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UNIVERSITY OF AMSTERDAM

WHEN DO TERRORIST ORGANISATIONS QUALIFY AS “PARTIES
TO AN ARMED CONFLICT” UNDER INTERNATIONAL
HUMANITARIAN LAW?

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Abstract

International humanitarian law places certain obligations on, or gives rights to, a “party to the conflict” or “parties to the conflict”. Although nearly 200 provisions of the Geneva Conventions and their Additional Protocols include such a phrase, none of these instruments defines this term. At the same time, even though terrorist groups or organisations may be using armed force during armed conflicts, States appear reluctant to recognise such groups as parties to a conflict. The present contribution explains what is to be understood as parties to the conflict for each of the two types of armed conflict under international humanitarian law, namely international armed conflicts and non-international armed conflicts, and discusses whether, or to what extent, (alleged) terrorist organisations can qualify as such parties. This contribution further critically assesses the findings in recent Belgian case law that various armed actors involved in the Syrian conflict are not considered to be parties to the said conflict.

Key words

Terrorist organisations, terrorism, international humanitarian law, party, belligerent, international armed conflict, non-international armed conflict

When do terrorist organisations qualify as “parties to an armed conflict” under international humanitarian law?

Rogier Bartels*

1. Introduction

International humanitarian law (IHL), also known as *jus in bello* or the law of armed conflict, applies during international or non-international armed conflict,¹ and during such conflicts, it places certain obligations on, or give rights to, “parties to the conflict”. During international armed conflicts, for example, persons protected under the Fourth Geneva Convention of 1949 are defined as civilians “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of *a Party to the conflict* or Occupying Power of which they are not nationals”,² while those protected under the Third Geneva Convention, namely prisoners of war, have to be “[m]embers of the armed forces of *a Party to the conflict*” or of militia or volunteer corps “forming part of such armed forces [or] belonging to *a Party to the conflict*”.³ It is further specified that the application of the 1949 Geneva Conventions and Additional Protocol I “shall not affect the legal status of *the Parties to the conflict*”.⁴ In times of non-international armed conflict, “each *Party to the conflict* shall be bound to apply” the minimum rules contained in Article 3, common to the

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¹ It should be noted that certain provisions of IHL do apply already in peacetime or continue to apply during an occupation or after the armed conflict has ended. See, for example, Articles 47, 49 and 53 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), 75 UN Treaty Series 31 (1950) (GC I); Articles 44-45, 48 and 50 of Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), 75 UN Treaty Series 85 (1950) (GC II); and Article 5 of Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflicts (8 June 1977), 1125 UN Treaty Series 609 (1979) (AP II).

² Article 4 of the Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), 75 UN Treaty Series 287 (1950) (GC IV) (emphasis added).

³ Article 4 of the Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), 75 UN Treaty Series 135 (GC III) (emphasis added).

⁴ Article 4 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Geneva, 8 June 1877), 1125 UN Treaty Series 3 (AP I) (emphasis added).

Geneva Conventions of 1949 (Common Article 3).⁵ In total, 194 provisions of the Geneva Conventions and their Additional Protocols refer to party or parties to the conflict.⁶ In fact, more than half of the provisions of Additional Protocol I contain such wording.⁷

Clearly, it is important to know therefore who can be regarded as a party to an armed conflict and when an entity becomes such a party. However, none of the relevant treaties contains a definition of the term, or any guidance as to what has to be understood as the concept "party to an armed conflict". The present contribution aims to shed some light on this notion. It is important to provide such clarification, because some States have a tendency to reject the idea that terrorist organisations or groups can be a party to an armed conflict and as such be subject to, but also benefit from, the rules of IHL.⁸ Yet, one must be mindful that "in today's reality, a terrorist organisation is likely to have considerable military capabilities."⁹ Indeed, "[a]t times they have military capabilities that exceed those of states."¹⁰

In discussing the personal scope of application of IHL, also known as *ratione personae*,¹¹ the present article therefore analyses when (alleged) terrorist organisations can qualify as parties to a conflict. It does so by first defining the scope of the term "terrorist organisation" for the purposes of the present contribution, followed by a discussion of the possible parties to an international armed conflict, and subsequently, the requirements a terrorist organization must fulfill to qualify as a party to a non-international armed conflict. The next section demonstrates that the inquiry whether terrorist organisations can constitute parties to armed conflicts is not merely a theoretical exercise, since convictions for terrorist acts in recent Belgian case law revolve around the question whether alleged terrorist groups

⁵ Emphasis added. Common Article 3 reads, in relevant part: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: [...]"

⁶ 29, 29, 30, and 41 articles of the four 1949 Geneva Conventions, respectively, and 65 articles of AP I refer to "Party to the conflict" or "Parties to the conflict". These numbers include instances where the provision refers only to a "Party", but the context makes clear that a party to the conflict is referred to, as opposed to a "High Contracting Party" (i.e. a State party to the conventions or protocols).

⁷ AP II does not contain one of these phrases, but the Article 12 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Adoption of an Additional Distinctive Emblem (Geneva, 8 December 2005), 1125 UN Treaty Series 3, refers to the "one of the Parties to the conflict".

⁸ The United States, for example, took this view with respect to members of Al-Qaida, before its Supreme Court ruled that the conflict was covered by Common Article 3 and the captured so-called "unlawful enemy combatants" were protected by the minimum guarantees contained in this article. See United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), pp. 66–69. More recently, members of the government of the United Kingdom stated that all British ISIS fighters must be "hunted down" and killed, raising questions about the prohibition on denial of quarter and protection of persons *hors de combat*. See, e.g., The Independent, 'British Isis fighters in Syria must be killed in almost all cases, says minister' (22 October 2017); and The Guardian, 'British Isis fighters should be hunted down and killed, says defence secretary' (8 December 2017).

⁹ Israeli Supreme Court, *Public Committee against Torture v Israel* H CJ 769/02 (14 December 2006), para. 21.

¹⁰ *ibid.*

¹¹ See generally Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflict* (Hart Publishing, Oxford 2008) p. 85 and further.

or networks are to be considered as fighting as parties to armed conflicts in, mainly, Syria, Iraq, and Turkey. Some critical comments are made on the said case law, before ending with concluding remarks.

2. Delineating "terrorist organisations"

While the so-called "Global War on Terror"¹² may not have been an armed conflict as such,¹³ because "terror" or "terrorism" are descriptions of methods rather than a distinct entity capable of being a party to a conflict,¹⁴ IHL and terrorism are not mutually exclusive; and IHL has relevance to terrorism. Acts or measures of terrorism¹⁵ and the spreading terror among the civilian population¹⁶ are explicitly prohibited under IHL. The Bosnian war provides a good example that such conduct may also be resorted to by regular armed forces. Generals Galić and Milošević of the Bosnian Serb Army (*Vojska Republike Srpske*) were convicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) for having terrorised the population of Sarajevo during the siege of that city between 1992 and 1996.¹⁷ Moreover, one of the most well-known rebel groups, the Liberation Tigers of Tamil Eelam (LTTE) or Tamil Tigers, who fought in the Sri Lankan Civil War,¹⁸ has been

¹² Whilst the term "Global War on Terror" was not used by the Obama administration, the newer 'version' ("Overseas Contingency Operations") still involved the use of armed force against (suspected) Al-Qaida operatives in various countries (other than Afghanistan).

¹³ Part of the military engagements that occurred during the Global War on Terror did amount to armed conflict, for example, the fighting in Afghanistan (see further below at section 3). See International Committee of the Red Cross, *The relevance of IHL in the context of terrorism* (2011) <https://www.icrc.org/eng/resources/documents/faq/terrorism-ihl-210705.htm>; see further Mary Ellen O'Connell, 'When Is A War Not A War? The Myth Of The Global War On Terror' (2006) 12 *ILSA Journal of International & Comparative Law*, pp 536-539; and Derek Jinks, 'The Applicability of the Geneva Conventions to the "Global War on Terrorism"' (2005) 46 *Virginia Journal of International Law*, pp 165-196.

¹⁴ See Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010) p. 113.

¹⁵ Article 33 GC IV and Article 4(2)(d) AP II.

¹⁶ Acts aimed at spreading terror among the civilian population are prohibited both in international and non-international armed conflicts. Using the same language, both the Additional Protocols state that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" (Article 51(2) AP I and Article 13(2) AP II). See also Rule 2 and the underlying practice of the study on customary international humanitarian law, carried out and updated by the International Committee of the Red Cross (Jean-Marie Henckaerts and Louise Doswald-Beck, *Study on Customary International Humanitarian Law: Volume 1 and 2* (Cambridge University Press 2005), an updated version is available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

¹⁷ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Judgment, 5 December 2003; and ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Judgment, 12 December 2007.

¹⁸ The LTTE was an organised rebel force that fought the Sri Lankan government in a lengthy non-international armed conflict until it was defeated by the Sri Lankan government forces in 2009.

'credited' for having invented the suicide bomb-belt¹⁹ and reportedly used this device against both military and civilian objects.²⁰

In IHL, armed non-State actors, such as the Tamil Tigers, are commonly referred to as (organised) armed groups, or armed opposition groups. When referring to terrorist entities, international law instruments use the terms "organisations"²¹ as well as "groups".²² National instruments, at least those of English speaking countries, such as the United States' list of "Designated Foreign Terrorist Organizations", appear to slightly favour the wording "terrorist organisation",²³ but also refer to "terrorist groups"²⁴ and "terrorist entities".²⁵

Whatever the name given, it is clear that not every actor designated as a terrorist organisation is an organised armed group in the sense of IHL. Besides lacking the required level of organisation,²⁶ many terrorist organisations are not involved in,²⁷ or linked to an armed conflict.²⁸ Also, such organisations or groups can be very small and their violence may not reach the intensity threshold of non-international armed conflict.²⁹ However, while many terrorist organisations may not use armed violence or resort to violent means in order to control territory or to overcome an enemy, under IHL the motivation of organised armed groups involved in armed violence "is not a criterion for determining the existence of an armed conflict".³⁰ What is relevant are the factual criteria for the existence of an armed

¹⁹ See Federal Bureau of Investigations, 'Taming the Tamil Tigers: From Here in the U.S.' (10 January 2008) https://archives.fbi.gov/archives/news/stories/2008/january/tamil_tigers011008.

