment.[262]

Furthermore, many documents include very vague references to how to treat humans, which are much open to interpretation, such as the *Holy Spirit Movement's* 'thou shalt love one another as you love yourself',[263] or the *Shining Paths'* 'maintain good moral conduct',[264] as well as the *Viet Cong's* 'I will be polite to the people, respect and love them.'[265] One can argue that these rules could embody the prohibition of any such practices as are specifically included in Common Article 3, but their ambiguousness and open-endedness cannot be said to be an endorsement of the explicitly prohibited acts as intended by Common Article 3. Thus, some reference to the acts prohibited by paragraphs (a) to (d) exist, but generally speaking NSAGs do not go into enough specifics to see them as an endorsement of IHL and as such, they cannot be said to follow these norms.

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[257] Adriaan Alsema, 'FARC Announces Intention to Release All Hostages, Abandon Kidnapping' (*Colombia Reports,* 26 February 2012) <https://colombiareports.com/farc-announces-to-release-all-hostages-abandon-kidnapping/> accessed 10 March 2021.
[258] 'III.1. Ejército de Liberación Nacional (ELN), Colombia, 1995'.
[259] 'V.6. Moro Islamic Liberation Front (MILF), Philippines, 2000'.
[260] 'III.10. Libyan National Liberation Army, Libya, 2011'.
[261] *ibid.*
[262] 'IV.7. Local Coordination Committees, Syria, 2012'.
[263] 'II.8. Holy Spirit Movement (HSM), Uganda, 1987'.
[264] 'II.4. Sendero Luminoso (Shining Path), Peru, possibly 1981'
[265] 'II.3. Viet Cong, Vietnam, no date'.

Lastly, subparagraph (d) prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people. Most of the inclusions refer to internal regulations to punish their own soldiers for wrongful conduct as discussed under Section 3.2.2, but no explicit mention is made at all of the passing of sentences in a fair way vis-à-vis the persons placed *hors de combat* or taking no active part in hostilities (civilians) as included in the first sentence of Common Article 3.

The *FARC* and *ELN* outline that 'executions may only be carried out for very serious crimes committed by enemies of the people and with the express authorization in each case of each organization's senior governing body',[266] but no further details are provided. The only manner in which this provision is indirectly referenced, is when NSAGs proclaim that they adhere to IHL or IL generally, such as the *ELN* in Colombia and the *MILF* in the Philippines.[267] Many NSAGs do have rules in place discussing the treatment of both prisoners of war and other detained persons, but those rules will be discussed in a later chapter.

As such, it can be concluded that the specifically addressed act of passing sentences without judgement, or the right to a fair trial, is not given any attention by NSAGs. However, it is difficult to attribute this finding to a lack of knowledge or intentional disregard. Due to a lack of access to courts, NSAGs will find it difficult to have the institutions and systems in place to conduct fair trials anyway. Therefore, it is difficult to attach too much value to the lack of recognition of this rule from NSAGs' internal communications, as the reasons for its omission cannot clearly be attributed to a lack of knowledge and cannot be solved merely by ICRC education. However, as the right to a fair trial is considered a core rule in any criminal judication system, it is still vital that it is known by NSAGs.

In conclusion, specifically prohibited acts do not seem to receive much attention in NSAGs' communications. It seems that they are too specific to be included into codes of conduct, which due to their nature and wide dissemination often aim to provide brief internal regulations. However, NSAGs must still adhere to IHL and these specifically prohibited acts and as such, they could benefit from education and training efforts to create awareness about

[266] 'V.10. Fuerzas Armadas Revolucionarias de Colombia (FARC) and Ejército de Liberación Nacional (ELN), Colombia, 2009'.
[267] 'III.1. Ejército de Liberación Nacional (ELN), Colombia, 1995'; V.6. Moro Islamic Liberation Front (MILF), Philippines, 2000'.

which conduct is explicitly prohibited under IHL and as such create further compliance and respect for humanity.

3.5 Wounded and Sick

3.5.1 Wounded and Sick in Common Article 3

Paragraph two of Common Article 3 embodies the founding principles and core values of humanitarian law and humanitarian aid, namely impartiality in the provision of medical care and the principle of the neutrality of medical action.[268] It reads 'the wounded and sick shall be collected and cared for', followed by 'an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.'

The mere existence of Common Article 3 was incentivised by the human rights violations experienced on European battlefields in the twentieth century, so omitting the core principles of humanitarian law in this article would have been unthinkable. Given that these two provisions are mentioned in a new paragraph, they are applicable not only to the non-combatants that were the sole subject of paragraph one and abovementioned specifically prohibited acts. This implies that 'the wounded and sick' can be both military personnel and civilians, making it the only provision in this article that (indirectly) mentions and addresses non-international armed conflict combatants.

The terms 'wounded and sick' are to be interpreted broadly as to apply to anyone that is in need of medical assistance. In addition, such persons may not act in a hostile manner. If one is wounded or sick but still continues to fight, the obligation to care and the duty to protect are not applicable.[269] The duty to 'collect and care' imposes a positive obligation on the parties to the conflict to search for such persons and remove them from dangerous areas, to care for them afterwards, and to respect the medical and religious personnel that seeks to carry out these tasks.[270] In addition, 'an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services…', meaning that the activities of such organisations must not be interfered with by the parties to the conflict,

[268] François Bugnion, 'Birth of an Idea: The Founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent Movement: from Solferino to the Original Geneva Convention (1859-1864*)* (December 2012) 94 *International Review of the Red Cross, suppl. ICRC: 150 Years of Humanitarian Action* 1299, 1304.
[269] Cameron et al (n 222) 252-256.
[270] *ibid* 256-265.

imposing a positive obligation on both state and non-state parties to the conflict to enable such organizations to carry out their humanitarian activities.[271]

3.5.2 Wounded and Sick and Non-State Armed Groups

Again, some reference is made to this founding principle of IHL. As early as 1928, China's *People's Liberation Army's* main rules of discipline included a provision stating, 'give medical treatment to sick and wounded captives.'[272] In addition, other references are made by other NSAGs, such as the *ELN,* stating that they will 'give humanitarian treatment to enemies who have surrendered or been wounded in combat … provide them with the aid necessary for their condition.'[273] The *Libyan National Liberation Army* urges its personnel to 'protect the wounded and sick … provide them with medical care required by their state of health … without distinction,'[274] in addition to imposing the positive obligation to search for the wounded, sick and missing persons as soon as possible. The *MILF* also includes a provision stating, 'collect and care for wounded combatants.'[275]

However, the majority of NSAGs does not explicitly reference that they shall care for and collect the wounded and sick from the battlefield. More often they require the care for the wounded and sick combatants that they have taken captive, so it creates an extra condition to be deserving of such care. The treatment of such captives will be discussed in a later chapter, but for now it suffices to conclude that some reference is made to the founding humanitarian principles of IHL, but that the principle is not unconditionally endorsed. A possible reason for this is that NSAGs might see the care for wounded combatants as the function of the ICRC or other humanitarian organisations, and only impose a similar obligation upon themselves when they have established themselves as the responsible party over enemy combatants, which is the case when they have taken them captive.

Then how much direct reference is made to the ICRC or other humanitarian organisations offering their services to the Parties to the Conflict? The *National Transitional Council* points towards the importance of this principle, as their internal code that is quite limited in size includes multiple provisions on the prohibition of targeting medical personnel, facilities, transports or equipment, as well religious personnel and explicit mentioning of the

[271] Advisory Service on International Humanitarian Law, 'Respecting and Protecting Health Care in Armed Conflicts and in Situations Not Covered by International Humanitarian Law' (ICRC, 2012), 1-2.
[272] 'I.1. Workers' and Peasants' Red Army/People's Liberation Army (PLA), China, 1947'.
[273] 'III.2. Ejército de Liberación Nacional (ELN), Colombia, 1996'.
[274] 'III.10. Libyan National Liberation Army, Libya, 2011'.
[275] V.6. Moro Islamic Liberation Front (MILF), Philippines, 2000'.

inviolability of ICRC, Red Crescent and UN personnel.[276] Other codes also make reference to the respect that must be given to the Red Cross and Red Crescent personnel, the facilitation of the work of humanitarian organisations, or recognition of their symbols.[277]

Again, it does not seem that the work of such organisations is recognized across the armed groups, and only rarely is explicit mention made of the positive obligation to facilitate such work in armed conflicts. Some NSAGs, such as the *Taliban* explicitly order their soldiers to hinder the work of NGOs, stating that 'those NGOs … come under the guise of helping people but in fact are part of the regime … we tolerate none of their activities.'[278] This is extra problematic in that it gathers purely humanitarian aid under 'Western oppression', which implies that they are aware of the applicable rules but actively choose to disregard them, further impeding the compliance of IHL. Thus, taking into account negative attitudes towards the conduct of organisations such as the ICRC and the lack of explicit mentioning of their status and inviolability points towards this rule of IHL not being endorsed by NSAGs.

