August 9, 2011

Regulating the Irregular: International Humanitarian Law and the Question of Civilian Participation in Armed Conflicts

Emily J Crawford, University of Sydney

Available at: https://works.bepress.com/emily_crawford/1/
Regulating the Irregular – International Humanitarian Law and the Question of Civilian Participation in Armed Conflicts

Emily Crawford

Abstract:

In the more than thirty years that have passed since the adoption of the Additional Protocols to the Geneva Conventions of 1949, there has been no revisiting of the Geneva laws, to see whether they still effectively regulate their subject-matter. Indeed, even if the Geneva Conventions were debated for revision, it seems highly unlikely that such revision would go ahead. There are so many parties that have a stake in the conduct of armed conflict that it seems doubtful that any kind of consensus could be reached. A graphic example of the difficulties of achieving consensus was seen during the Expert Process convened to discuss the concept of Direct Participation in Hostilities. Disagreements over the final text, known as the Interpretive Guidance on Direct Participation in Hostilities, resulted in almost a third of the fifty experts involving withdrawing their names from the document. Given this background, this paper will look at the history of international humanitarian law relating to regulating irregular participation in armed conflict, as a case study to demonstrate the increasingly difficult task of achieving consensus on the international plane. From the first provisions in the Hague Regulations regarding levee en masse, to the Geneva Conventions and the Additional Protocols, this paper will look at how non-conventional combatancy has been regulated, and examine the debates surrounding the expansion of the category of combatant. This paper will culminate in an analysis of the ICRC Expert Process on Direct Participation in Hostilities; and argue that both the final Interpretive Guidance, and the controversy leading up to and surrounding its publication, is demonstrative of the obvious stumbling blocks facing any new treaties regarding participation in armed conflict.

August of 2009 marked the sixtieth anniversary of the adoption of the Geneva Conventions. News organisations around the world ran segments on the anniversary,

1 BA (Hons) LLB PhD (UNSW) Postdoctoral Fellow at the University of Sydney. This paper is an expanded version of a presentation delivered at the 19th Annual Australian and New Zealand Society of International Law Conference in Canberra, 23-25 June 2011.

2 Comprising Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (hereinafter Geneva Convention I or GCI) 75 UNTS 31 (1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (hereinafter Geneva Convention II or GCII) 75 UNTS 85 (1950); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (hereinafter Geneva Convention III, GCIII or the POW Convention) 75 UNTS 135 (1950); and Geneva Convention Relative to the Protection
invariably asking international lawyers whether they considered the Geneva Conventions to still be relevant in the twenty-first century. The common refrain from journalists seemed to be that factors such as changes in weaponry, the rise of terrorist groups, the increasing use of corporations to help fight wars, and the emergence of so-called ‘asymmetric warfare’ were beyond the scope of the Geneva Conventions, and were in danger of rendering that instrument, if not obsolete, then certainly outmoded. The common response of most international lawyers and commentators was in the affirmative – that the Geneva Conventions are still as relevant today as they were in 1949.

However, less than twenty years after the adoption of the Geneva Conventions, it was already evident that the Conventions were failing to adequately address certain types of armed conflict. This realisation was one of the driving factors that lead to the drafting and adoption of the Additional Protocol in 1977. Since then, considerable advances have been made in a number of other international humanitarian law arenas, such as the creation of the

---

International Criminal Court, as well as the ad hoc criminal tribunals and courts for Rwanda, the Former Yugoslavia, Lebanon, Cambodia, East Timor and Sierra Leone. Numerous weapons treaties have been adopted, and there is a growing awareness of the importance of international intervention in situations where grave human rights and humanitarian law abuses are taking place. The laws relating to the means and methods of hostilities, and to the mechanisms for enforcement and accountability have kept pace with technological and geopolitical developments. However, in the more than thirty years that have passed since the adoption of the Protocols, there has been no similar revisiting of the Geneva laws, to see whether they still effectively regulate their subject-matter.