²⁰ See, for example, the Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (31 March 2011), according to which "[t]he LTTE pioneered modern suicide bombing, which it used against military, political and civilian targets" (para. 32).

²¹ See, for example, the Preamble and Article 18 of the International Convention for the Suppression of the Financing of Terrorism (adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999), which refers to "terrorist organizations".

²² See the European Union's Council common position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), which established a list of "persons, groups and entities involved in terrorist acts" (Article 1 and Annex).

²³ Besides the abovementioned list of the United States, see also the United Kingdom's Terrorism Act 2000; the Division 102 of the Australian Commonwealth Criminal Code Act 1995, and the accompanying "Protocol for listing terrorist organisations"; the Kenyan Prevention of Terrorism Act 2012.

²⁴ For example, New Zealand Terrorism Suppression Act 2002.

²⁵ See the Canadian Anti-terrorism Act 2001.

²⁶ See below at Section 4 for a discussion on the required level of organisation.

²⁷ Canada, for example, (still) lists the Canadian organisation called the World Tamil Movement as a terrorist entity. <https://www.publicsafety.gc.ca/cnt/ntnl-scrtr/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-eng.aspx>.

²⁸ The Basque separatist movement *Euskadi Ta Askatasuna* (ETA), for example, has been listed as a terrorist organisation by Spain and the United States, while the European Union lists the Dutch Hofstadgroep as such. However, there are no non-international armed conflicts taking place in Spain and the Netherlands, respectively.

²⁹ The existence of a non-international armed conflict requires resort to, or use of, violence by at least two sides. For a discussion about when the so-called lower threshold of non-international armed conflict reached (meaning that the situation goes beyond mere internal disturbances), see below at Section 4.

³⁰ ICRC, *International humanitarian law and the challenges of contemporary armed conflicts: Report in preparation of the 31st International Conference of the Red Cross and Red Crescent* (ICRC, Geneva 2011) p. 11.

conflict. Once these factual criteria are met, an armed conflict exists and an armed entity can fight as part of it, provided it meets the minimum criteria discussed below, irrespective of a designation as terrorist organisation. Moreover, the labeling of a group as a terrorist organisation is often done for political reasons,³¹ and increasingly so since 11 September 2011.³² The acts and operations carried out by organised armed groups involved in (mostly) non-international armed conflict are often referred to as terrorist acts, because they are in opposition to a government and such groups often resort to guerilla tactics.³³ Indeed, sometimes terrorism may be "more appropriately regarded as but one method of conducting hostilities rather than as a type of warfare in itself".³⁴

The focus of the present contribution is not on armed groups that are generally recognised as fighting in opposition to their governments in non-international armed conflicts of a civil war-like nature, and are or were at the same time listed as terrorist organisations, such as the Tamil Tigers in Sri Lanka.³⁵ Instead, the emphasis is on groups that are broadly recognised as being terrorist organisations, such as Al-Qaida, but that also use armed violence in situations that may be regarded as armed conflicts. In addition, while the definition of a terrorist organisation, such as the one contained in the United Kingdom's Terrorism Act of 2000,³⁶ generally includes those organisations that prepare for, promote, encourage or finance terrorism, while not themselves using force,³⁷ the present contribution only considers those organisations that actually engage in violent acts that could be qualified as terrorism.

³¹ See Helen Duffy, *The 'War on Terror' and the Framework of International Law* (2nd ed., Cambridge University Press 2015) p. 346. Similarly, there may be political reasons not to designate an armed group as a terrorist organisation. The United States' government, for example, claimed in 2015 that the Taliban was not a terrorist organisation in order not to be criticised for "negotiating with terrorists" when it was discussing prisoner swaps with the Afghan Taliban (see, for example, Jessica Chasmar, "Taliban not a terrorist group, White House deputy press secretary says", *The Washington Times* (28 January 2015) <http://www.washingtontimes.com/news/2015/jan/28/white-house-spokesman-suggests-taliban-is-not-a-te/>).

³² Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart Publishing, Oxford 2011) p. 100.

³³ In this regard, the ICRC stresses that "acts that are not prohibited by IHL – such as attacks against military objectives or against individuals not entitled to protection against direct attacks – should not be labelled 'terrorist' at the international or domestic levels". ICRC, *International humanitarian law and the challenges of contemporary armed conflicts: Report in preparation of the 32nd International Conference of the Red Cross and Red Crescent* (ICRC, Geneva, 2015) p. 18.

³⁴ Steven Haines, 'The Nature of War and the Character of Contemporary Armed Conflict' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) p. 27.

³⁵ The LTTE was listed as a terrorist organisation, *inter alia*, by the European Union. See "Declaration by the Presidency on behalf of the European Union concerning listing of the LTTE as a terrorist organisation", P/06/78, 9962/06 (31 May 2006). http://europa.eu/rapid/press-release_PESC-06-78_en.htm.

³⁶ Section 3(2) specifies that "an organisation is concerned in terrorism if it (a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism".

³⁷ See also the Australian Commonwealth Criminal Code 1995, which lists terrorist organisations in Division 102.1 as "an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act".

Having set out the scope of the entities that will be analysed, the discussion now turns to when such entities can qualify as parties to an armed conflict. Given the binary system of IHL, which recognises only two types of armed conflict (international and non-international ones),³⁸ this question has to be answered in two parts. The next section will discuss international armed conflict situations.

3. International armed conflicts

Pursuant to Article 2 common to the Geneva Conventions of 1949 (Common Article 2), the conventions apply in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them [and][...] all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". Based on this provision, international armed conflicts are those that oppose "High Contracting Parties" – which refers to States – and occur when one or more States have recourse to armed force against one or more other States, irrespective of the reasons of this confrontation, or whether these States concerned acknowledge that such a conflict is taking place.³⁹ Moreover, the intensity of such armed confrontation is irrelevant when it comes to armed clashes between two States.⁴⁰

³⁸ E.g., ICRC, *How is the term "Armed Conflict" defined in international humanitarian law?* (Opinion Paper, ICRC, Geneva 2008) p. 1. Available at <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

³⁹ See, for example, Jann K Kleffner, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd ed., Oxford University Press 2013) pp 43-46; ICRC 2008 (n 38), p. 1; and ICRC, *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), para. 213. Although States need not acknowledge that the factual situation gives rise to an international armed conflict for IHL to be applicable, the expression of States on fighting has become more relevant given the fact that, as is now also acknowledged by the ICRC, armed confrontations between a State and a non-State actor on the territory of a third State qualify as international armed conflicts in case the third State does not consent to the use of armed force against the non-State actor concerned. See further below and *ibid.*, paras 261 and further.

⁴⁰ This was confirmed by, the ICTY Appeals Chamber, when considering whether the tribunal had jurisdiction over the alleged crimes in the *Tadić* case, famously defined the concept "armed conflict", as part of which it held that an international armed conflict "exists whenever there is a resort to armed force between States" (emphasis added). ICTY, *Prosecutor v. Dusko Tadić*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995 ("*Tadić* Jurisdiction Decision"), para. 70. The second part of the Appeals Chamber definition addressed non-international armed conflicts: "[A]n armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*" (emphasis added). See also Kleffner (n 39), p. 43; and ICRC 2016 (n 39), paras 236-244.

It therefore appears that the parties to international armed conflicts can only be States,⁴¹ but the situation is more nuanced. Although it should be noted that the United States, for example, uses the concept of "State Sponsors of Terrorism",⁴² the present analysis focuses on the question whether terrorist organisations, which generally would be non-State actors, can be a party to such conflicts.⁴³ The question what makes up a State has to be answered with reference to general public international law.⁴⁴ However, as will be shown next, in addition to States, parties to international armed conflicts can also be entities with State-like status under IHL. In the following three situations, a terrorist organisation could attain such status and be a party to an international armed conflict.

First, a terrorist organisation, or its armed wing, may make up the armed forces of a State. The obvious example in this regard is the Taliban, which was the government of Afghanistan during the start and – at least the first phase of – the international armed conflict that took place in 2001 and 2002 between the coalition led by the United States and Afghanistan. However, it was also regarded as a terrorist organisation.⁴⁵ It was aligned with, and arguably fought together with, Al Qaeda,⁴⁶ which is at the time "could be identified as an organized group with clear leadership and even a fixed location, including a trainings camp and headquarters".⁴⁷ At the same time it was the most notorious terrorist organisation in the

⁴¹ See also Bianchi and Naqvi (n 32), p. 26.

⁴² The US Department of State, for example, lists Iran, Sudan and Syria as such. <https://www.state.gov/j/ct/list/c14151.htm>. If engaged in an armed conflict with other States, such States sponsors would, of course, be parties to these international armed conflicts.

⁴³ International organisations with international legal personality, such as the United Nations, can be party to an international armed conflict (see Kleffner (n 39), p. 53). However, in case of organisations such as the North Atlantic Treaty Organization, it is generally considered that the troop contributing countries would be the parties to the conflict concerned. See, for example, Marten Zwanenburg, 'International organisations vs troops contributing countries: which should be considered as the party to an armed conflict during peace operations?' in Stéphane Kolanowski (ed), *Proceedings of the Bruges Colloquium - International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (College of Europe/ICRC, Bruges 2011) pp 23-28.