3.6 Special Agreements

3.6.1 Special Agreements and Non-State Armed Groups

The penultimate provision reads: 'the parties to the conflict shall further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.' Common Article 3 seeks to regulate NIACs, but due to the limited specific rules contained in it and the fact that later APII was necessary to expand on the applicable laws, it falls short in certain areas. It therefore urges parties to a conflict to agree upon a more comprehensive set of rules to protect people engaged in the conflict and to limit suffering.[279] These special agreements can take the form of a recognition of applicable rules drawn upon from human rights law or humanitarian law, a peace or ceasefire agreement, or an agreement to release prisoners.[280]

Naturally, the endorsement of this provision would not be included in existing codes of conduct. Whereas previously discussed rules, norms and principles of IHL can either be

[276] 'V.11. National Transitional Council (NTC), Libya, 2011'.
[277] V.6. Moro Islamic Liberation Front (MILF), Philippines, 2000'; 'III.10. Libyan National Liberation Army, Libya, 2011'; FARC 'Belligerence' (2005) <https://web.archive.org/web/20050204145424/http://farcep.org/pagina_ingles/documents/beligerence.html> accessed 10 December 2020.
[278] 'A New Layeha for the Mujahideen' (n 236).
[279] Cameron et al (n 222) 284.
[280] *ibid.*

addressed or ignored in codes of conduct, the adoption of separate agreements to recognize some articles of the Geneva Conventions are by nature instruments to endorse the current provision. Additionally, this provision differs from the rest of Common Article 3 in that it does not impose upon NSAGs rules and obligations to adhere to; it serves more to further clarify and reassure to what extent NSAGs are aware of the Geneva Conventions and which articles they will strive to adhere to, in addition to Common Article 3. This does not mean that without issuing such special agreements the applicable law is changed, as their obligations under IHL remain unchanged and the issuing of such agreements serves to clarify and ascertain the applicable rules.[281]

Additionally, it serves to urge and encourage NSAGs to declare that they adhere to more articles of the Geneva Conventions to settle in more detail the treatment they will provide to combatants and civilians, the limitations on the weapons used and so on.[282] Until quite recently, many of these declarations issued by NSAGs were in relation to a particular conflict and often issued in bilateral agreements between the group and the other party at the request or assistance of the ICRC, which were often not published and confidential.[283] The recent work of the NGO *Geneva Call* has resulted in more of such declarations becoming public and as such there is a growing amount of source material.[284] With all of this taken into consideration, a look can be taken at whether in practice efforts have been undertaken by NSAGs to bring into force parts of the Geneva Conventions, in compliance with the obligation imposed upon them under this provision.

There exist many different forms of unilateral or *ad hoc* commitments made by NSAGs. Some are meant to provide the public with the political reasoning for taking up arms and stipulating the final objectives of the conflict, such as the *Chinese People's Liberation Army's* Manifesto from 1947, the *Ogaden National Liberation Front's* Political Programme which argues for self-determination against colonial oppression and other crimes committed against their people, or the *Zapatista National Liberation Army* declaring that they fight to gain basic rights such as education and food, and to do so, they will pursue the defeat of the

[281] Mack and Pejic (n 10) 20.
[282] Pictet (n 88) 59.
[283] Mack and Pejic (n 10) 20.
[284] 'Their Words: Directory of Armed Non-State Actor Humanitarian Commitments' (*Geneva Call*) <http://theirwords.org/?title=&country=&ansa=&document_type=3&year=&__keyword_field=> accessed 18 March 2021.

Mexican Federal Army whilst also making reference to the aim to respect prisoners and turn the wounded over to the ICRC.[285]

Many declarations are in line with the obligation under Common Article 3 to commit themselves to the Geneva Conventions, either in general or specific terms. As early as 1948, the Jewish Agency of Palestine declared its commitment to the 1929 Geneva Conventions in regard of combatants and civilians.[286] The *South West Africa People's Organisation* briefly states that 'fundamental rules protecting the dignity of all human beings must be upheld at all times', and therefore it 'intends to respect and be guided by the rules of the four Geneva Conventions … and 1977 Additional Protocol.'[287] Many other organisations follow such statements, such as the *National Democratic Front of the Philippines* pledging adherence to Common Article 3 and Additional Protocol II issued in a 160 page commitment,[288] the *African National Congress of South Africa* commitment to 'respect and be guided by the general principles of IHL applicable to armed conflicts' and 'wherever practically possible … [they] will endeavour to respect the rules of the four Geneva Conventions …',[289] and the *Kurdistan Workers Party* 'undertakes to respect the provisions of the four Geneva Conventions of 1949 and Protocol I of 1977 … in its conflict with the authorities and to treat those obligations as having the force of law within its own forces and the areas within its control.' [290]

However, the majority of unilateral agreements issued by NSAGs focus on specific issues, issuing statements committing themselves to banning certain conduct. The work

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[285] 'Manifesto of the Chinese People's Liberation Army' (*Geneva Call*) <*http*://theirwords.org/media/transfer/doc/cn_pla_1947_03-60f514c30801601e9e3a89d86c6dc956.pdf> accessed 18 March 2021; 'Political Programme of the Ogaden National Liberation Front (ONLF)' (*Geneva Call*) <http://theirwords.org/media/transfer/doc/et_onlf_02-3c7a7281a188e37a9c88003e82188845.pdf> accessed 20 March 2021; Declaration of War of the Zapista National Liberation Army (EZLN) (*Geneva Call*) <http://theirwords.org/media/transfer/doc/1_mx_ezln_1994_06-7cc964b9c2a07e7d72c8f346bca97aa0.pdf> accessed 20 March 2021.

[286] Iddie Myerson, D. Ben-Zevie, 'Comité Exécutif de l'Agence Juive de Palestine et de la Vaad Leumi' (*Geneva Call*) <http://theirwords.org/media/transfer/doc/ps_agence_juive_vaad_leum_1948_01-5bf0dccc947f8bc96df8f7ac6eaeffa4.pdf> accessed 21 March 2021.

[287] 'South West Africa People's Organisation – SWAPO Declaration to the International Committee of the Red Cross – ICRC, 15 July 1981' (*Geneva Call*) <*http*://theirwords.org/media/transfer/doc/na_swapo_1981_01-c69993289a437a48ccd467ea42798b25.pdf> accessed 24 March 2021.

[288] 'Declaration of Undertaking to the Apply the Geneva Conventions of 1949 and Protocol I of 1977, National Democratic Front of the Philippines' (*Geneva Call*) <http://theirwords.org/media/transfer/doc/1_ph_ndfp_2005_20-11d48a9675a2eaeaba19db0162c8ab09.pdf> accessed 24 March 2021.

[289] 'ANC Declaration to the International Committee of the Red Cross-ICRC 28 November 1980' (*Geneva Call*) <http://theirwords.org/media/transfer/doc/za_anc_mk_1980_01-bd1666a96887dfd0b39c39635360b04f.pdf> accessed 24 March 2021.

[290] 'Declaration of Application of the Geneva Conventions of 1949 and Protocol I of 1977, PKK' (*Geneva Call*) <http://theirwords.org/media/transfer/doc/sc_tr_pkk_hpg_1995_06-b6a1feaa089eb4beb4e3c68b4b0d9f58.pdf> Accessed 24 March 2021.

aforementioned *Geneva Call* cannot be understated, as it took the lead on having NSAGs commit themselves to so called *Deeds of Commitment.* One of the most recent examples is the ban on anti-personnel mines, a document which dozens of NSAGs signed.

It is interesting to note which principles of IHL underly the argumentation used by NSAGs in supporting their decision to adhere to this ban. The majority of NSAGs such as the *Lahu Democratic Front,* the *Kuku National Organisation,* and the *Free Life Party of* signed the document issued by *Geneva Call* itself, noting anti-personnel mines inhumane and indiscriminate nature, recognizing that their use is not proportional to the aims pursued, and directly recognizing that they are forbidden to employ them derivate of IHL.[291] Some organisations however issued their own documents, which better provides their own reasoning for adhering to this ban. The *Republic of Somaliland* for example bans the use of the mines due to their obligations under IHL such as the Ottawa Declaration of 1997, and address that such mines target, kill and maim innocent civilians and have other severe consequences even years into the future. Additionally, reference is made to the effect anti-personnel mines have on economic development, refugees, displaced persons, and children in particular.[292] The *Sudan Peoples Liberation Army* makes a sole reference to the indiscriminatory nature of such mines,[293] the *United Jihad Council* refer to wanting to 'end the suffering and casualties caused … frequently civilians and especially children',[294] and the *Taliban* also refers to the effect they have on innocent civilians, especially women and children and how such mines pose an obstacle for the rebuilding of Afghanistan.[295]

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[291] 'Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and For Cooperation in Mine Action, Lahu Democratic Front' (*Geneva Call)* <http://theirwords.org/media/transfer/doc/sc_mm_ldf_2007_21-4ed0eb17fb6c940b15ce82f746244ea9.pdf> accessed 26 March 2021; 'Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and For Cooperation in Mine Action, Kuki National Organisation' (*Geneva Call)* <http://theirwords.org/media/transfer/doc/sc_in_kno_kna_2006_02-83b0954f998410f4ac01b3c9e7d9aab3.pdf> accessed 26 March 2021; 'Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and For Cooperation in Mine Action, Free Life Party of Kurdistan' (*Geneva Call*) <http://theirwords.org/media/transfer/doc/sc_ir_pjak_hrk_2010_19-84eb09e0a97b7fe214222c944d517441.pdf> accessed 26 March 2021.

[292] 'Golaha Wakiillada, Somaliland' (*Geneva Call*) <http://theirwords.org/media/transfer/doc/sc_so_somaliland_1999_23-55690103586643b84ddd57aace3e74a2.pdf> accessed 28 March 2021.

[293] 'Resolution on Problem Posed by Proliferation of Anti-Personnel Mines on Liberated Parts of New Sudan, Sudan Peoples Liberation Army (SPLM) (*Geneva Call*) <*http*://theirwords.org/media/transfer/doc/sc_sd_splm_a_1996_07-f22cfb3dee8032a783d5df4c3d1f2bae.pdf> accessed 28 March 2021.

[294] 'Declaration of a Total Ban on Anti-Personnel Mines in Kashmir, U.J.C' (*Geneva Call)* <http://theirwords.org/media/transfer/doc/ujc_ban_declaration-4f52eefc77384a8be9c7d0a1b87626a5.pdf> accessed 28 March 2021.

[295] 'Taliban of Afghanistan, Statement of the Islamic Emirate of Afghanistan on the Problem of Landmines, 06 October 1998' (*Geneva Call)* <http://theirwords.org/media/transfer/doc/ut_af_taliban_1998_01-d631e9853b6909a692f10408438eda18.pdf> accessed 28 March 2021.