Indeed, even if the Geneva Conventions were debated for revision, it seems highly unlikely that such revision would go ahead. There are so many parties that have a stake in the conduct of armed conflict that it seems doubtful that any kind of consensus could be reached. A graphic example of the difficulties of achieving consensus was seen during the Expert Process convened to discuss the concept of Direct Participation in Hostilities. Disagreements over the final text, known as the Interpretive Guidance on Direct Participation in Hostilities, resulted in almost a third of the fifty experts involving withdrawing their names from the document.7

This disagreement merely reflects a trend noticeable when one looks at the ongoing attempts to expand the laws of armed conflict relating to persons participating in armed conflict – otherwise known as Geneva law. While States have been relatively open to developing and updating Hague Law, on the means and methods of conflict, equivalent moves to update the laws relating to participants has routinely encountered reluctance, if not

outright resistance. As more States have emerged and joined the international community, so too have there been more States to assert the right of State sovereignty, and non-interference in internal affairs. The multiplicity of States has meant a multiplicity of opinions; achieving even a semblance of consensus has thus become exponentially difficult. The trend has thus been to either adopt generalised treaties that provide some basic rules (such as Protocol II) or else to adopt a treaty so specific as to allow considerable ‘wiggle-room’ for those States to circumvent the existing restrictions (such as the Cluster Munitions treaty).

Given this background, this paper will look at the history of international humanitarian law relating to regulating irregular participation in armed conflict, as a case study to demonstrate the increasingly difficult task of achieving consensus on the international plane. From the first provisions in the Hague Regulations regarding levee en masse, to the Geneva Conventions and the Additional Protocols, this paper will look at how non-conventional combatancy has been regulated, and examine the debates surrounding the expansion of the category of combatant. This paper will culminate in an analysis of the ICRC Expert Process on Direct Participation in Hostilities; and argue that both the final Interpretive Guidance, and the controversy leading up to and surrounding its publication, is demonstrative of the obvious stumbling blocks facing any new treaties regarding participation in armed conflict.

The History of the Legal Regulation of Civilian Participation in Hostilities

The earliest of the modern laws of war with regards to civilian participation in armed conflict were in large part shaped by the European experiences with land warfare during the nineteenth century. Resistance warfare carried out by civilians was considered illegal; partisan fighters were essentially bandits who were not entitled to any form of protection or recognition under the laws and customs of war at that time. In his 1836 text, *Elements of International Law*, American jurist Henry Wheaton, commented on the legal position of resistance warfare, mindful of State practice in Europe following Napoleon’s advances on Russia and Spain:

> The usage of nations has (legalised) such acts of hostility only as are committed by those who are authorised by the express or implied command of the State. Such as regularly commissioned naval and military forces of the nation and all others called in its defence, or spontaneously defending themselves in case of urgent necessity, without any express authority for that purpose… hence it is that in land wars, irregular bands of marauders are liable to be treated as lawless bandits, not entitled to the protection of the mitigated usages of war as practiced by civilised nations.  

When the first codified laws of war were drafted – the US Lieber Code – the accepted position on resistance warfare was reiterated: Articles 81-83 affirmed that only members of the regular army were legitimate combatants, entitled to all protections of combatant status, such as prisoner-of-war rights on capture. These articles also affirmed that POW rights did

---

9 During the Franco-Prussian War of 1870-1871, the German practice was to summarily execute any foreign volunteers serving in the French forces. When 13,000 riflemen in the Garibaldi corps were captured, Bismarck stated “13,000 Francs-tireurs, who are not even Frenchmen, have been made prisoners - why on earth were they not shot?” *Bismarck in the Franco-German War 1870-1871* (Dr Moritz Busch trans, 2 volumes, Scribners, New York, 1879) Vol 2, at 7. Francs-tireurs – translated as ‘free shooters’ – were unofficial groups of riflemen who operated ad hoc throughout German occupied territory during the 1870 war. See generally Walter Laqueur, ‘The Origins of Guerrilla Doctrine’, 10 *Journal of Contemporary History* 341 (1975) at 357-358.


not extend to irregular fighters – persons not incorporated into the armed forces proper, and that scouts or individual soldiers caught wearing civilians clothes were subject to the death penalty if captured.