⁴⁴ See generally James R Crawford, *The Creation of States in International Law* (2nd ed., Oxford University Press, 2007) chapters 1-3.

⁴⁵ On the classification as an international armed conflict, see Francoise Hampson, 'Afghanistan 2001-2010' in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2012) pp. 249-252. Once the *Loya Jirga* was convened in Kabul in June 2002, the conflict transformed in a non-international one. See, *inter alia*, Letter to the United Kingdom's International Development Committee of the House of Commons, by Philipp Spoerri, International Committee of the Red Cross (dated 20 December 2002). <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm>; and ICRC 2016, para. 400.

⁴⁶ See, for example, Laurie R Blank and Benjamin R Farley, 'Identifying The Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World' (2015) 36 *Michigan Journal of International Law* pp. 494-496; and John Bellinger, "Armed Conflict with Al Qaida?" on *Opinio Juris* (15 January 2007) <http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida/>.

⁴⁷ Lubell (n 14) p 118, referring to Mohammad-Mahmoud Ould Mohamedou, 'Non-Linear Engagement: Transnational Armed Groups, International Law and the Conflict between Al Qaeda and the United States' (Program on Humanitarian Law and Policy Research of Harvard University 2005) p. 13.

world.⁴⁸ It has been argued that Al Qaeda was a party to that same international armed conflict,⁴⁹ but the situation with organised armed groups is not straightforward,⁵⁰ as will be shown below.

A similar situation would arise if Hezbollah, which has been designated as a terrorist organisation but was also represented in the Lebanese parliament,⁵¹ were to become the government of Lebanon and Lebanon would subsequently be engaged in an armed conflict with another State. It is clear, however, that such situations are exceptional.

The second situation where a terrorist organisation can be a party to an international armed conflict arises if a group, which is likely to be designated by the government concerned as a terrorist group,⁵² is fighting against colonial domination, alien occupation, and against racist régimes in the exercise of their right of self-determination. Pursuant to Article 1(4) of Additional Protocol I, such situations are international armed conflict.⁵³ It is important to note, however, that for Article 1(4) to be applicable, the State concerned has to be a party to Additional Protocol I. In practice, this has rarely been the case, precisely because States that faced a situation that could potentially qualify as "wars of national liberation" (and thus fall under Article 1(4)) wished to avoid elevating the conflict within their borders to an international level.⁵⁴ The Palestine Liberation Organization, for example,

⁴⁸ The United Nations sanctions regime against Al-Qaida was established in UN Security Council Resolution 1267 (19 October 1999) and has been updated and continued since. In fact, a special United Nations subsidiary body exists that is called the Al-Qaida Sanctions Committee (see <https://www.un.org/counterterrorism/ctitf/en/al-qaida-sanctions-committee>).

⁴⁹ For example, Mohamedou (n 47).

⁵⁰ See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd ed., Cambridge University Press 2016) pp 64-66.

⁵¹ For a useful overview about Hezbollah, see Catherine Bloom, 'The Classification of Hezbollah in Both International and Non-International Armed Conflicts' (2008) 14 *Annual Survey of International & Comparative Law* pp 64-68.

⁵² History shows that armed opposition groups are generally designated as terrorist organisations at some point during an armed struggle. Well-known examples include the FARC, the LTTE and the PKK. The maxim "One man's terrorist is another man's freedom fighter" is appropriate here.

⁵³ Article 1 AP I reads, in relevant part: "This Protocol [...] shall apply in the situations referred to in Article 2 common to [the four Geneva Conventions of 1949]. The[se] situations [...] include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

⁵⁴ The States whose situations the drafters specifically had in mind when agreeing upon Article 1(4), e.g. the Apartheid in South Africa and the Israeli occupation of Gaza and the Westbank, did not ratify the protocol precisely for that reason (Note: Israel had further reason). Only after the Apartheid ended, South Africa ratified Additional Protocol I. States such as Sri Lanka and the Philippines never ratified the protocol out of fear that the armed opposition in these countries would call upon Article 1(4). Similarly, the stated reason for the United States not to ratify the protocol was this contentious provision of the "ill-defined concept" of "wars of national liberation", averring that "we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law": Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims

when fighting Israel, which never ratified Additional Protocol I, unsuccessfully tried to submit such a declaration.⁵⁵ Only when the State against whom the armed group is fighting has ratified the Protocol, will the Swiss government, who is the depository of the Geneva Conventions of 1949, accept a declaration made pursuant to Article 96(3) of Additional Protocol I. Until recently that never happened,⁵⁶ but in 2015, following Morocco's ratification of Additional Protocol I, the Polisario Front, which has been fighting Morocco for many years and has been called a terrorist organisation, renewed its Article 96(3) declaration; this time it was accepted by the Swiss authorities, which duly notified the State Parties to the Geneva Conventions of 1949.⁵⁷ The conflict between Morocco and the Polisario Front that until that moment had been non-international in character, thus transformed into an international armed conflict,⁵⁸ to which Polisario remained a party.⁵⁹

The third and final situation in which a terrorist group would constitute a party to an international armed conflict occurs in case of recognition of belligerency of an armed group involved in a non-international armed conflict. When a government involved in a non-international armed conflict with an armed group recognises its opposition as belligerents, it is undisputed that this brings into force the law of international armed conflict.⁶⁰ Views differ as to whether such recognition changes the nature of the armed conflict, or merely the laws

of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977 (29 January 1987), available at http://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf.

⁵⁵ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) p. 118.

⁵⁶ Several armed groups that considered themselves as national liberation armies, such as the South West Africa People's Organization (SWAPO), unsuccessfully tried to submit Article 96(3) declarations to the Swiss Federal authorities, which refused these declarations because the relevant States were not a parties to Additional Protocol I. Often, such declarations have therefore symbolically been submitted to the ICRC, but this would not resort the same legal effect. See *ibid*, pp 118-120.

⁵⁷ Federal Department of Foreign Affairs of the Swiss Confederation, Notification to the Governments of the States parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims (242.512.0 – GEN 4/15, 26 June 2015), https://www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150626-GENEVE_en.pdf.

⁵⁸ Katharine Fortin, 'Unilateral Declaration by Polisario under API accepted by Swiss Federal Council Fortin' on *Armed Groups and International Law* (2 September 2015) <https://armedgroups-internationallaw.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/>; and Andrew Clapham, Paola Gaeta and Marco Sassoli, *The Geneva Conventions of 1949: A Commentary* (Oxford University Press 2015) pp 19-20.

⁵⁹ Article 96(3) AP I states, in relevant part, that "[t]he authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depository. Such declaration shall, upon its receipt by the depository, have in relation to that conflict the following effects: (a) the Conventions and this Protocol are brought into force for the said authority *as a Party to the conflict* with immediate effect; [...]" (emphasis added).

⁶⁰ On recognition of belligerency and its requirements, see generally Chapters XII to XV in Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) pp 175-269; and Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010) pp 13-23.

applicable to it,⁶¹ but if the view that the situation transforms into an international armed conflict is followed, the group that has been recognised as a belligerent would be a party to an international armed conflict. Although recognition of belligerency is a rare phenomenon and has not occurred for many years, the doctrine of belligerency is still valid and can be applied.⁶²

The debate that arose in the past as to whether Colombia had recognised the Revolutionary Armed Forces of Colombia (FARC),⁶³ designated by many as a terrorist organisation⁶⁴ and until the recent peace agreement engaged in a conflict with the government that lasted over 50 years, as a belligerent⁶⁵ shows that this possibility is not entirely unrealistic. Indeed, this example demonstrates that it is "premature" to consider that such recognitions could no longer take place.⁶⁶ Therefore, while recognition of belligerency of a terrorist organisation is unlikely to take place, if it were to be done, it would make the organisation a party to an international armed conflict.

In addition to the previous three situations, terrorist organisations would appear to be parties to international armed conflicts if the view is taken that the transnational or extraterritorial fighting between an organised armed group and a foreign State that takes place without the consent of the State on whose territory the group resides, is to be classified as such a conflict. A minority of academics suggests that this is the case,⁶⁷ but – importantly – the International Committee of the Red Cross (ICRC), in its updated commentaries to the

⁶¹ See, for example, Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed) *International Law and the Classification of Conflicts* (Oxford University Press 2012) p. 50, noting that recognition of belligerency would internationalise a non-international armed conflict. For an opposing view, see Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) pp 108-110.

⁶² See Sasha Radin, 'The Current Relevance of the Recognition of Belligerency' in Marielle Matthee *et al.* (eds), *Armed Conflict and International Law: In Search of the Human Face* (T.M.C. Asser Press, The Hague 2013) pp 115-149; Akande (n 60) p. 150; Sivakumaran (n 54) pp 19-20; and Yair M Lootsteen, 'The Concept of Belligerency in International Law' (2000) 166 *Military Law Review* pp 109-141.

⁶³ *Fuerzas Armadas Revolucionarias de Colombia*.

⁶⁴ *Inter alia*, Council of the European Union press release, "Colombia: EU suspends sanctions against the FARC" (27 September 2016), in which it states that the FARC "has been listed since June 2002 under the so-called 'EU terrorist list'". http://www.consilium.europa.eu/en/press/press-releases/2016/09/27-colombia-eu-suspends-farc/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Colombia%3A%20EU%20suspends%20sanctions%20against%20he%20FARC.