Thus, it seems that NSAGs commit themselves to such pledges because they recognize that the use of anti-personnel mines goes against foundational principles and norms of IHL, such as the principle of distinction, proportionality, and indiscrimination, and they recognize the devasting effect they have on vulnerable civilians, in particular women and children, and also recognize how deployment of mines can have economic and human consequences that can persist until decades after conflict is over.

Another area where NSAGs have widely stated their commitment towards banning the practice is that of child soldiers. The employment of child soldiers is generally considered to be forbidden, but ambiguity exists regarding the age under which it is illegal to conscript children into the armed forces.[296] There does seem to be consensus that recruitment should never happen under the age of 15, but disagreement exists whether children between the ages of 16 and 18 could be employed in customary international law.[297] However, NSAGs' communications do seem to pledge themselves to not conscript any children under the age of 18 into their armed forces, such as the *Karenni National Progressive Party*, the *Justice and Equality Movement Sudan,* the *Chin National Front,* and the *Supreme Military Council*, pointing towards an acceptance of the prohibition of conscripting any child under the age of 18 into the armed forces.[298]

These findings are interesting for this current research as it clearly shows which issues NSAGs feel strongly about. Their commitments point towards the inherent immorality of certain conduct such as child soldiers and mines, affirming that these norms of IHL are endorsed by NSAGs to a wide extent. In complying with the provision of Common Article 3, NSAGs do issue documents issuing compliance with the Geneva Conventions or specific articles thereof. However, it is important to note that without the active role of the ICRC and *Geneva Call*, chances are that much less of these compliance documents would have been issued, based on the direct reference NSAGs make to these organisations and by using the exact wordings that they propose. As such, the ban on anti-personnel mines and the

[296] ICRC 'Customary International Humanitarian Law' (n 73) rule 136.
[297] *ibid.*
[298] 'Deed of Commitment, Karenni National Progressive Party' (*Geneva Call*) <http://theirwords.org/media/transfer/doc/sc_mm_knpp_ka_2007_10-185315c26ac6de1e465dd6108b6d732c.pdf> accessed 25 March 2021; 'Justice & Equality Movement Sudan (JEM) (*Geneva Call*) <http://theirwords.org/media/transfer/doc/jem_renewed_command_order_2015-a4d52a78ef3c99c2e0f4d0ae096de884.pdf> accessed 25 March 2021; 'Deed of Commitment, Chin National Front' (*Geneva Call*) <http://theirwords.org/media/transfer/doc/mm_cnf_cna_2009_05-5d9f8e63936f9d1dd82b23797c05be93.pdf> accessed 25 March 2021; 'A Statement about the Recruitment of Child Soldiers, Supreme Military Council' (*Geneva Call*) <http://theirwords.org/media/transfer/doc/fsa-280a7e3c5cb7d3512fa8d731dfed53c4.pdf> accessed 25 March 2021.

prohibition on the use of child soldiers seem to be endorsed by NSAGs, but compliance with other articles of the Geneva Conventions and other norms of IHL should still be pursued.

3.7 Legal Status of the Parties to the Conflict

3.7.1 Legal Status of the Parties to the Conflict in Common Article 3

Finally, Common Article 3 stipulates that 'the application of the preceding provisions shall not affect the legal status of the Parties to the conflict.' Agreeing that application of the rules by non-state actors does not provide them with any legitimacy was essential to the adoption of Common Article 3 and without it, states would not have signed and ratified the article. The importance of this provision has been discussed in depth in Chapter 2. Additionally, this provision merely states as a fact that application of the law does not in any way alter the legal status of NSAGs, so there is nothing to be gathered from the communications of NSAGs that could either endorse or diverge from this provision. Any reference made to being the continuation of a former ruling party, being the one true and legal government, or any such variations on establishing themselves as a party with full legal personality on par with the government does not in any way change the legal status of such groups.[299]

[299] See for example: 'Text of Irish Republican Army (IRA) 'Green Book' (Book I and II)' <https://cain.ulster.ac.uk/othelem/organ/ira/ira_green_book.htm> accessed 18 December 2020.

Chapter 4: Customary International Humanitarian Law and Non-State Armed Groups

4.1 Introduction

4.1.1 The ICRC Study

Common Article 3 is applicable to parties involved in situations of non-international armed conflict due to its universal ratification by states. That does not render it the only applicable legislation, as customary international law is to be applied regardless of whether states agree to it. Customary international law as a source of international law is included in art. 38(b) of the ICJ Statute, reading 'international custom, as evidence of a general practice accepted as law'.

In order for a rule to be regarded as international custom, it needs to fulfil two separate components, as confirmed by the Court in *Legality of the Threat or Use of Nuclear Weapons* as being *opinio juris* and state practice.[300] The objective element, state practice, is derived from the actual conduct of states, who through behaving in a certain way indirectly confirm what customary laws they conform to. *Opinio juris* entails that any conduct undertaken by a state is done so out of a belief that such conduct is legally binding. As such, it is the subjective element to customary international law.[301] The only exception to being exempt from being subjected to a rule of customary international law is if a party has persistently expressed its rejection of such a rule.[302] The applicability of international humanitarian law to such groups is born out of the underlying principle of international law that the requirements of international life determine the status of its subjects, meaning that it serves international law and its community that NSAGs conduct is regulated by its laws and rules to counter human rights abuses and ensure fair fighting and conduct in armed conflicts.[303] The discussion in Section 2.3 has outlined that NSAGs are bound by customary international law and as such, it is necessary to compare their internal communications with this source of law.

In an extensive study from 2005 the ICRC recognized 161 rules of customary international law applicable to armed conflict.[304] In the introduction, the objective was identified as capturing the clearest possible 'photograph' of customary IHL as it stands today (2005).[305] It is obvious that an extensive discussion of each individual rule is both redundant

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[300] ICJ; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996) ICJ Reports 1996, 226, para. 64.
[301] Christian Dahlman, 'The Function of *Opinio Juris* in Customary International Law' (2012) 81 *Nordic Journal of International Law* 327, 329-330.
[302] ICJ, *Fisheries Case (United Kingdom v. Norway)* (Judgment of December 18th) ICJ Reports 1951, 131; 19; Dino Kritsiotis, 'On the Possibilities of and for Persistent Objection' (2010) 21 *Duke Journal of Comparative & International Law* 121, 127-134.
[303] Sivakumaran 'Binding' (n 95) 373; *Reparations for Injuries* (n 39) 178.
[304] ICRC 'Customary International Humanitarian Law' (n 73).
[305] *ibid* xvii.

and unnecessary in the scope of the current research. As such, rules applicable to a specific concept or principle will be discussed together, to see whether norms and principles as confirmed in the study as belonging to the realm of customary IHL are also recognised by NSAGs. This is in line with the goal of this thesis: to recognise principles and norms that find recognition as the *opinio juris* of NSAGs. It is not to see which specific rules have been included or excluded in their internal communications, but the underlying principles.

In assessing which rules of customary international law are included in NSAGs' internal communications, it is important to avoid overlap with those laws that have already been addressed in depth in the previous chapter due to their inclusion in Common Article 3. As just addressed, there exists a considerate amount of overlap between treaty law and customary international law, and the two sources influence each other and shape the international moral and legal framework. Therefore, only the rules of customary law that go beyond what has been discussed in Chapter 3 will be discussed below.

4.2 Principle of Distinction

4.2.1 Principle of Distinction in the ICRC Study

Although Section 3.3 has already dealt with the principle of distinction, customary international law establishes additional guarantees applicable in NIACs that aim to safeguard the distinction between civilians and combatants. Any rule of customary international law that goes beyond the minimal interpretation of distinction as included in Common Article 3 will be discussed below.

Echoing Common Article 3, the first rules of the customary humanitarian law study deal with the obligation for parties to a conflict to distinguish between civilians and combatants, followed by four rules extending this principle to objects.[306] Objects in this sense encompasses mainly buildings of which the primary purpose is one of civilian nature, meaning hospitals, dwellings, schools, markets and other civilian areas. Additional to the basic concept of distinction, these rules prohibit acts that seek to spread terror against the population.[307]

The void left by Common Article 3 in what to classify NSAGs' fighters as is unfortunately not filled by customary international law. Rule five reads that *'*civilians are persons who are not members of the armed forces *... '*, which implies that dissident fighters are civilians, because they are not a part of the organized governmental armed forces. Rule six strips civilians from their protected status 'for such time as they take a direct part in hostilities',

[306] ICRC 'Customary International Humanitarian Law' (n 73) rules 1-10.
[307] *ibid* rule 2.

which would seemingly solve the dissident fighter problem by creating the legality for government forces to actively target NSAGs' fighters when they are actively fighting. However, the problem is not solved because of the lack of a proper delimitation of what entails 'direct participation'. Is a fighter that lays down his gun as soon as the government soldier targets him a civilian? The lack of a proper interpretation of direct participation creates uncertainty, and state practice has remained silent on the issue. A clearer rule, interpretation of the direct participation problem and recognition of NSAGs' combatant status would create clearer rules on the principle of distinction in combat and enhance the protection of the civilian population against attack.[308]

Tying in with the principle of distinction is the prohibition of indiscriminate attacks, a logical consequence of the obligation to distinguish between combatants and civilians. Attacks which are not directed at a military target or are incapable of making this distinguishment are prohibited. Cluster weapons, biological weapons and bombardments are all means of warfare that are not able to solely target a military objective, and the risk of collateral civilian damage is inherent to the use of such weapons and thus, they are prohibited.[309]

The principle of distinction is not one that is absolute. It does not mean that once distinguished every military objective can be targeted to a full extent even if it means civilian casualties. Rule fourteen outlines the principle of proportionality, which imposes upon the parties to a conflict the obligation to weigh the military advantage gained from an attack against the possible damage incurred upon civilians and civilian objects.[310] If this damage is disproportionate to the military advantage gained, the attack is illegitimate. A military advantage is seen as an attack that makes a substantial, relevant and proportional contribution to the objective of the military attack. The weighing of such an advantage and possible losses is thus to be conducted in each case of a possible attack.