At the core of these provisions was the enduring belief, repeated in later instruments, that civilians taking direct part in hostilities was fundamentally disruptive for all parties; it endangered both civilian and combatant, by blurring the distinction between the two. Belligerent forces would be unable to distinguish between civilian and combatant if the custom of wearing of uniforms and carrying arms openly was not respected. As argued by Fyodor Fyodorich von Martens, the Russian delegate at the Hague Conference of 1899\textsuperscript{12} and ‘father’ of the Martens Clause, civilian participation in armed conflict should not be sanctioned or encouraged:

\begin{quote}
It is not hard to stir the people up to oppose the enemy, but it is not easy to direct its aroused forces and to oblige it to subordinate itself to the orders of the government. In the majority of cases people’s wars lead to complete anarchy, which is equally undesirable for the state which is attacked and the attacker.\textsuperscript{13}
\end{quote}

This position was reaffirmed when moves towards adopting an international document regulating armed conflict were debated in 1874 at the Brussels Conference. On the initiative of Tsar Alexander II of Russia, delegates from fifteen European States met in Brussels to discuss the draft of an international agreement concerning the laws and customs of war.\textsuperscript{14} One of the debated articles dealt with participation in levées en masse. Article 10 of the Declaration kept the Lieber requirement of non-occupied territory for the raising of a levée, but added additional criteria. Thus, under the Brussels definition:

\begin{quote}
\textsuperscript{12} Martens was also Russian delegate at the 1874 Brussels Conference, which debated, but failed to adopt, an instrument regarding the laws of armed conflict.

\textsuperscript{13} Fyodor Fyodorich von Martens, \textit{Contemporary International Law}, 1896, at 523.

\textsuperscript{14} The draft was submitted to the States by the Russian Government; see Schindler and Toman, at 21.
\end{quote}
the population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having has the time to organise themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.15

The Brussels rules reinforced in the requirement that the levée may only be raised ‘on the approach’ of the enemy – that is, in territory that is not yet occupied. Thus, international recognition and protection was still denied to civilians taking direct part in hostilities in the context of resistance warfare. In the end, not all governments at the Conference were willing to accept the declaration as a binding convention, and the Conference closed without adopting a binding instrument.16 Despite this, the Brussels Document was an important starting point for a number of processes that would eventually lead to the 1899 and 1907 Hague Regulations.17

The Hague Regulations of 1899 and 1907

Though primarily documents dealing with rules regarding the means and methods of armed conflict, the Hague Regulations of 1899 and 1907 include some provisions regarding legitimate combatancy. During the 1899 Hague Peace Conference, rules regarding the conduct of hostilities on land were adopted; 18 lawful combatant status was provided for the regular army, as well as to militia and volunteer corps. These provisions were uncontroversial, and reflected accepted State practice.

15 Project of an International Declaration Concerning the Laws and Customs of War, 27 August 1874; see also The Oxford Manual of the Laws of War on Land, Published by the Institute of International Law, 9 September 1880, which included levée en masse in Article 2(4).
16 Countries such as Spain, Belgium, Holland and Switzerland were the main advocates for extending belligerent rights to irregular fighters. As countries without large standing armies and historically the subject of frequent incursions from neighbouring European nations, they were reluctant to limit the scope of permissible civilian participation in armed conflict. See generally JM Spaight, War Rights on Land (1911) at 51-53.
17 Indeed, the Brussels Declaration was used the reference paper from which discussions originated during the 1899 Diplomatic Conference; see the Report to the Hague Conferences of 1899 and 1907, James Scott (ed) (Oxford, Clarendon, 1917) at 137.
18 Hague Convention II with Respect to the Laws and Customs of War on Law 1899, 187 CTS 429.
However, a diplomatic stalemate emerged at the Conference when the time came to discuss *levée en masse* and other forms of resistance warfare. The British delegate, General Sir John Ardagh, proposed adding a new provision into the Regulations:

Nothing in this chapter is to be considered as tending to modify or suppress the right which a population of an invaded country possesses of fulfilling its duty of offering the most energetic national resistance to the invaders by every means in its power.\(^{19}\)