⁶⁵ Felicity Szesnat and Annie R Bird, 'Colombia' in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2012) pp 221-223.

⁶⁶ Clapham (n 57) p. 22; see also Akande (n 60) p. 59.

⁶⁷ See, e.g., Akande (n 60) pp 72-79; Rogier Bartels, 'Transnational Armed Conflict: Does it Exist?' in Stéphane Kolanowski (ed.), *Proceedings of the 13th Bruges Colloquium - Scope of Application of International Humanitarian Law* (College of Europe/ICRC, Bruges 2012) pp 114-128; and as more recently expressed by Adil Ahmad Hague in several posts on Just Security, including Adil A Haque, 'Whose Armed Conflict? Which Law of Armed Conflict?' on Just Security (4 October 2016) <https://www.justsecurity.org/33362/armed-conflict-law-armed-conflict/>.

1949 Geneva Conventions, has now also advocated this view.⁶⁸ On this view, if the host State does not consent to a terrorist organisation being attacked on its territory, an international armed conflict would exist between the intervening foreign State and the host State. The fighting between the foreign State and the group would be part of that same conflict, but as the organisation is not part of the host State (in a manner as discussed below), it appears to be a separate party to the conflict. Support for this position can be found in the 2006 conflict between Israel and Hezbollah, which was viewed as having been international by both Israel and Lebanon.⁶⁹ The UN Commission of Inquiry that investigated the conflict concluded that the "hostilities were in actual fact and in the main only between the [Israel Defence Forces] and Hezbollah. The fact that the Lebanese Armed Forces did not take an active part in them neither denies the character of the conflict as a legally cognizable international armed conflict, nor does it negate that Israel, Lebanon and Hezbollah were parties to it".⁷⁰

3.1 Part of a party?

Although the above shows that the cases where a terrorist organisation would itself be a party to an international armed conflict are rare,⁷¹ it may be more common for such an organisation to be qualified as a *part of a party*. This would occur when the group can be characterised as a "militia or volunteer corp" that forms part of the armed forces of a State.⁷² During the drafting process of the Third Geneva Convention of 1949, it was suggested to delete the reference to militias or volunteer corps, as they would be covered by the expression "armed forces". However, as certain countries at the time still had militias and volunteer corps that formed part of the armed forces, but were "quite distinct from the army", the reference was retained.⁷³ It has nevertheless been argued that a *de jure* relationship between the State concerned and the armed group is required to consider the group as belonging to the State

⁶⁸ ICRC 2016 Commentary (n 39) para. 261.

⁶⁹ Human Rights Council, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1 (UN Doc. A/HRC/3/2, 23 November 2006), paras 57-62.

⁷⁰ *ibid*, para. 55. In a case study on this conflict, Iain Scobbie concludes that there was both an international armed conflict between Israel and Lebanon, and a parallel non-international armed conflict between Israel and Hezbollah: Iain Scobbie 'Lebanon 2006', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2012), pp 387-420.

⁷¹ At least, if one follows the majority academic view.

⁷² Article 4(1)(A) GC III states that "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces" qualify as prisoners of war once fallen into the power of the enemy.

⁷³ Jean S Pictet, Commentary on the Third Geneva Convention of 12 August 1949 (ICRC, Geneva 1960) pp 51-52.

armed forces.⁷⁴ However, while "membership in State armed forces is generally defined by domestic law, [...] membership in irregular State armed forces, such as militia, volunteer or paramilitary groups, generally is not regulated by domestic law and can only be reliably determined on the basis of the same functional criteria that apply to organized armed groups of non-State parties to the conflict."⁷⁵ Be that as it may, the origin of the provision indicates that the link between the militia or volunteer corps and the armed forces has to be rather obvious.⁷⁶ It therefore appears that Hezbollah, for example, which has been fighting on the side of the Syrian government and assisting its armed forces in the Syrian conflict – parts of which are to be qualified as international armed conflicts⁷⁷ – cannot be considered as falling under the first sub-paragraph of Article 4(1) of the Third Geneva Convention.⁷⁸ Having said that, Hezbollah would appear to fall under the next situation where a terrorist entity would not be a party itself, but take part in an international armed conflict arises, namely when it "belongs to a Party to the conflict".⁷⁹ The relevant provision of the Third Geneva Convention of 1949 originates from the problematic situation of the Partisans and resistance movements during the Second World War.⁸⁰

A terrorist organisation belongs to the armed forces of a State if it is fighting for or on behalf of a State, and whether that State – either expressly or tacitly – accepts that the group is fighting on its behalf.⁸¹ The Third Geneva Convention requires groups to fulfil certain conditions, such as "being commanded by a person responsible for his subordinates", for it to be considered a militia.⁸² Arguably, the fulfillment of these requirements only becomes

⁷⁴ Mohamad G Janaby, 'The Legal Status of Hezbollah in the Syrian Conflict: An International Humanitarian Law Perspective' (2016) 33 *Arizona Journal of International & Comparative Law* p. 408.

⁷⁵ Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, Geneva 2016) p. 31. The criteria for organisation of armed groups are discussed below in Section 3.

⁷⁶ Article 1 of the Hague Regulations respecting the Laws and Customs of War on Land of 1907 clarifies that "[i]n countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army.'"

⁷⁷ See, for example, the Rule of Law in Armed Conflicts projects of Geneva Academy, which considers that "[d]ue to the use of force by the US-led coalition against the Islamic State group in Syria without the consent of the Syrian government, there is an international armed conflict in Syria". <http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria>. However, for an opposing view, see Terry D Gill, 'Classifying the Conflict in Syria' (2016) 92 *International Law Studies* pp 353-380.

⁷⁸ See Janaby (n 73) p. 408.

⁷⁹ *ibid.* pp 408-411.

⁸⁰ Pictet (n 72) p. 53 and further. Interestingly, at the time Germany sometimes referred to members of resistance movements as terrorists. Randall D Law, *Terrorism: A History* (2nd ed. Polity Press, Cambridge 2016), chapter 10.

⁸¹ Katherine Del Mar, 'The Requirement of 'Belonging' under International Humanitarian Law' (2010) 21 *The European Journal of International Law* pp 111-112.

⁸² Article 4(A)(2) GC III sets out these following conditions that militias or volunteer corps have to fulfil: a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

relevant when considering the entitlement of members of the group to prisoner of war status. Failing to meet one of the conditions would still mean that the group concerned can be considered as being associated with a party to an international armed conflict.⁸³

A further, related situation exists in internationalised non-international armed conflicts.⁸⁴ In such a case, the fight between a non-State entity and another State has become an international armed conflict, due to the overall control of a foreign State over a the non-State actor.⁸⁵ As with the militias and volunteer corps, a terrorist group acting under overall control by a State, only *participates* in the conflict. It is submitted here that fighting on behalf of a party to an international armed conflict, either in the meaning of "belonging to" or being under overall control, does not make the fighting non-State entity a party itself. Indeed, in its commentary to the Third Geneva Convention of 1949, the ICRC held that "[r]esistance movements must be fighting on behalf of a 'Party to the conflict' in the sense of Article 2, otherwise the provisions of Article 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a 'Party to the conflict'".⁸⁶ It should be noted that in such an internationalised non-international armed conflict, the terrorist organisation acting under the overall control of a foreign State does not itself need to fulfil the organisation criterion required for the existence of a non-international armed conflict, to which the discussion now turns.

4. Non-international armed conflicts

Non-international armed conflicts differ enormously, ranging from those that resemble conventional warfare, similar to international armed conflicts, to conflicts that are rather unstructured. The parties to non-international armed conflicts – whether States or organised armed groups – therefore also vary a lot in character.⁸⁷

⁸³ However, see ICRC, 'International humanitarian law and the challenges of contemporary armed conflicts: Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007', printed in (2007) 89 *International Review of the Red Cross* p. 748, where the ICRC appears to submit that all four requirements need to be fulfilled.

⁸⁴ It should be noted that "belonging to" a State is not the same as when an armed group is under the overall control of a State. Even though the ICTY Appeals Chamber in *Tadic* appears to have misinterpreted the "belonging" test. See Del Mar (n 80) p. 108.

⁸⁵ On internationalised non-international armed conflicts and the concept of overall control, see James G Stewart, 'Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict' (2003) 85 *International Review of the Red Cross* pp 315-333.

⁸⁶ Pictet (n 72) p. 57.

⁸⁷ ICRC, 'International humanitarian law and the challenges of contemporary armed conflicts, Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red

Present examples of well-known parties to non-international armed conflicts that are at the same time designated as terrorist organisations are Boko Haram, listed a terrorist organisation by *inter alia* the UN,⁸⁸ and Al-Shabaab, which is allegedly aligned with Al Qaeda and listed as such.⁸⁹ Al-Qaeda itself, as well as its "associated forces" has also been treated as a party to an (allegedly global) non-international armed conflict, at least by the US.⁹⁰ However, also in more traditional – civil war like – non-international armed conflicts, the parties are, or have been, often listed as terrorist organisations. The FARC and the LTTE, for example, were both recognised as parties to the non-international armed conflicts involving the governments of Colombia and Sri Lanka, respectively, but were at the same time listed as terrorist organisations; and not only by the governments they were fighting.⁹¹

This section discusses when a non-State armed group can become a party to a non-international armed conflict. It therefore first needs to be set out when such a conflict actually exists.

4.1 *The existence of a non-international armed conflict*

Common Article 3 sets out its scope of application as follows: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions [...]". At the time of the drafting of Common Article 3, there was much debate about the use of the term "Party to the conflict", but the drafters nonetheless did not define it in the treaty text.⁹² In addition, the phrase "conflicts not of an international nature" remained similarly undefined.⁹³ However, since the mid-nineties, the definition and criteria for the existence of non-international armed conflicts have been clarified by the *ad hoc* tribunals.

Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007', as reprinted in (2007) 89 *International Review of the Red Cross*, p. 744.

⁸⁸ See UN Security Council press release, "Security Council Al-Qaida Sanctions Committee Adds Boko Haram to Its Sanctions List" (SC/11410, 22 May 2014). <https://www.un.org/press/en/2014/sc11410.doc.htm>.

⁸⁹ See, for example, Public Notice 6136 of the US Department of State. <https://www.state.gov/j/ct/rls/other/des/102446.htm>; and the Joint Media Release, "Listing of Al-Shabaab as a Terrorist Organisation" of 21 August 2009, by the Australian Attorney-General and Minister for Foreign Affairs. <http://foreignminister.gov.au/releases/2009/fa-s090821.html>.

⁹⁰ See, generally, Sasha Radin, 'Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts' (2013) 89 *International Law Studies*, pp 696-743.

⁹¹ As to the FARC, see above at footnote 63; for the LTTE, see above at footnote 35.

⁹² Cullen (n 59) pp 48-49.

⁹³ In the early nineteen-seventies, Tom Farer noted that the only certain aspect about the notion of 'conflicts not of an international nature' was that no-one could say with certainty what it means. Tom Farer, 'Humanitarian Law and Armed Conflict: Towards the Definition of 'International Armed Conflict'' (1971) 71 *Columbia Law Review* p. 43.

As mentioned above, the ICTY Appeals Chamber in the *Tadić* case defined a non-international armed conflict as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".⁹⁴ Various chambers of the ICTY and International Criminal Tribunal for Rwanda (ICTR) have since clarified the notion of non-international armed conflict, highlighting two requirements: i) the existence of (at least) two parties of an organised nature; that are ii) fighting each other with a certain level of intensity.⁹⁵ The requirement that for a non-international armed conflict to exist these two criteria must be fulfilled has been widely accepted as reflecting custom.⁹⁶ The ICTY used, in its own words, the criteria of intensity and organisation as a way to distinguish an armed conflict "from banditry, unorganized and short-lived insurrections, or *terrorist activities*".⁹⁷ However, that statement should not be taken as meaning that terrorist activities cannot be part of an armed conflict. Instead, as later clarified by the ICTY in *Boškoski*, it merely means that "certain terrorist activities committed in peace time, would not be covered by Common Article 3".⁹⁸

As to the intensity requirement, it has been argued by defence teams before the ICTY that terrorist acts should not be counted for the assessment of the existence of an armed conflict. In *Boškoski*, the Trial Chamber correctly stated that "terrorist acts may be constitutive of protracted violence" and that "while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict."⁹⁹

4.2 The organisation requirement

The concept of "party to an armed conflict" presupposes a minimum level of organisation without which coordinated military operations and collective compliance with IHL would not be possible. For a terrorist group to be a party to a non-international armed conflict, it

⁹⁴ *Tadić* Jurisdiction Decision, para. 70.

⁹⁵ ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Trial Judgment, 2 October 1995, para. 562. The ICTR followed this approach in its first case: *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 620.

⁹⁶ See ICRC 2016 Commentary (n 39), para. 424.

⁹⁷ ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Judgment (Trial Chamber), 2 October 1995, para. 562.

⁹⁸ ICTY, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), Case No. IT-04-82-T, 10 July 2008 (*Boškoski* Trial Judgment), para. 185.

⁹⁹ *Boškoski* Trial Judgment, paras 187 and 190.

therefore has to fulfill the organisation requirement.¹⁰⁰ The ICTY and ICTR identified various factors and indicators of the organisation requirement in cases where the existence of a non-international armed conflict was challenged, such as *Limaj*, *Haradinaj*, and the abovementioned *Boškoski* case. Even though these indicators were developed to aid the assessment of the existence of a non-international armed conflict, because such a conflict can only exist when there are, at a minimum, two parties, the way to analyse whether an armed group is sufficiently organised to be the non-State side, is a useful guidance. For the 'organisational' criterion, *Boškoski*, as the last and most detailed judgment on the issue,¹⁰¹ identified factors with various indicators that can be grouped together as follows: i) the existence of a command structure, which would be exemplified by having headquarters, a general staff or high command, identifiable ranks and positions, internal regulations, the issuing of political statements or communiqués, and the use of spokespersons; ii) the military (operational) capacity of the armed group, which would be shown, for example, by the ability to define a unified military strategy, the use military tactics, the ability to carry out (large scale or coordinated) operations, the control of territory, and having a territorial division into zones of responsibility; iii) the logistical capacity of the armed group, for which indicators would be that a supply chain exists that allows the group to gain access to weapons and other military equipment, the group's ability to move troops around and to recruit and train personnel; iv) the existence of an internal disciplinary system and the ability to implement IHL by having disciplinary rules or mechanisms in place; v) the group's ability to speak with one voice, indicated, for example, by the capacity of the leadership to act on behalf of its members in political negotiations and to conclude cease-fire agreements.¹⁰²

It is important to note that these factors are only indicative and need not all be fulfilled, or all apply, at the same time. In addition, it is not determinative for the existence of a non-international armed conflict whether a group pursues legitimate or criminal aims.¹⁰³ One may nonetheless wonder whether a terrorist organisation that completely refrains from attacking government structures or members of the armed forces and only targets civilians can qualify as a party. In this regard, the general reluctance to classify the Mexican drug-

¹⁰⁰ See similarly Melzer (n 74) p. 68; and Bianchi and Naqvi (n 32) pp 26-29.

¹⁰¹ This was also the only judgment for which the issue of the threshold of non-international armed conflict addressed, and confirmed, on appeal: ICTY, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment (Trial Chamber), Case No. IT-04-82-A, 19 May 2010, paras 19-24.

¹⁰² *Boškoski* Trial Judgment, paras 194-203.

¹⁰³ See the interesting discussion on "'Criminal' Armed Conflict" in Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (Oxford University Press 2015), Chapter 7.

related violence as a non-international armed conflict¹⁰⁴ may be taken to indicate that such terrorist groups would not be parties. However, in the view of the present author, while one may question whether IHL is a suitable legal framework to address the conduct of such groups, both during and after their use of violence,¹⁰⁵ it would be incorrect to reject the idea that such situations may rise to the level of non-international armed conflict merely due to a lack of involvement of government forces. While armed groups, such as the Lord's Resistance Army, for example, may attack only civilians and raid villages (i.e. acts that may be referred to as terrorism), violating the core rules of IHL along the way, the fact that such a group successfully manages to avoid clashing with government forces should not be determinative in answering the question whether the situation is to be considered a non-international armed conflict. The force used by an armed group against civilians of a State, when carried out by an organised armed group that is not aligned with the government,¹⁰⁶ must be considered as directed against "a State".¹⁰⁷ Moreover, although the concept of occupation does not exist in non-international armed conflicts, by controlling part of a State's territory to the detriment of the State's governmental authorities, the lack of clashes (and thus factors indicating fulfilment of the intensity requirement) should not be taken as meaning that no non-international armed conflict exists. Namely, by replacing the governmental authority for part of a State's territory in such a manner that the government would only be able regain its authority and (effective) control through the use of armed force, the intensity requirement ought to be considered as being fulfilled, as the absence of armed clashes between government forces and the armed group are likely to be due to the government's inability to

¹⁰⁴ See *ibid*, p. 187

¹⁰⁵ See Rogier Bartels and Katharine Fortin, 'Law, Justice and a Potential Security Gap: The "Organization" Requirement in International Humanitarian Law and International Criminal Law' (2015) 21 *Journal of Conflict and Security Law*, p. 46; and Rogier Bartels, 'The Interplay between International Human Rights Law and International Humanitarian Law during International Criminal Trials', forthcoming in *Journal of Human Rights & International Legal Discourse*.

¹⁰⁶ In Darfur, for example, violence against the civilian population is carried out by the Janjaweed, which is aligned with the Sudanese government. Such violence by a State-associated militia is of a different nature and would only qualify as a non-international armed conflict if there is an organised armed group on the opposing side.

¹⁰⁷ With respect to international armed conflicts and attacks against a non-State actor on the territory of a third State, the ICRC recently found it "useful to recall that the population and public property of the territorial State may also be present in areas where the armed group is present and some group members may also be residents or citizens of the territorial State, such that attacks against the armed group will concomitantly affect the local population and the State's infrastructure." ICRC 2016 Commentary (n 39), para. 262. See similarly, Bartels (n 66) p 124, stressing that "[a] State is not merely made up of a government. The main criteria for Statehood are a territory, a population, and a functioning government" and in case of attacks not directed against government forces, "[a]t least one of these, the territory, but more often two, the territory and the population, are made object of attack".

challenge the armed group's control over part of its territory, for example, because the armed group is considered too strong to be ousted militarily.¹⁰⁸

4.3 One or more armed conflicts?

Once the threshold for the existence of a non-international armed conflict has been fulfilled, it may be questioned whether other armed actors that are involved in the conflict but are not themselves sufficiently organised, also qualify as parties. The answer to this question depends on the approach one takes with respect to the possibility of parallel non-international armed conflicts existing alongside each other. Is the fighting in Syria, for example, one non-international armed conflict with many different parties? Or are there many separate non-international armed conflicts with the Syrian government (and Russia) on one side and one organised armed group on the other, as well as certain non-international armed conflicts between some of these armed groups themselves? The latter approach¹⁰⁹ would mean that groups that do not fulfill the organisation requirement cannot be regarded as parties to a non-international armed conflict. Yet, applying the former approach,¹¹⁰ such participating groups can all be parties; and, arguably, at least in the view of the present author, be considered as "parties" even if they themselves are not sufficiently organised to fulfil the non-international armed conflict threshold criterion.¹¹¹

A further question arises with regards to so-called "associated" armed forces.¹¹² The US, for example, has declared a number of organisations that are also listed as terrorist

¹⁰⁸ See similarly ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Judgment (Trial Chamber), 27 September 2016, para. 49.