Lastly, tying in with the principle of distinction is the principle of precaution. This principle, and the more detailed rules accompanying it such as the obligation to verify that targets are of military nature, to warn civilian populations in the event of an attack, and to attack objects that have less change of causing collateral damage, imposes upon parties to a conflict the obligation to take into account civilian populations in both their attacking and defensive operations. Whilst attacking, parties must verify that their targets are of military nature, must deliberately choose their methods of warfare, must warn civilian populations in case of

[308] ICRC 'Customary International Humanitarian Law' (n 73) rule 6.
[309] *ibid* rules 11-13
[310] *ibid* rules 14.

attacking, and must do everything in their power to limit the effects of warfare, possible injuries, casualties, and damages to the civilian population of the attacking party.[311]

4.2.2 Principle of Distinction and Non-State Armed Groups

Although as discussed in Chapter 3 the principle of distinction itself seems to be one of the most established and endorsed principles of international humanitarian law by NSAGs', the abovementioned more detailed provisions do not receive much attention. *ELN* does explicitly state that 'operations shall be carried out against enemy forces in such a way as to avoid indiscriminate attacks'[312], as well as that they will 'work to reduce the maximum unnecessary human sacrifice and suffering by the enemy.'[313] The *United Jihad Council* recognize the inviolability of 'public places like, schools, religious places, hospitals, markets and population settlements', and 'groups shall not strike near human settlements.'[314] The *National Transitional Council* states that their fighters cannot 'harm (public) buildings, unless Qadhafi forces are using them for hostile purposes, and such harm is absolutely necessary',[315] thus taking into account the principle of proportionality and precaution. *Kosovo Liberation Army*'s phrasing of 'opening fire unnecessarily is prohibited'[316] could point towards some recognition of abovementioned principles, but to say it is a direct recognition or confirmation would be far-fetched.

Thus, not a lot of recognition is giving to the principles accompanying the principle of distinction, such as precaution, necessity and proportionality. Additionally, the main focus of internal regulations seems to distinguish between combatants and civilians; a similar separation between buildings and objects dependent on their military or civilian nature seems to be mainly absent. As such, although the principle of distinction itself is widely recognized, its more detailed and extended protections could be more widely disseminated.

4.3 Specifically Protected Persons and Objects

4.3.1 Specifically Protected Persons and Objects in the ICRC Study

[311] *ibid* rules 15-24.
[312] 'III.2. Ejército de Liberación Nacional (ELN), Colombia, 1996'.
[313] *ibid.*
[314] 'III.7. United Jihad Council (UJC), Pakistan-India (Kashmir), 2005'.
[315] 'V.11. National Transitional Council (NTC), Libya, 2011'.
[316] 'V.5. Kosovo Liberation Army (KLA), Kosovo, 1998'.

The distinction between combatants and civilians does not entail that only civilians are free from being deliberately targeted. Different groups of personnel and objects exist that enjoy a more extensive protection under customary international law.

Firstly, medical and religious personnel, medical units, and medical transports, are to be protected, stemming both from the obligations imposed upon parties from Common Article 3 and as rules of customary law. In order to care for the wounded and sick and provide humanitarian aid, medical and religious personnel that are exclusively assigned to perform these duties are not to be targeted and also imposes a positive obligation on combatants, in that they have to respect and protect such personnel.

Arguably, this obligation is extended even further in that combatants have to actively defend medical and religious personnel. Medical and religious personnel enjoy their protection from being targeted in so far as they are exclusively assigned to their tasks and lose their protection as soon as it is used to perform acts harmful to the enemy. Without these protections, medical and religious personnel would be unable or at least experience highly dangerous situations whilst performing one of the most important and underlying principles of humanitarian law in caring for the wounded and sick on the battlefield.[317] In addition, a number of civilians with specific tasks in conflicts are separately mentioned in the study on customary rules of IHL. Humanitarian relief personnel, peacekeeping personnel and journalists all enjoy protection under customary law due to their status as civilians but are specifically addressed to reiterate their specific functions during armed conflict and to impose upon combatants the duty to respect and protect them from attack.[318]

Not only people and objects enjoy specific protections. Safe zones, demilitarised zones and non-defended localities are all exempt from being targeted. These protections are derivate of the protection awarded to civilians and the care for the wounded and sick; without these special zones, personnel cannot to the fullest extent ensure the highest level of care and protection to vulnerable people.[319] The highest level of care and consideration of the principles of proportionality and necessity must be exercised in military operations to avoid damage to culturally significant buildings and objects.[320] Installations containing dangerous forces, meaning constructions such as dykes and nuclear power plants, cannot be targeted and a high level of consideration is to be taken in military operations concerning such installations, in order

[317] ICRC 'Customary International Humanitarian Law' (n 73) rules 25-30.
[318] *ibid* rules 31-34.
[319] *ibid* rules 35-37.
[320] *ibid* rule 38.

to prevent populations from being subjected to dangerous natural forces.[321] Lastly, the natural environment cannot be the target of an operation, and military commanders must take into consideration the effects of their operations on the environment, meaning that long-term and severe damages to the soil, woods or water supplies is prohibited.[322]

4.3.2 Specifically Protected Persons and Objects and Non-State Armed Groups

Only one mention is made of the inviolability of installations and other constructions containing natural forces. Colombia's *ELN* prohibits any such targeting, stating that 'we shall not target installations more useful to the community' and 'installations containing dangerous forces such as dams or nuclear material shall not be attacked.'[323] However, most of the rules dealing with specifically protected persons and objects do not receive any attention. The inviolability of journalists, culturally significant objects (bar one brief mentioning in the *Libyan National Liberation Army*), and access for humanitarian personnel all are not addressed.[324]

Some of this neglect can be considered surprising; one of the main objectives and necessities of insurgent warfare is winning the hearts and minds of people, and therefore the absence of any rules condemning conduct that damages some of their most essential necessities for survival in dams or plants, or additionally sacred places which are so culturally significant that damaging them would certainly create tension between NSAGs and local populations and even regional or global outrage.[325] Regarding the omittance of journalists in internal communications, it could be argued that due to their status as civilians, the many references to the principle of distinction already inherently render journalists inviolable.

In general, the neglect of any reference made to the subjects discussed above points either towards a gap in the knowledge, or simply a diverging opinion on the applicable rules.

4.4 Specific Methods of Warfare

4.4.1 Specific Methods of Warfare in the ICRC Study

The majority of rules concerning methods of warfare regulate the conduct surrounding tactics of warfare such as perfidy, denial of quarter, and deception. However, some rules dealing with property and access to humanitarian relief do directly concern civilians.

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[321] *ibid* rules 38-42.
[322] *ibid* rules 43-45.
[323] 'III.1. Ejército de Liberación Nacional (ELN), Colombia, 1995'.
[324] 'III.10. Libyan National Liberation Army, Libya, 2011'.
[325] See for example Vasiliki Georgopoulou, 'The Destruction of Cultural Heritage by ISIS as a Threat to Security' (Archaeology Wiki, 29 November 2016) <https://www.archaeology.wiki/blog/2016/11/29/destruction-cultural-heritage-isis-threat-security/> accessed 24 March 2021.

It is not allowed to pillage, meaning that occupying powers cannot forcibly take property from civilians and claim it for personal use. The prohibition of pillage included in rule 52 is to be differentiated from rule 51(c) which stipulates that 'private property must be respected and may not be confiscated', meaning that private property can be seized by the occupying power in order to use the property during the occupation. Ownership of the private property always remains with the initial person, and when peace is made, compensation must be paid to him or her.[326]

Starvation cannot be used as a method of warfare. In addition, destroying objects that are essential to the survival of the civilian population such as food, water, medicine, and shelters. If a civilian population is struggling, humanitarian aid personnel must be allowed to freely provide their services and be provided to freely move around the area where the civilian population is in need of aid. In essence, the civilian population may not be used as a means of waging war and must be left outside of military tactics.[327]

The improper use of flags and emblems is strictly prohibited. This includes symbols of the Red Cross, the UN, or other partaking or third states. Concluding an agreement to suspend combat with the intention of attacking by surprise is also prohibited.[328]

4.4.2 Specific Methods of Warfare and Non-State Armed Groups

Regarding the tactics such as perfidy, denial of quarter, and deception, only two of the manuals and codes prohibit such conduct. The *ELN* has stated that 'no acts shall be undertaken with the sole purpose of spreading terror among the population',[329] and the *Libyan National Liberation Army* likewise prohibits the spread of terror among the population.[330] No other mentions of any prohibited conduct are included. An explanation for this could lie with the nature of the codes of conduct, being intended for soldiers who in theory should not make any such decisions regarding warfare tactics. The codes across the board confirm the importance of discipline and following the orders of superiors, who should be the ones making tactical decisions and distributing them to the lower ranks. As such, it cannot be considered to be surprising that rules that are mainly applicable to commanders and chiefs are not included in documents aimed at subordinate fighters.

[326] ICRC 'Customary International Humanitarian Law' (n 73) rules 51-52.
[327] *ibid* rules 53-56.
[328] *ibid* rules 58–64.
[329] 'III.1. Ejército de Liberación Nacional (ELN), Colombia, 1995'
[330] 'III.10. Libyan National Liberation Army, Libya, 2011'.

In confirmation of this notion, an explicit confirmation of a rule of customary international law that is aimed at the individual conduct of precisely those that occupy places where fighting takes place can be recognised. The prohibition to pillage as included in rule 52 finds much support in internal communications. It is such a fundamental rule of internal discipline that certain extremely small codes or brief oaths acknowledge it, such as the *Mouvement des Nigériens pour la justice*'s recruits who promise 'to obey their chiefs, never to attacks civilians, nor to loot'[331] and additionally swear on the Koran prior to entering military bases to never harm civilians or their property. Many other codes include similar rules, such as the *Workers' and Peasants' Red Army, New People's Army,* and the *Revolutionary United Front,* which all include minor variations on the phrasing 'do not take a single needle or piece of thread from the masses'.[332]

Other internal communications convey the same message, such as *Shining Path*'s 'Do not steal',[333] *National Resistance Army*'s 'Never take anything in the form of property from any members of the public, not even somebody's sweet bananas or sugar-cane…',[334] and the *Sudan People's Liberation Army*'s 'a member of the SPLA shall not steal any property or obtain any goods by false pretences, or take anything from a person without paying for it …'.[335] Then there are also other NSAGs which go into some more depth to reiterate how important it is to refrain from taking property from the masses, seemingly to confirm their status as a 'friend of the people'. The *Taliban* for example, state that 'taking care of public property and the lives and property of the people is considered one of the main responsibilities of a Mujahed; you must try very hard to carry out this responsibility…'.[336] In its 'oath of honour', the *Viet Cong* state that they 'swear that in my relationship with the people I will do three things …: I will respect, protect, and help the people; I will not steal from them …'.[337] The majority of all NSAGs thus include a prohibition on pillaging in their internal communications, with some last examples being 'I will respect our people, their property, and their customs'[338] from the *Ejército Guerrillero de los Pobres*, 'I pledge not to engage in any form of theft or looting…'[339] from the *Syrian Coordination Committees,* or *Kosovo Liberation Army'*s 'commanders … will

[331] 'IV.6. Mouvement des Nigériens pour la justice (MNJ), Niger, possibly 2006'.
[332] 'I.1. Workers' and Peasants' Red Army/People's Liberation Army (PLA), China, 1947'; 'I.3. 'New People's Army (NPA), Philippines, 1969'; 'I.4. Revolutionary United Front (RUF), Sierra Leone, no date'.
[333] 'II.4. Sendero Luminoso (Shining Path), Peru, possibly 1981'.
[334] 'II.6. National Resistance Army (NRA), Uganda, 1982'.
[335] 'III.4. Sudan People's Liberation Army (SPLA), Sudan, 2003'.
[336] 'III.9. Taliban, Afghanistan, 2010.'
[337] 'IV.2. Viet Cong, Vietnam, no date'.
[338] 'IV.3. Ejército Guerrillo de los Pobres (EGP), Guatamala, possibly 1983'.
[339] 'IV.7. Local Coordination Committees, Syria, 2012'.

immediately stamp out negative tendencies and the abuse of persons and private property.[340] Thus, the prohibition to pillage and take property of the civilian population is widely acknowledged in international communications.

Lastly, some rules recognise the prohibition of damaging objects essential to the survival of the population such as food, water, medicine, and houses. The *Moro Islamic Liberation Front* stipulates that combatants should not 'cut or burn palm trees or fruitful trees or ruin dwellings. Don't slay sheep, a cow, a camel or other animals except for food.'[341] 'Water supplies shall not be poisoned',[342] the prohibition of 'intentional deprivation of food, drinking water, and indispensable medicines',[343] 'do not damage crops',[344] 'do not … trample other people's property, do not march across the villagers fields',[345] 'do not destroy the people's crops',[346] 'respect the property of farmers',[347] and 'when staying in other people's houses I will treat them as I would my own house'[348] are many other instances of the recognition of some aspects of this customary rule. However, this customary rule entails a prohibition of any damage to all objects essential to survival, and many of the codes only prohibit certain parts or aspects of the rule. As such, some confirmation can be found, but to affirm that across-the-board NSAGs adhere to the total prohibition of damaging such objects would be a bridge too far.

4.5 Use of Weapons

4.5.1 Use of Weapons and Non-State Armed Groups

Due to the brevity of this field of law, the applicable rules and their acknowledgment in the assessed documents will be analysed together.

Different weapons and methods of conducting warfare are prohibited under customary international law. The main purpose of these prohibitions is to limit the damage done to combatants of the parties to a conflict. Rule 71 continues the trend in customary law of underlining the principle of distinction as one of the most important principles that must be adhered to by parties to a conflict. It prescribes that the 'use of weapons which are by nature indiscriminate is prohibited', prohibiting those weapons that cannot solely target military targets and have a high chance of damaging civilians or civilian objects without them being the

[340] 'V.5. Kosovo Liberation Army (KLA), Kosovo, 1998'.
[341] 'V.7. Moro Islamic Liberation Front (MILF), Philippines, 2006'.
[342] 'III.1. Ejército de Liberación Nacional (ELN), Colombia, 1995'.
[343] 'III.10. Libyan National Liberation Army, Libya, 2011'.
[344] '1.1. Workers' and Peasants' Red Army / People's Liberation Army (PLA), China, 1947'.
[345] '1.2. Conseil National de Libération (CNL), Democratic Republic of the Congo'.
[346] 'I.3. New People's Army (NPA), Philippines, 1969'.
[347] 'II.4. Sendero Luminoso (Shining Path), Peru, possibly 1981'.
[348] 'II.3. Viet Cong, Vietnam, no date'.

main goal of the action, but being considered collateral damage.[349] Weapons that are forbidden under customary law due to them causing superfluous or unnecessary suffering are laser weapons, incendiary weapons, chemical, nuclear and biological weapons, booby-traps, and exploding or expanding bullets. The use of anti-personnel mines is highly discouraged, and in case of use parties must aim to document their locations as detailly as possible and limit to the fullest extent the possible damage to civilians.[350]

Very little reference to any specific weapons is made in the assessed documents. Two instances of restrictions on the weapons used in conflict can be discerned. Firstly, the *ELN* in Colombia dictates in their subsection on the methods and means of warfare that 'no poisonous gases shall be used',[351] and the *Libyan National Liberation Army* dictates that it only makes use of weapons that are allowed under national legislation.[352] Many other internal regulations do contain rules on maintaining weapons and ammunition, but no reference is made to a prohibition on the use of certain weapons.

This, in a way, cannot be considered unsurprising if one recognises the objective of internal regulations and who publishes them and for who they are intended, namely higher command or authoritative figures and subordinate fighters respectively. In line with this subsidiarity, weapons and other military materials would be distributed by the commanders to the soldiers and as such, those will have little to say on the type of weapons to be used. Would a prohibition on the use of nuclear weapons, the resort to biological warfare or poisonous gases, or wielding laser weapons or explosive bullets in a manual aimed at soldiers be necessitated at all? These decisions as to the weapons used would be made by the higher command and as such their decisions are simply to be abided by those following the regulations and their superiors. This is also exemplified by the previously assessed *deeds of commitment* by Geneva Call aimed at binding those with authority and decision-making power to a prohibition on the use of anti-personnel mines, as their decision to abide by such intentions to withdraw from employing such means of warfare would be noticed by the subordinates within the NSAG simply by a lack of the distribution of such mines.

Thus, although it is possible that the decision-making bodies of NSAGs have all the knowledge on which weapons are considered legal and illegal during NIAC and take decisions

[349] ICRC 'Customary International Humanitarian Law' (n 73) rule 71.
[350] *ibid* rules 72-86.
[351] 'III.1. Ejército de Liberación Nacional (ELN), Colombia, 1995'.
[352] 'III.10. Libyan National Liberation Army, Libya, 2011'.

on such issues internally and adjust their weapon and material distribution efforts accordingly, the neglect of any mentioning as to which weapons are allowed can be considered problematic.

4.6 Treatment of Civilians and Persons *hors de combat*

4.6.1 Treatment of Civilians and Persons *hors de combat* in the ICRC Study

Lastly, numerous customary rules exist outlining how parties are to treat civilians in a conflict. Many of these have already been discussed above, as Common Article 3 is considered the codification of customary rules of humanitarian law. This cannot be considered surprising; a draft of a new set of rules that has little connection to reality and has not been applied in practice has little chance of being agreed upon by states. States sign and ratify treaties that contain rules that they believe in and as such, the universal ratification of Common Article 3 shows that its contents were rules that were already adhered to by the vast majority of states. Vice versa, this inclusion and universal ratification of Common Article 3 has re-established the customary nature of these laws. Customary rules that are also included in Common Article 3 are those dealing with the humane treatment of civilians, the prohibition of discriminate treatment, murder, torture, and sexual violence, the taking of hostages and the prohibition of sentencing persons without a fair trial or without providing them with judicial guarantees.[353] In addition, the search, care, and protection for the wounded, sick and shipwrecked and their property is also included in both sources of law.[354]

Other rules of customary law regarding civilians and persons *hors de combat* have not been included in Common Article 3 but are still to be adhered to due to their customary nature. These are the prohibition of corporal punishment, slavery, uncompensated or forced labour, the use of human shields, enforced disappearances and the arbitrary deprivation of liberty.[355] Although the prohibition of mutilation, torture and other cruel treatment is included in Common Article 3, customary law builds on this by explicitly prohibiting scientific or medical experiences on humans.[356] It also includes general rules such as the prohibition of collective punishment, and the respect for the family life and religious practices of civilians.[357]

The principle of legality is also recognized as a customary principle. *Nulla poena sine lege* entails that no one can be punished for an act that was not considered a crime under national or international law at the moment the act was committed. One can only be convicted of a crime

[353] ICRC 'Customary International Humanitarian Law' (n 73) rules 87-90, 93, 96.
[354] *ibid* rules 109-111.
[355] *ibid* rules 91, 94, 95, 97-99.
[356] *ibid* rule 92.
[357] *ibid* rules 103-105.

once the law stipulates that the act was forbidden, and only individuals can be accused of a crime thereof on the basis of their own acts.[358]

The customary law study also includes provisions on how the dead are to be treated. It imposes upon parties to a conflict the obligation to search for and collect the victims of a conflict, and subsequently treat them with respect and do everything they can to make sure to identify the victims and aim to deliver their remains to the family of the victim.[359]

Persons deprived of their liberty are also guaranteed a number of safeguards. Basic humane treatment applies, meaning food, water, shelter, basic hygiene and health needs and medicine ought to be provided. In addition, women, children, and men are to be kept separately unless they are a family. Their records are to be kept and they are to be allowed correspondence, and their possessions must be respected and kept safe.[360]