¹⁰⁹ As supported, for example, in this report: Louise Arimatsu and Mohbuba Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya* (Chatham House March 2014), pp 29-30 https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf.

¹¹⁰ See, for example, the Geneva Academy project on classification of situations of armed conflict: <http://www.rulac.org/classification/contemporary-challenges-for-classification#collapse1accord>. Furthermore, some academics such as Terry Gill argue that the situation in Syria in one non-international armed conflicts with various actors: Gill (n 76), p. 374.

¹¹¹ See, for example, 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/>. However, others have argued that while "there is sound reason for accepting that it may not be appropriate to use this same test for determining the entry of a new party into a pre-existing [non-international armed conflict], since the overall level of prevailing violence has already surpassed the required threshold [...], [t]he organizational requirement should remain in place and the new group cannot be considered a party to the conflict without it." Noam Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups' (2017) 93 *International Law Studies*, p. 242.

¹¹² The international armed conflict concept of "belonging to" and law of neutrality concept of "co-belligerency" do not exist in the context of non-international armed conflicts. Interestingly, however, individuals or groups around the world conducting terrorist acts appear to pledge allegiance to ISIS, for example, and ISIS appears to accept these links by claiming the attacks carried out by these persons.

groups to be "associated forces" of Al-Qaeda.¹¹³ Do these form one and the same party to an armed conflict, or only if they share the same Command and Control structure? Or do such associated groups constitute separate parties to the same conflict? It has recently been submitted that for armed groups to be regarded as "co-belligerents", more is required than for two States to qualify as such during an international armed conflict. Despite being separate groups, they should, for example, be "coordinating their operations against the State (e.g., by dividing up zones of activity or by coordinating the time and place of attacks in order to maximize their effect)."¹¹⁴ Moreover, providing material support for the commission of hostilities, which has been proposed as the test to determine whether third States supporting the government-side in an ongoing non-international armed conflict qualify as parties,¹¹⁵ could lead to a determination that the new group has become a party to the conflict. However, in the context of armed groups, it is more appropriate to require actual participation in the hostilities by each group,¹¹⁶ to avoid members of such groups to be considered as lawful targets too easily. When someone is a member of an organised armed group, including terrorist organisations will be discussed next.

4.4 Membership of a party

The non-State Terrorist groups are often diffuse, making it difficult to determine who forms part of them. A 2010 US Senate report, for example, stated about Al-Qaeda that it had "transformed into a diffuse global network [...] made up of semi-autonomous cells which often have only peripheral ties to either the leadership in Pakistan or affiliated groups elsewhere".¹¹⁷ Whereas in an international armed conflict, it is clear that the members of the armed forces of a party are combatants and can thus be targeted, the exact scope of the loss of protection during a non-international situation is less clear and remains subject to debate.

¹¹³ Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force, and Related National Security Operations, which accompanied the Presidential Memorandum, Steps for Increased Legal and Policy Transparency Concerning the United States Use of Military Force and Related National Security Operations of December 2016. https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf. For an overview of the present Authorization for Use of Military Force and the proposals for an update, including the additional of new "associated forces", see Matthew C. Weed, *A New Authorization for Use of Military Force Against the Islamic State: Issues and Current Proposals* (Congressional Research Service, 21 February 2017) <https://fas.org/sgp/crs/natsec/R43760.pdf>.

¹¹⁴ Lubell (n 110), p. 242.

¹¹⁵ This is called the "support-based approach": Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 *International Review of the Red Cross*, p. 584.

¹¹⁶ See similarly, Lubell (n 110), p. 243.

¹¹⁷ *Report to the Committee on Foreign Relations of the United States Senate*, "Al Qaeda in Yemen and Somalia: A Ticking Bomb" (111th Congress, 2nd session, 21 January 2010), p. 5.

So when a terrorist organisation is party to a non-international armed conflict, which persons can be considered as members of such a group? Common Article 3 refers to "members of armed forces", which relates to the armed forces of both States and non-State actors.¹¹⁸ One of the approaches to determine who can be targeted is to look at the membership of an organised armed group. Membership for IHL (and thus: whether someone may be targeted) should therefore not be interpreted too widely. In this regard, it is important to note that the membership of a terrorist organisation for the purposes of sanction lists, which also include persons engaging in fundraising, for example, is very different and much broader than the persons who may be targeted in accordance with IHL. In order to avoid insertion of the political aspects surrounding the qualification of terrorism, for the purpose of establishing IHL-membership, one must therefore resort to the same standard as for membership to an organised armed group. Generally, this will mean that those who are not part of the armed wing of an entity referred to as a terrorist organisation are not targetable "members" for IHL purposes. Dissecting the full debate on direct participation in hostilities and membership goes beyond the scope of the present article, but it suffices to say that different views exist as to the scope of IHL-membership and the related loss of protection against targeting.¹¹⁹ The present author favours the "functional membership" approach. Applying this standard would mean that persons who fulfill a "continuous combat function" in a terrorist organisation that qualifies as an organised armed group, lose their protection as a civilian. They are therefore subject to attack on a continuous basis – until such time as they cease their combat function.¹²⁰

Before moving to the last section, it must be highlighted that there is a difference between being a party to an armed conflict and being bound by IHL; or falling within the law's scope of application. It is true that Common Article 3 states only that "each Party to the conflict shall be bound to apply" the minimum rules, but those groups or persons not themselves constituting parties to the armed conflict, which take up arms and fight during

¹¹⁸ As suggested, for example, in Jann Kleffner, 'The Beneficiaries of Common Article 3', in Andrew Clapham, Paola Gaeta, and Marco Sassòli, *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015), p. 439.

¹¹⁹ See Nils Melzer, *Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law* (ICRC 2009); and critiques, thereof, such as, Jann K. Kleffner, 'Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The end of Jus in Bello Proportionality as we know it?', (2012) 45 *Israel Law Review* pp 35-52; and Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities Interpretive Guidance"' (2012) 42 *New York University Journal of International Law and Politics* pp 641-695.

¹²⁰ On functional membership, see generally, Melzer (n 119).

armed conflicts, must be considered to be bound by IHL.¹²¹ If this were not the case, such groups or persons could not violate IHL and thus not commit war crimes. However, the case law of the *ad hoc* tribunals, mainly that of the ICTR, clearly shows that also civilians, for example those participating in the genocidal violence, can be convicted for war crimes.¹²² The nexus requirement in international criminal law is used to determine whether certain conduct can qualify as a war crime, but in effect, what is being determined is whether IHL was applicable to the conduct, as that has to be the case for provisions of this body of law to be violated. In turn, the nexus requirement, normally used to assess whether certain prohibited conduct is sufficiently associated with an armed to qualify as a war crime, and as set out by the ICTY in *Kunarac*, for example, can also be used to assess the personal scope of IHL.¹²³

5. Belgian case law on “armed forces involved in armed conflict”

At the end of this contribution, it is appropriate to show that the above discussion is not merely a theoretical exercise and to highlight the impact incorrect application of IHL terms, such as party to an armed conflict, may have on related issues.

5.1 Foreign fighter cases concerning Al Nusra Front and ISIS

In Belgium, domestic courts recently were seised of a number of criminal cases dealing with the phenomenon of “foreign fighters”, that is persons who have travelled to Syria or elsewhere, to join or otherwise support groups fighting against the government or other armed groups. In the first case of these cases, as with any other Belgian case concerning a situation of armed conflict, the Belgian judges had to consider whether two groups in Syria that qualified as terrorist groups under Belgian law at the same time constituted “armed forces engaged in an armed conflict”, because the Belgian Criminal Code includes a clause that excludes the application of Belgian criminal law over “acts of armed forces during an

¹²¹ The ICRC explains that “[w]hile IHL is binding on non-State actors, this is only the case insofar as they are parties to an armed conflict (namely, organized armed groups). As legal entities, private companies are not bound by IHL, contrary to their staff who, as individuals, must abide by IHL in armed conflicts.” ICRC Report 2007 (n 82), p. 748.

¹²² A conviction for war crimes necessarily implies the application of IHL to the acts committed by the convicted person.

¹²³ ICTY, *Prosecutor v Dragoljub Kunarac et al.*, Case No. IT-96-23-A, 23/1-A, Appeals Judgment, 12 June 2002, paras 57-59. The ICC has also adopted these criteria to establish the requisite nexus to the armed conflict for certain conduct to qualify as a war crime.

armed conflict".¹²⁴ In determining whether the groups concerned qualified as "armed forces" for the purposes of this exclusion clause, the Belgian courts made an assessment similar to analysing whether these groups were parties to a (non-international) armed conflict in Syria. Indeed, the Court of Appeal in Antwerp,¹²⁵ whose findings on this issue were confirmed by the Court of Cassation in Brussels,¹²⁶ answered the aforementioned question by considering whether the groups concerned fulfilled the organisation requirement, and did so by looking at the factors as set out by the ICTY.¹²⁷ The analysis therefore started with the correct approach, by applying the correct legal framework, but the findings made by the Belgian courts are highly questionable in this first case, while in some later cases, including one dealing with ISIS, they were plainly wrong.