There is a prohibition on the displacement of the civilian population or transferring part of the population to a different area. In case of displacement by either party, displaced persons are to be ensured all basic human needs in shelter, food, water, safety etc. and their property rights are to be ensured.[361]

Some provisions are included that do not provide more extensive safeguards but seek to recognize the more vulnerable positions that women, children, the elderly, disabled and the infirm occupy in NIAC, which also includes the prohibition of recruiting into the armed forces children or utilizing them in any way in hostilities.[362]

Lastly, it is important to devote some attention to one area that is regulated extensively by international humanitarian law but is absent in non-international humanitarian law. The entire Third Geneva Convention is devoted to the rules applicable to Prisoner-of-War Status, but efforts to recognise such status in NIACs have been rejected.[363] This is unsurprising when one takes into consideration that Prisoner-of-War status is reserved for combatants and seeks to extract enemy military power from a conflict by temporarily denying their soldiers their liberty and military capacities. Combatant status, therefore, is a requirement for Prisoner-of-War status and because of the ambiguous legal status of NSAGs' fighters which often transforms them into civilians the moment they do not fulfil their continuous combat function,

[358] *ibid* rules 101-102.
[359] *ibid* rules 112-116.
[360] *ibid* rules 122-125.
[361] *ibid* rules 129-133.
[362] *ibid* rules 134-138.
[363] Jessica Honan, 'Extending Prisoner of War Status to Belligerents in Non-International Armed Conflicts' (*Human Security Centre,* 8 December 2020) <http://www.hscentre.org/latest-articles/extending-prisoner-of-war-status-to-belligerents-in-non-international-armed-conflicts/> accessed 10 May 2021.

allowing Prisoner-of-War status for NSAGs could result in misuse of the law by keeping possibly insurgent civilians in camps. Surprisingly, NSAGs themselves attribute considerate attention to Prisoner-of-War regulations as will be discussed next. This is possibly because it is such a distinct feature of international humanitarian law and therefore it would boost the legality of the non-governmental party as an independent and distinctly different legal entity.

4.6.2 Treatment of Civilians and Persons *hors de combat* and Non-State Armed Groups

The Prisoner-of-War and persons deprived of liberty receive considerate attention in internal communications of NSAGs.

As early as 1928, the *Worker's and Peasants' Red Army* developed a set of rules outlining the humane treatment of prisoners, including their property rights, provision of basic amenities such as food, water, and medicine, and the obligation to set them free after combat, which points towards a recognition of Prisoner-of-War status.[364] Similar (or more concise) provisions were included by the *Conseil National de Libération, New People's Army, Revolutionary United Front, Shining Path* and the *National Resistance Army.*[365] Other interesting internal regulations mentioning prisoners can be found in the principles of the *Frente Farabundo Marti de Liberación Nacional*, stating 'we shall treat prisoners with respect. We shall always strive to persuade enemy soldiers to leave the army of the rich'.[366] Derived from the Bible, the *Holy Spirit Movement* based upon Leviathan the 'thou shall not kill prisoners of war' rule.[367] As well as Prisoners-of-War, other persons deprived of their liberty should also be treated with respect according to the *ELN, Libyan National Liberation Army, Local Coordination Committees, People's Liberation Army, New People's Army,* and the *Moro Islamic Liberation Front.*[368] As such, the humane treatment and respect for prisoners seems to be well established under NSAGs. The distinction between Prisoner-of-War and persons deprived of their liberty often seems blurry, but since the former status does not exist in NIAC it seems that the respect for prisoners, whatever they are called in internal communications,

[364] I.1. Workers' and Peasants' Red Army/People's Liberation Army (PLA), China, 1947.
[365] 'I.2. Conseil National de Libération (CNL), Democratic Republic of the Congo, 1963'; 'I.3. 'New People's Army (NPA), Philippines, 1969'; 'I.4. Revolutionary United Front (RUF), Sierra Leone, no date'; 'II.4. Sendero Luminoso (Shining Path), Peru, possibly 1981'; 'II.6. National Resistance Army (NRA), Uganda, 1982'.
[366] 'II.7. Frente Farabundo Marti de Liberación Nacional (FMLN), El Salvador, 1985'
[367] 'II.8.' Holy Spirit Movement (HSM), Uganda, 1987'.
[368] 'III.1. Ejército de Liberación Nacional (ELN), Colombia, 1995';'III.10. Libyan National Liberation Army, Libya, 2011'; 'IV.7. Local Coordination Committees, Syria, 2012'; 'V.1. People's Liberation Army, China, 1928'; 'I.3. 'New People's Army (NPA), Philippines, 1969'; 'V.8. Moro Islamic Liberation Front (MILF), Philippines, 2010'.

should be interpreted as a confirmation of the humane treatment of prisoners as codified in Chapter 37 of the ICRC study.

Lastly, some explicit reference to the specifically vulnerable status of women, children and the elderly as included in rules 134, 135 and 138 can be recognized. For example, the *Moro Islamic Front* indicates that 'old people, children, and women shall not be harmed or killed',[369] and the *ELN* indicates that they shall 'try to avoid holding pregnant women, minors, elderly people, and those in delicate health in captivity'.[370] Women, and especially the prohibition of engaging into sexual relations with women is addressed quite regularly, for example by *Shining Path,* the *Sudan People's Army, United Jihad Council, People's Liberation Army* and *Conseil National de Libération.*[371] To conclude that the vulnerable status of certain members of society is widely recognized would however be too far-fetched and as such, reiteration of those that deserve more extensive attention could be beneficial.

[369] 'V.8. Moro Islamic Liberation Front (MILF), Philippines, 2010'.
[370] 'III.1. Ejército de Liberación Nacional (ELN), Colombia, 1995'.
[371] 'II.4. Sendero Luminoso (Shining Path), Peru, possibly 1981'; 'III.4 Sudan People's Liberation Army (SPLA), Sudan, 2003'; 'III.7. United Jihad Council (UJC), Pakistan-India (Kashmir), 2005'; 'V.1. People's Liberation Army, China, 1928'; 'I.2. Conseil National de Libération (CNL), Democratic Republic of the Congo, 1963'.

Chapter 5: Additional Protocol II

5.1 Adoption of Additional Protocol II

Additional Protocol II to the Geneva Conventions was an important accomplishment in international humanitarian law. Until its adoption in 1977 and its subsequent entry into force in 1978, aforementioned Common Article 3 was the sole codified legislation dealing with non-international armed conflict. Although this article on its own can theoretically regulate most conduct regarding internal armed conflict, the fact remains that over eighty percent of victims of armed conflict since the end of the Second World War have occurred in internal conflicts.

The disparity between the legislation dealing with both types of armed conflict thus becomes clear: one article ought to encompass eighty percent of conflicts, whereas dozens of treaties and books of customary law exist to regulate international armed conflict. This is not surprising considering both the origins of international law as a state-centric system and the accompanying unwillingness to give up state sovereignty. To expand upon the laws applicable in NIACs, the ICRC in the 1960's began conducting initial research and held consultations as to the content of additional legislation.[372] However, in order to not adopt legislation that would limit the provisions of Common Article 3, for example by having more restricted definitions or thresholds, what came to be Additional Protocol II was to be seen as a separate entity that would not modify the contents of Common Article 3.[373] As such, APII constitutes an addition to Common Article 3 and the Geneva Conventions as a whole. This fact is reflected in the existence of numerous states that have not acceded to APII but are a member to the Geneva Conventions. At the time of writing, 169 states have ratified APII, whereas three states are signatories.[374] This leaves more than twenty-five states that are party to the Geneva Conventions without having ratified APII.

Thus, although APII is not universally applicable, it is still binding on a vast majority of states. Leaving it outside of the current research would neglect an important legal document and undermine its impact on the development of IHL and therefore it shall be considered below. However, taking into account that customary international law already includes many of the provisions included in APII, and its provisions hardly go beyond those included in Common Article III, it becomes clear that not many rules exist solely in APII.

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[372] Sylvie Junod, 'Additional Protocol II: History and Scope' (1983) 33 *The American University Law Review* 29, 31.
[373] *ibid* 32.
[374] 'States Parties' (n 185).

APII consists of twenty-eight articles, of which the last ten address procedural issues such as entry into force, amendment requirements, and authoritative languages.[375] The substantive laws are divided into four parts, which will be addressed below.

5.2 Laws of Additional Protocol II

Part I consists of three articles, which confirm the definition of a Non-International Armed Conflict as being one 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', excluding 'situations of internal disturbances and tensions.'[376] Like Common Article 3, article 2 stipulates the non-discriminatory character of the Protocol, including the additional features of language, belief, political or other opinion, national or social origin, which are in a way redundant because of the inclusion of 'any other similar criteria' in Common Article 3, which in theory includes all the above mentioned criteria.[377]

This inclusion of more characteristics does not necessarily mean a better sense of protection; to repeat Jean Pictet, 'the more specific a list tries to be, the more restrictive it becomes.' Article 3 reiterates the sovereignty of the state and its exclusive jurisdiction to decide on matters within its territorial integrity, as included in Article 2(4) of the UN Charter.[378] Taking into consideration the earlier addressed sources, no further assessment of NSAGs' internal communications is necessary.

Part II includes more elaborate provisions dealing with the humane treatment of persons *hors de combat*. Article 4 contains many prohibitions which have been addressed prior due to their inclusion in either Common Article 3 or customary international law. These include the prohibition of violence to life, health and mental well-being, murder, cruel treatment, torture, collective punishments, hostage taking, outrages upon personal dignity, acts of terrorism, slavery, pillage and threats to commit any of the foregoing acts.[379] Article 5 deals with the humane treatment of those persons deprived of their liberty during the time of the conflict, including the obligation to provide them with food, drinking water, religious freedom and spiritual assistance, the separation of men and women, communication opportunities, and the

[375] APII arts. 19-28.
[376] APII art. 1.
[377] APII art. 2.
[378] APII art. 3.
[379] APII art. 2(a-h).

overall respect to their physical and mental health.[380] All of these provisions have since been considered as part of customary international law. Article 6 then extends the protections awarded under Common Article 3 1(d), stipulating the prohibition of sentencing and executions without previous judgments, as well as confirm rules 100 and 101 of the customary international law study. Article 6(4) reads: 'the death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.'[381] Although no such clearly stated rule exists in customary international law, according to the ICRC this prohibition is included under rule 135 which reads that 'Children affected by armed conflict are entitled to special respect and protection.'[382] APII includes in article 4(3) extensive obligations vis-à-vis children, stating that they shall receive an education, shall be reunified with their familied, and cannot be used in the armed forces.[383] According to the ICRC, all these specific rules are included under the same customary rule 135.[384]

Part III of APII deals with additional provisions on the wounded, sick, and shipwrecked. The articles under this section are all similar to rules included in the customary international law study, including the respect for and humane treatment of the wounded, sick and shipwrecked, as well as the obligation to actively search and collect them, the respect for medical and religious personnel and their duties and activities, the inviolability of medical units and their transports, and the respect to be awarded to the distinctive emblem of the Red Cross and Red Crescent societies.[385] As such, all these rules have already been addressed prior and compared to NSAGs' internal communications.

Part IV includes rules on the civilian population. The principle of distinction is repeated, emphasising the inviolability of civilians as well as cultural objects and places as worship as also included in rules 38-40 of the customary international law study.[386] In addition, articles 14 and 15 mirror the rules included in rules 53 and 54, and 42 respectively, dealing with the prohibition of starving civilians and destroying objects indispensable to their survival, as well as the prohibition of attacking works and installations containing dangerous forces.[387] Lastly, articles 17 prohibits the forced movement of civilians similar those rules in Chapter 38 of the

[380] APII art. 5.
[381] APII art. 6(4).
[382] ICRC 'Customary International Humanitarian Law' (n 73) rule 135.
[383] APII art.4(3).
[384] ICRC 'Customary International Humanitarian Law' (n 73) rule 135.
[385] APII arts. 7–12.
[386] APII arts. 13 and 16.
[387] APII arts. 14 and 15.

customary international law study, and article 18 reiterates the right of relief societies to offer their humanitarian services to the conflict as also included in Common Article 3(2).[388]

As it seems above, all provisions included in APII have obtained customary international law status or are reiterations of rules of Common Article 3. This is not surprising considering the fact that APII binds over 170 states, and therefore rules that would differ massively from already established humane conduct applicable to NIACs would not have found such widespread support. It is also worth reiterating that many customary rules considered in Chapter 4 have obtained customary status because of their inclusion in APII. As stated, the confirmation of over 170 states of rules of humanitarian law creates significant evidence as to the customary nature of such rules.

In this thesis, customary international law was addressed before APII because customary international law is universally applicable without exceptions. APII on the other hand, although it sees widespread support, has not been signed by some thirty state and therefore its provisions do not bind every state or NSAG for that matter. Therefore, it seemed necessary to still assess the rules of APII even though the inclusion of its contents by NSAGs had already been conducted in the chapter prior through customary international law.

[388] APII arts. 17 and 18.

Chapter 6: An Analysis of the Humanitarian Laws Endorsed and Neglected by Non-State Armed Groups

6.1 General Observations

The three chapters above have focused on the internal communications of Non-State Armed Groups and have sought to compare them to the laws applicable to non-international armed conflict. In doing so, the *opinio juris* of a form of 'customary NSAG law' has been recognised which includes those principles of IHL that across the board have been included in NSAGs' manuals, codes of conduct, oaths and other soft law instruments. In this chapter, an analysis will be made of exactly which principles can be said to belong to this 'NSAG *opinio juris*' and can thus be said to be endorsed, and which rules find little inclusion and can therefore be said to have been neglected or even rejected by NSAGs. Some general observations regarding the relationship between NSAGs and IHL will be made, followed by which specific laws have been endorsed and which have not.

Firstly, the nature of NSAGs' internal communications does not allow them to include the full body of IHL. Although they provide a valuable insight into their convictions and internal rules, their primary purpose is to create a set of basic rules of conduct and discipline amongst the fighters of the group.[389] In doing so, it seems that to include all the rules discussed above, meaning Common Article 3, customary international humanitarian law, and Additional Protocol II, would result in an abundance of applicable specific rules which would dilute the core principles that really should be taken into account. By keeping the internal communications brief and limited to core concepts, the recollection of, and adherence to these principal rules is easier to achieve. In general, therefore, it is not surprising that those rules which can be said to belong to NSAGs' *opinio juris* are some of the most foundational principles of IHL.

Secondly, the nature of some of the rules of IHL leave them outside of the scope of internal communications. As their primary focus is to regulate the conduct of soldiers and lower-ranking personnel, its provisions seem to mainly be focused on limiting their negative actions vis-à-vis the population. Focusing on what a soldier is not allowed to do in the event of a battle or when engaging with the locals seems to be the message such codes focus on and seem to lie at their core. They seem to focus on limiting the negative consequences of individual decision-making that are made in a short amount of time, such as looting, targeting, or using violence. As such, it is not surprising that these types of rules relating to weapons, tactics such as displacing an entire population, or other such laws that are usually the result of a collective

[389] Olivier Bangerter, 'A Collection of Codes of Conduct Issued by Armed Groups' (June 2011) 93 *International Review of the Red Cross* 483, 484.

effort, or of tactical decisions by leaders and other decision-making bodies are not included in documents intended for internal use.

Thirdly, often those NSAGs' that include more detailed rules on a certain principle or norm will also go more in depth on other principles. It is rare for a code to address a specific rule included in customary international law and not address any others. For example, Colombia's *ELN* and Libya's *NLA* have extensive internal instruments which address numerous more specific rules of customary international law, such as more rules regarding public installations containing dangerous forces, destroying objects indispensable for a population's survival, and protecting culturally significant objects. This inclusion points towards some recognition of these more specific rules, but because the current research focuses on a general evidence of such rules being included in customary NSAG' law, such sporadic recognition does not point towards an overall confirmation and endorsement of these rules.

6.2 Endorsed International Humanitarian Laws and Principles

Firstly, much attention is devoted to the organisational structure and rules relating to hierarchy, discipline and internal conduct. As discussed in Section 3.1, this inclusion potentially points towards a recognition of the organisational requirement of NSAGs which qualifies them to be regarded as a party to a NIAC. Of course, given the primary purpose of internal communications, they also seek to ensure internal discipline regardless of international law, as a disorganised group will encounter difficulties in achieving their aims. In drawing a comparison to customary international law, it could be said that potentially the *opinio juris* is missing, whereby a group recognises the organisational requirement, but does not do so out of a feeling of legal necessity; rather, it is a vital aspect of existing as a group at all. Therefore, it cannot with certainty be said that the inclusion of organisational rules can be taken as evidence that such rules are included to increase NSAG legitimacy in a conflict in accordance with Common Article 3's definition of a NIAC.

Secondly, the principle of distinction can be said to be widely endorsed. Taking into consideration that it is one of the most foundational principles of IHL, that NSAGs often portray themselves as defenders of the people, and that winning the hearts and minds of the people is a key component to success, this recognition of the inviolability of civilians cannot be considered surprising. Almost all NSAGs include some rules that outline that only enemy combatants can be targeted, and that any armed action can only be directed against military targets. As such, it can with almost full certainty be said that the principle of distinction is actively recognized and endorsed by NSAGs.

Thirdly, as discussed in Section 3.6, there seems to be wide support under NSAGs vis-à-vis the prohibition on the use of child soldiers and the use of anti-personnel mines, especially due to the work of NGOs such as *Geneva Call*. Unfortunately, the practices have not yet been outlawed completely, but it seems that any conduct that contradicts the established laws is to be seen as an anomaly rather than a rejection of the existence of these rules belonging to the realm of NSAGs' customary law. Thus, it can be said that the prohibition on the use of child soldiers and the use of anti-personnel mines is recognised and endorsed by NSAGs.

Fourthly, NSAGs also recognise the inviolability of looting. In almost every soft law instrument, the prohibition of taking anything from people is included in different wordings, ranging from needles and threads to all belongings. Again, this is not unexpected as acting contrarily to this rule would severely damage the capabilities of NSAGs, as due to their nature they are reliant on local support in the form of food, water and shelter. As such, NSAGs need to uphold a close relationship with local populations and need to portray themselves as defenders of the masses, in order to win their hearts and minds and achieve the destruction of the state.

Lastly, from customary international humanitarian law, the humane treatment of prisoners can be recognised. As discussed in Section 4.6, many NSAGs include in their codes and manuals the obligation to treat captives and prisoners of war with respect and provide them with basic amenities. Across the board, not a lot of NSAGs ignore humane prisoner treatment and as such, it can be considered a law that is endorsed by NSAGs.

These five rules can be said to fulfil the element of a sort of *opinio juris* of 'customary NSAG law', and as such, in their efforts to further disseminate international humanitarian law and in their activities to engage with and educate NSAGs, the ICRC should be aware of the widespread support for these principles. As practice, the second element of customary international law, has been left outside of the current research, it cannot be said that these five rules are to be recognized as 'customary NSAG law'. However, the above has outlined which rules find widespread support in their writings, and thus can be seen as fulfilling the *opinio juris* element of customary international law.

6.3 Educational Efforts

To unravel why certain principles are not included in NSAGs' communications is a question that lies outside the scope of the current research and would require a much deeper non-legal analysis of specific NSAGs. Any of the reasons discussed in section 2.7 could explain per group

why certain rules are neglected, disregarded, or purposely excluded, or a lack of knowledge of the rules could also explain their absence.