One of these alleged groups of the first case was Jabhat Al Nusra, or the Al Nusra Front. According to the facts as reflected in the judgment of the Court of Appeal,¹²⁸ which are very conservative when compared to some of the figures that are given by monitoring bodies or governments,¹²⁹ Al Nusra Front at the relevant time was a sizable group. The judgment refers to Al Nusra Front as, *inter alia*, "a large group of armed rebels" with a clear leader that carried out nearly 600 attacks, and posted statements on its own online forum.¹³⁰ The Court of Appeal further found that besides "terrorist acts", the group carried out armed operations against the Syrian governmental army.¹³¹

Yet, somehow, in what appears to be an unjustifiably strict application of the ICTY factors and indicators, namely by requiring all of them to be fulfilled, despite the ICTY's clear indication that this need not be the case for a finding that a non-international armed conflict existed, the Belgian judges found that Al Nusra Front did not qualify as an

¹²⁴ Article 141*bis* of the Belgian Criminal Code refers to "handelingen [acts] van strijdkrachten tijdens een gewapend conflict".

¹²⁵ Hof van Beroep Antwerpen, Arrest [Appeal Judgment], 26 January 2016, in the cases 2015/FP/1-7 - FD35.98.47-12 ("Appeal Judgment of 26 January 2016"); generally known as the *Sharia4Belgium* case.

¹²⁶ Hof van Cassatie van België, Judgment of 24 May 2016, P.16.0244.N.

¹²⁷ Appeal Judgment of 26 January 2016, p. 53

¹²⁸ *ibid*, pp 53-54.

¹²⁹ Such as the Australian government, which estimated Al Nusra Front to have a few thousand members: <https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/Jabhatal-Nusra.aspx>. It has also been reported that Al Nusra front has consistent been able to procure weapons, funding and fighters from foreign donors: Entry on *Hay'at Tahrir al-Sham (Formerly Jabhat al-Nusra)* on *Mapping Militant Organizations*, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/493>.

¹³⁰ "M.b.t. Jabhat Al Nusra staat, op basis van de gegevens van het strafdossier, vast dat dit een grote groep van gewapende rebellen betreft die een wereldwijde islamitische staat nastreven; [...]deze groep verantwoordelijk is voor bijna 600 aanslagen, waarvan 30 zelfmoordaanslagen." Appeal Judgment of 26 January 2016, pp 53-54.

¹³¹ *ibid*, pp 46 and 52 ("Ze houden zich naast het organiseren van gewapende missies tegen het regeringsleger van president Bashar Al Assad, ook bezig met terroristische activiteiten [...]"; and "Ze houden zich naast gewapende missies tegen het regeringsleger van de Syrische president Bashar Al Assad bezig met terroristische activiteiten [...], die de regio destabiliseren en onrust zaaien onder de bevolking.").

“organised armed group” for the purposes of IHL.¹³² Consequently, if this ruling were to be correct, Al Nusra Front was not a party to a non-international armed conflict in Syria in 2014-15. The judgment is problematic because it distorts the relevant applicable law, by on the one hand relying on the method used by the international courts and tribunals to determine whether the organisation criterion for the existence of a non-international armed conflict is fulfilled, yet on the other hand requiring a higher threshold than these international institutions¹³³ and stressing mainly subjective notions, such as whether the groups concerned were terrorist groups, and the alleged absence of a political goal for or purpose of the fighting.¹³⁴ Furthermore, the ruling is problematic because it appears to reject the application of IHL to such cases of armed violence. If the Belgian case law were to be applied in a different context, when considering whether war crimes were committed, for example, the unreasonably restrictive interpretation of the scope of application of IHL would risk creating impunity and may also negatively affect IHL’s protective reach.

The present author does not advocate the lowering of the non-international armed conflict threshold, but the conclusion that a group like Al Nusra Front was not a party to such a conflict in Syria is incorrect and must be dismissed. Indeed, as others have held, Al Nusra Front was “[u]nquestionably” a party to the NIAC in Syria.¹³⁵ Moreover, since that first case, the Belgian courts have in later cases made the even more striking, and indeed even more problematic, finding that ISIS did not qualify as an armed force engaged in conflicts in Syria or Iraq. In the Appeal Judgment of 26 January 2016, the Court of Appeal had already stated that the activities of the Sharia tribunal of ISIS could not be considered to constitute a

¹³² *ibid.*, p. 54. The Antwerp Court of Appeal appears to have considered the alleged absence of disciplinary rules to enforce IHL very important, finding, *inter alia*, that the sharia courts cannot be considered as an internal disciplinary system. See *ibid.*, pp 53-54: “De activiteiten van de shariarechtbank van ISIS kunnen niet beschouwd worden als een disciplinaire instantie die toezicht houdt op de te respecteren gedragsregels binnen de groep.” and “M.b.t. Jabhat Al Nusra staat, op basis van de gegevens van het strafdossier, vast dat [...] er geen disciplinaire gedragsregels kunnen afgedwongen worden om de noodzakelijke en fundamentele verplichtingen van het internationaal humanitair recht na te leven.”)

¹³³ As mentioned above, the ICTY referred to the factors only as “indicative” and its case law shows that not all factors need to be fulfilled for an armed group to be considered as organised.

¹³⁴ The Antwerp Court of Appeal stressed that Al Nusra Front was part of the international terrorist network of Al Qaeda and was engaged in an armed struggle against all infidels, democracy, human rights and IHL (Appeal Judgment of 26 January 2016, pp 52 and 54: “Uit de elementen van het strafdossier blijkt genoegzaam dat Majlis Shura Al Mujahidin en Jabhat al Nusra beiden, behorende tot het internationaal terroristisch netwerk van Al Qaeda, een sektarische gewelddadige strijd voeren tegen de Sjiieten, ongelovigen, democratische waarden, mensenrechten en humanitair recht.”)

¹³⁵ Sandra Kraehenmann, *Foreign Fighters under International Law* (Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No. 7, October 2014), p. 23.

disciplinary body aimed at ensuring respect for the "rules of behaviour" within the group.¹³⁶ Naturally, on the basis of both the facts on the grounds, as well as the clear expressions by the various States fighting ISIS in this regard, ISIS ought to have been considered (and continuous to be) a party to a series of armed conflicts.¹³⁷

In addition, it is worth recalling, as stressed by the ICRC, that "acts that are not prohibited by IHL – such as attacks against military objectives or against individuals not entitled to protection against direct attacks – should not be labelled 'terrorist' at the international or domestic levels".¹³⁸ Of course, the provision of the Belgian Criminal Code that excludes criminality in case the alleged conduct was "an act" (i.e. *any* act) of an armed force involved in an armed conflict may be partially to blame. Faced with this provision, the judges appear to have desired to limit the provision's effect, as it could lead to impunity, but in doing so – knowingly or perhaps unwittingly – misapplied IHL.

5.2 Exclusion clause

Article 141*bis*, the problematic provision of the Belgian Criminal Code, appears to be based on similar exclusion clauses contained in anti-terrorism treaties, aimed at excluding the conduct of government forces from their scope of application. A provision of the Council of Europe Convention on the Prevention of Terrorism, for example, states that "[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention".¹³⁹ While the aforementioned provision is somewhat ambiguous, the phrase "which are governed by that law" appears intended to ensure that only those activities that are lawful under IHL fall under the exclusion clause and thus not considered as terrorism. However, the Belgian provision does not include such a specification and therefore any act by any armed force engaged as a party to an armed conflict would be excluded, both conduct lawful under IHL and acts that violate this body of laws.

The better way to address this issue in the cases concerning Al-Nusra Front and ISIS would have been for the Belgian judiciary to acknowledge that the exclusion clause was

¹³⁶ "De activiteiten van de shariarechtbank van ISIS kunnen niet beschouwd worden als een discipline instantie die toezicht houdt op de te respecteren gedragsregels binnen de groep." Appeal Judgment of 26 January 2016, p. 53.

¹³⁷ See, *inter alia*, Vaios Koutroulis, 'The Fight Against the Islamic State and *Jus in Bello*' (2016) 29 *Leiden Journal of International Law* p 827-852; and Gill (n 76).

¹³⁸ ICRC 2015 (n 33) p. 18.

¹³⁹ Article 26(5) of the Council of Europe Convention on the Prevention of Terrorism, Warsaw 16 May 2005, Council of Europe Treaty Series No. 196.

worded too broadly and urge – by way of a non-guilty verdict as a result of application of the exclusion clause, for example – the Belgian lawmakers to adopt a new version of the exclusion clause;¹⁴⁰ one that would only exclude lawful behaviour by armed forces from the criminal code.¹⁴¹ However, as will be discussed next, in a more recent ruling, the Court of Appeal in Brussels gave a different, more restrictive reading of the exclusion clause contained in Article 141*bis* of the Belgian Criminal Code

5.3 *The PKK as a party to an armed conflict*

In a more recent ruling, an investigative judge of the court in Brussels¹⁴² found that as a result of Turkey and the PKK being engaged in a (non-international) armed conflict, the PKK did not fall under the Belgian terrorism legislation.¹⁴³ The judge concerned appears to have considered the PKK to be an organised armed group for the purposes of IHL, engaged in a non-international armed conflict;¹⁴⁴ which is, given the recent upsurge of fighting between the Turkish government forces and the PKK, a correct analysis,¹⁴⁵ and was upheld by the Court of Appeal in Brussels.¹⁴⁶ Whereas this ruling indicates that the Belgian courts' understanding of the IHL concept of organised armed group, and hence of a party to a non-international armed conflict, may be improving, the following discussion of this case shows that the judges still considered the wrong question in their analysis of the case.