The chapters above have discussed many rules that do not find widespread support by NSAGs in their internal communications. As the section directly above has concluded, five rules exist that can be considered to be the *opinio juris* of 'customary NSAG law'. The other many rules of Common Article 3, customary international humanitarian law, and Additional Protocol II thus need to be disseminated further and made more known. The ICRC then, as the 'guardian of international humanitarian law', should in its educational efforts based on its mandate devote considerable attention to the clarification and dissemination of those rules that are not included above. It seems redundant, due to the number of rules that should lie at the focus of such efforts, to reiterate them here, as they have been discussed in depth in the previous chapters.

However, in parallel to the justification given for the structure used in this thesis, it seems that those rules that are universally applicable should lie at core of such efforts. Rules such as the prohibition of taking hostages as included in Common Article 3 are binding on every NSAG, and therefore it is vital that such rules are respected and included in internal communications. Provisions derived from Additional Protocol II on the other hand, might not even be binding on NSAGs due to their location, and because its rules are often based on more fundamental rules included in Common Article 3 and customary international humanitarian law, educational efforts should primarily be focused on those rules foundational to IHL.

Chapter 7: Conclusion

This thesis has sought to contribute to international humanitarian law compliance by one of the most present and at the same time neglected actors of armed conflict. Non-State Armed Groups are involved in 95 per cent of all armed conflicts globally, but the body of law regulating their conduct is underdeveloped and makes up only a minor fraction of the system of international humanitarian law. This discrepancy of the majority of conflicts being regulated by a minimum number of rules is problematic, and as such, this thesis has sought to contribute to the development of the law regulating non-international armed conflict by recognizing which norms, principles and laws of humanitarian law are included in the internal communications of non-state armed groups.

In analysing 58 NSAGs' codes of conduct, manuals, oaths, international commitments, and so on, a core set of rules has been recognised which can be said to make up the body of 'customary NSAG law'. The goal of this undertaking was to better increase the operationalisation of and compliance with the limited set of rules that regulate NIAC by recognising which principles they already widely recognise and endorse, and in similar vein, which rules need to be made more known, explained further, or disseminated more widely.

Taking as a starting point the mandate awarded to the International Committee of the Red Cross stemming from the Geneva Conventions of 1949 and its founding statutes, this organisation as the 'guardian of international humanitarian law' has the legal obligation to engage with armed groups and to achieve further compliance and knowledge of international humanitarian law by setting up education programs, workshops, and other attempts at realising this goal. Due to the often secretive nature of NSAGs, derivative of their inherent anti-government activities and aims to disrupt the status quo, such ICRC activities need to be efficient and effective, also taking into account the difficulties and harsh conditions associated with armed conflicts.

This research has sought to contribute to these efforts by firstly sketching the situation in which NSAGs operate. It was firstly concluded that in the state-centric international system, non-state armed groups possess a limited form of international legal personality, which is subordinate to that of the state. This contributed to the understanding of how the body of law regulating NIACs has come into being and why the slow establishment and development can be ascribed to the reluctance of states to give up any sovereignty, guided by concerns that the regulation of NSAG conduct would elevate their legitimacy, which could potentially contribute to the break-up of the state.

Then, further questions relating to the relationship between non-state armed groups and international humanitarian law were tackled to better understand questions relating to compliance and enforcement, as well as discussing whether there are any potential legal possibilities for NSAGs to exist. Having established that they are bound by both treaty and customary international law, and that in theory there do seem to exist potential legal principles on which their right to existence could be based, their position within the international system was fully established. Thereafter, the position of the ICRC was delved into to discover where their international mandate to disseminate international humanitarian law stems from. Lastly, some considerations were given which determine whether or not NSAGs themselves choose to either adhere to or disregard international humanitarian law.

Having fully established the relationship between non-state armed groups and international humanitarian law, as well as illustrating the peculiar position they occupy on the international plane, the following chapters delved into three different instruments which are applicable to non-state armed groups. By looking at Common Article 3 of the Geneva Conventions of 1949, the ICRC's customary international humanitarian law study, and Additional Protocol II, the rules, norms and principles therein which were also recognised in non-state armed groups' internal communications could be discerned. It could be concluded that there are five subjects which can with certainty be said to form the core set of customary NSAG laws, namely the principle of distinction, the prohibition of using child soldiers, the prohibition on the use of anti-personnel mines, the prohibition of looting, and lastly, the humane treatment of prisoners. In addition, NSAGs could be said to confirm to the organisation requirement as necessary for being considered a party to a non-international armed conflict, but it cannot with certainty be said that the organisation of a group is recognized because of this or whether this is an essential aspect of having a disciplined and functional organisation.

By recognising the existence of core principles which across the board are recognised by non-state armed groups, the ICRC can better engage with non-state armed groups and educate them on those rules which have not found much confirmation. Although this thesis has sought to contribute to further enhancing international humanitarian compliance by NSAGs, the road ahead is still long. As the ICRC's President Peter Maurer said: 'the work of upholding humanity in warfare is never finished.'[390]

[390] 'The Equation is Evident: Respect for IHL Equals Reduced Human Suffering' (*International Committee of the Red Cross,* 24 February 2020) <https://www.icrc.org/en/document/icrc-president-address-french-and-german-side-event-alliance-multilateralism> accessed 26 May 2021.

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III.4 Sudan People's Liberation Army (SPLA), Sudan, 2003

III.5. Ejército Zapista de Liberación Nacional (EZLN), Mexico, 2003

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III.10. Libyan National Liberation Army, Libya, 2011

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IV.4. Ejército Guerrillero de los Pobres (EGP), Guatamala, possibly 1983

IV.5. Kosovo Liberation Army (KLA), Kosovo, 1998

IV.6. Mouvement des Nigériens pour la justice (MNJ), Niger, possibly 2006

IV.7. Local Coordination Committees, Syria, 2012

V.1. People's Liberation Army, China, 1928

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V.4. Revolutionary United Front (RUF), Sierra Leone, no date

V.5. Kosovo Liberation Army (KLA), Kosovo, 1998

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V.7. Moro Islamic Liberation Front (MILF), Philippines, 2006

V.8. Moro Islamic Liberation Front (MILF), Philippines, 2010

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Annex I: Non-State Armed Groups and Documents

Name	Location	Document Type	Document Year
African National Congress	South Africa	Declaration	1980
African National Congress	South Africa	Standing order	1985
Agence Juive de Palestine et de la vaad Leumi	Palestine	Declaration	1948
Armée de Libération Nationale	Algeria	Code of conduct	1956
Chinese People's Liberation Army	China	Manifesto	1947
Chin National Front	Myanmar	Commitment	2009
Conseil National de Liberátion	D.R. Congo	Code of conduct	1963
Ejército de Liberación Nacional	Colombia	Code of conduct	1995
Ejército de Liberación Nacional	Colombia	Code of conduct	1996
Ejército de Liberación Nacional	Colombia	Code of conduct	1998
Ejército Guerrillero de los Pobres	Guatemala	Oath	1983
Ejército Guerrillero de los Pobres	Guatemala	Oath	1983
Ejército Zapista de Liberación Nacional	Mexico	Code of conduct	2003
Free Life Party of Kurdistan	Turkey/Iraq/Iran/Syria	Commitment	2010
Frente Farabundo Marti de Liberación Nacional	El Salvador	Code of conduct	1985
Fuerzas Armadas Revolucionarias de Colombia	Colombia	Supplement	2005
Fuerzas Armadas Revolucionarias de Colombia and Ejército de Liberación Nacional	Colombia	Standing order	2009
Golaha Wakiillada	Somalia	Commitment	1999
Haganah	Israel	Oath	1920
Holy Spirit Movement	Uganda	Code of conduct	1987
Irish Republican Army	Ireland	Code of conduct	1956
Justice and Equality Movement	Sudan	Command order	2015
Karenni National Progressive Party	Myanmar	Commitment	2007
Kosovo Liberation Army	Kosovo	Oath	1998
Kosovo Liberation Army	Kosovo	Standing order	1998
Kurdistan Workers' Party	Turkey/Iraq/Iran/Syria	Declaration	1995
Kuki National Organisation	India/Myanmar	Commitment	2006
Lahu Democratic Front	Myanmar	Commitment	2007
Libyan National Liberation Army	Libya	Code of conduct	2011

Lord's Resistance Army	Uganda	Code of conduct	2005
Local Coordination Committees	Syria	Oath	2012
Moro Islamic Liberation Front	Philippines	Standing order	2000
Moro Islamic Liberation Front	Philippines	Standing order	2006
Moro Islamic Liberation Front	Philippines	Standing order	2010
Mouvement des Nigériens pour la justice	Niger	Oath	2006
National Democratic Front	Philippines	Declaration	2005
National Resistance Army	Uganda	Code of conduct	1982
National Transitional Council	Libya	Standing order	2011
New People's Army	Philippines	Code of conduct	1969
Ogaden National Liberation Front	Ethiopia/Somalia	Declaration	1984
People's Liberation Army	China	Standing order	1928
Revolutionary United Front	Sierra Leone	Code of conduct	Unknown
Revolutionary United Front	Sierra Leone	Standing order	Unknown
Sendero Luminoso	Peru	Code of conduct	1981
Sendero Luminoso	Peru	Code of conduct	1981
South West Africa People's Organisation	Namibia	Declaration	1981
Sudan People's Liberation Army	Sudan	Resolution	1996
Sudan People's Liberation Army	Sudan	Code of conduct	2003
Supreme Military Council	Syria	Statement	2014
Taliban	Afghanistan	Statement	1998
Taliban	Afghanistan	Code of conduct	2006
United Jihad Council	Pakistan/India	Code of conduct	2005
United Jihad Council	Pakistan/India	Declaration	2007
Viet Cong	Vietnam	Code of conduct	Unknown
Viet Cong	Vietnam	Oath	Unknown
Workers' and Peasants' Red Army/People's Liberation Army	China	Code of conduct	1947
Zapista National Liberation Army	Mexico	Declaration	1994