In the appeal judgment of this case against 43 suspected members of the PKK and/or its armed wing the HPG, the Brussels Court of Appeal considered that – as a result of the exclusion clause contained in Article 141*bis* of the Belgian Criminal Code – the central question before it was whether the PKK is a terrorist organisation or an armed force

¹⁴⁰ Naturally, the Belgian Prosecutor's office could also have withdrawn the relevant charges or asked for an acquittal.

¹⁴¹ It is noted in this regard that in the Sharia4Belgian case, the accused were also convicted of other charges, *inter alia*, related to terrorism.

¹⁴² The body of the court in question is referred to as a "raadkamer", which is a unit of a criminal court in first instance that under Belgian law consists of one investigative/examining judge.

¹⁴³ Het Laatste Nieuws, '36 PKK-leden buiten vervolging gesteld, want "terrorismewetgeving niet van toepassing"' (3 November 2016) <http://www.hln.be/hln/nl/957/Binnenland/article/detail/2957713/2016/11/03/36-PKK-leden-buiten-vervolging-gesteld-want-terrorismewetgeving-niet-van-toepassing.dhtml>; and RUDAW, 'PKK activities "armed conflict," not terrorism, rules Belgian court' (3 November 2016) <http://rudaw.net/english/world/03112016>.

¹⁴⁴ This does not mean, of course, that the PKK could not still also qualify as a terrorist organisation for purposes other than Belgian criminal law.

¹⁴⁵ Only limited information about this case is (publicly) available, but it is generally considered that the PKK has been involved in a non-international armed conflict with the Turkey's governmental forces since the breakdown of the cease fire in July 2015. See, for example, the Rule of Law in Armed Conflicts database of the Geneva Academy of International Humanitarian Law and Human Rights <http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-turkey>.

¹⁴⁶ Hof van Beroep Brussel, Appeal Judgment ("Arrest"), 14 September 2017, Case No. 2017/2911 ("Appeal Judgment of 14 September 2017").

involvement in an armed conflict, as defined by IHL and subject to the rules of IHL.¹⁴⁷ In other words, the Court of Appeal, as the other Belgian courts discussed above, considered qualifying as a terrorist organisation or as a party to an armed conflict to be mutually exclusive.¹⁴⁸

The Court of Appeal held that the lower judge had correctly found that the PKK was involved in a non-international armed conflict with Turkey.¹⁴⁹ To reach this conclusion, it analysed whether the factors identified by the ICTY for the existence of a non-international armed conflict were fulfilled. Most of the analysis considers relevant factors and its conclusion that the PKK was involved in a non-international armed conflict is certainly justified,¹⁵⁰ but the Court of Appeal also stressed that the PKK's goal was to establish an independent State, and not to instil severe fear in the civilian population.¹⁵¹ Besides the fact that the (political) purpose of an armed group was explicitly found to be "irrelevant" in the very case law from which the Court of Appeal took the factors it applied for its analysis,¹⁵² it must be noted that ISIS, which – as mentioned above – was found not to be a party to an armed conflict, as its name suggests, similarly strived to established an independent State.

The Brussels Court of Appeal did make a helpful clarification with regards the exclusion clause, noting that terrorist acts may occur during armed conflicts and that such acts are prohibited by IHL and punishable as war crimes, but do not fall on the Belgian domestic laws concerning terrorism.¹⁵³ It then proceeded, however, to juxtapose such a

¹⁴⁷ "De vraag die zich stelt is of de PKK een terroristische organisatie is dan wel een strijdkracht bij een gewapend conflict, als gedefinieerd in en onderworpen aan het internationaal humanitair recht." *ibid.*, p. 11.

¹⁴⁸ Is shown above, this is an incorrect understanding of the law.

¹⁴⁹ The judgment in first instance is not available, but the Appeal Judgment of 14 September 2017 indicates that the judge in first instance, on the basis of the facts available to him, concluded that during the period relevant to the charges, in Turkey an armed conflict for the purposes of IHL existed, between the PKK and Turkey (p. 10).

¹⁵⁰ The Court of Appeal found that the PKK's struggle consisted of more than sporadic acts of violence and rather constituted protracted armed violence of certain intensity. It noted that the PKK had a strict hierarchy and that its armed wing (HPG) has a complex command structure, which includes a geographical division of command, and had a system in place to recruit and train new members. It further noted that the PKK and HPG expressed their commitment to abide by the prohibitions to use child soldiers and anti-personnel landmines, and had "courts" with public statutes, with the capability to enforcement IHL. In addition, the court noted that the PKK was financed pursuant to a very well-organised system, which includes the levying of taxes. Appeal Judgment of 14 September 2017, pp 14-16.

¹⁵¹ *ibid.*, pp 16-17 ("Het doel van de PKK bestaat er niet in een bevolking ernstige vrees aan te jagen maar haar doelstelling is de oprichting van een onafhankelijke staat [...]") and "De doelstelling van de PKK is [...] de oprichting van een onafhankelijke staat doch niet het terroriseren van burgers.")

¹⁵² In *Limaj*, a case specifically referred to by the Court of Appeal in its judgment (see Appeal Judgment of 14 September 2017, p. 12), the ICTY found that "most importantly in the Chamber's view, the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant." ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 170.

¹⁵³ "Het is evenwel niet uitgesloten dat terroristische handelingen plaatsvinden in het kader van een gewapend conflict binnen het conflictgebied. Terroristische acties binnen het kader van een gewapend conflict zijn

situation with that of "armed forces who are a party to an armed conflict" and commit acts of terrorism outside the conflict area, which it found not to constitute acts of armed forces "in the context of an armed conflict" and therefore subject to the domestic laws on terrorism.¹⁵⁴ This approach is not new,¹⁵⁵ or unreasonable,¹⁵⁶ so long as the Court of Appeal did not intend to say that acts by armed forces at a location that is geographically removed from the area of active hostilities by definition fall outside the scope of IHL and are not "in the context" of an armed conflict; as this would be incorrect.

To sum up, the most recent (publicly known)¹⁵⁷ Belgian ruling in relation to the notion of party to an armed conflict must be considered a step forward in terms of the correct application of IHL. However, some of the findings of the Brussel Court of Appeal remain cause for concern, especially for future cases involving situations that may – as opposed to the fight between the PKK and Turkey – be less traditional rebellions or insurgencies.

6. Concluding remarks

States do not like to be restricted in the way they can deal with armed opposition by non-State actors, including when it concerns alleged terrorist organisations.¹⁵⁸ As shown by the treatment of alleged terrorists in Guantanamo Bay and the use of so-called black sites, States may wish to rely on the alleged membership of such organisations as a reason to deny their rights under IHL.¹⁵⁹ Yet, the fact that an armed group is designated as a terrorist organisation,

oorlogsmisdaden die niet straffeloos blijven maar onder de toepassing van het internationaal humanitair recht vallen doch niet onder de toepassing van de wetgeving inzake terrorisme." Appeal Judgment of 14 September 2017, p. 16.

¹⁵⁴ "Wanneer strijdkrachten die partij zijn in een gewapend conflict, daden van terrorisme plegen buiten het conflictgebied zijn dergelijke handelingen geen handelingen van strijdkrachten in het kader van een gewapend conflict en zij vallen dus onder de bepalingen van de wetgeving inzake terrorisme." *ibid.*

¹⁵⁵ See Ben Saul, *Defining Terrorism in International Law* (OUP 2006) p. 312 for a similar approach.

¹⁵⁶ As argued above in section 4.4, the criteria to assess whether a nexus between the armed conflict and certain conduct exists are suitable to determine whether IHL applies to the relevant conduct. However, the geographical location of the conduct should not automatically be considered a limitation to the application of IHL.

¹⁵⁷ Only very few judgments in Belgian criminal law cases are made available to the public. The judgments discussed in the present contribution have been obtained with the assistance of others and are, in part, only available in unredacted form (i.e. mentioning the full names of the accused persons).

¹⁵⁸ It should be noted that nowadays, IHL is often seen as an enabling body of law, rather than a restricting one. See, for example, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings' (UN Doc A/HRC/14/24/Add/6, 28 May 2010; and Yuval Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror' in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (OUP 2011) pp 22-24; as well as, more generally, International Committee of the Red Cross, *Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* (ICRC 2013).

¹⁵⁹ See, e.g., Leila Sadat, 'Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law' (2006) 37 *Case Western Reserve Journal of International Law* pp 309-342; and Knut Doermann, 'The legal situation of "unlawful/unprivileged combatants"' (2003) 85 *International Review of the Red Cross* pp 45-73.

often for political reasons, does not preclude this entity from at the same time constituting a party to an armed conflict; and have rights and obligations as such.

The above discussion has shown that the number of situations in which terrorist organisations may qualify as parties to international armed conflicts is limited, but the possibility of such organisations to fulfill the criteria for being parties to non-international armed conflicts is very realistic, and indeed has been confirmed by various national and international courts. In such a case, the fighting by these organisations is governed by IHL and their members derive rights from and have obligations under this body of law. While they do not have combatant privilege in times of non-international armed conflicts, and IHL does not confer on them a 'right to kill', it is important to acknowledge that even if their participation in hostilities may violate domestic criminal law, it does not violate IHL. So long as they adhere to the rules of IHL, which includes limiting attacks to those performing a combatant-like function or taking a direct part in hostilities and against legitimate military objects, they do not commit any war crime.

Furthermore, as domestic law will generally provide sufficient options to prosecute members of alleged terrorist organisations, it is important that IHL is not (ab)used to achieve a conviction. Any domestic prosecutions should therefore be mindful of the framework and purpose of IHL. Incorrect pronouncements on the law risk distorting this body of law and the realism it is based on.