As with the Brussels Conference, argument was divided over whether those who used force to resist an invading army could be considered as legitimate combatants or whether they were to be treated as criminals.\(^{20}\) The larger military powers of Europe argued that such people were *francs-tireurs* and should be subject to summary execution.\(^{21}\) The smaller European States argued that lawful combatant status should be granted to resistance fighters.\(^{22}\) The impasse was overcome when the Conference agreed to essentially “split” the issue.\(^{23}\) Persons participating in a *levée en masse* could be considered legitimate only if the *levée* took place within strict parameters:

Art. 2. The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with Article 1, shall be regarded as belligerent, if they respect the laws and customs of war.

Persons participating in on-going partisan or resistance war in occupied territory were not to be granted combatant status, but were, instead, to be treated according to ‘certain minimum fundamental standards of behaviour, as understood by considerations of “humanity” and “public conscience”’.\(^{24}\)

---

19 Report to the Hague Conferences, 54.
20 See *Report to the Hague Conferences* at 139-142.
21 *Report to the Hague Conferences* at 142.
22 *Ibid* at 141.
23 *Ibid*.
24 This phrase comes from the Martens Clause, named for the Russian delegate to the 1899 Conference – Fyodor Fyodorich von Martens. The Martens Clause was a compromise position suggested by the Russian, who was concerned that the stalemate over the question of civilian participation in mass levies and resistance warfare could derail the Conference, and result in the failure to adopt any conventions. For a more detailed analysis of
When the Hague Conference reconvened in 1907, *levée en masse* was again included in the revised Hague Regulations. However, in this iteration, Article 2 of Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, added the additional requirement that:

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents *if they carry arms openly* and if they respect the laws and customs of war.\(^{25}\)

This new requirement of the open carrying of arms was a further (and final) narrowing of the criteria for a *levée en masse*.\(^{26}\) However, as in 1899, resistance and partisan war was not included in the categories of lawful combatant.

*The Geneva Conventions of 1949*

Following the Second World War, the laws of armed conflict were again revisited and reassessed.\(^{27}\) Again, debate centred on questions of who may legitimately participate in armed conflict; namely, when were civilians allowed to legitimately participate in armed conflict? There was little controversy over including *levée en masse* in the categories of legitimate combatant. Reaffirming the Hague Regulations, and utilising the formula laid down in the 1907 Regulations, the Geneva Conventions included *levée en masse* in Article

---


\(^{26}\) See *Report to the Hague Conferences*, at 522, 528-529.

\(^{27}\) *Levée en masse* was affirmed in the 1929 Geneva Convention on Prisoners of War (Geneva Convention Relative to the Treatment of Prisoners of War 1929, 118 *LNTS* 343) by way of reference to the Hague Regulations. The 1929 Convention was replaced by the 1949 Conventions.
13(6) of Convention I, Article 13(6) of Convention II, and Article 4(A)(6) of Convention III.  

However, the experience and treatment of partisan and resistance fighters in Occupied Europe was such as to again put the issue on the agenda for the 1949 Diplomatic Conference. During the War, captured partisans and resistance fighters operating in Nazi-held Europe were routinely denied any sort of legal protection or recognition, either international or domestic. They were either summarily executed, or shipped to concentration camps. State practice from Allied States demonstrates similar attitudes: when Winston Churchill announced the unconditional surrender on 8 May, 1945, he stated that:

Hostilities will end officially at one minute after midnight tonight... [t]he Germans are still in places resisting the Russian troops, but should they continue to do so after midnight they will of course deprive themselves of the protection of the laws of war and will be attacked from all quarters by the allied troops.  

Indeed, during the post-war war crimes trials, it was explicitly confirmed that partisan fighters had no protected status under international law. However, only a few years later, at

---

28 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; See also Jean Pictet (ed), Commentary to the Third Geneva Convention Relative to the Treatment of Prisoners of War (ICRC, Geneva, 1960) at 67-68 (hereinafter GCIII Commentary).

29 See further GCIII Commentary at 49-50, and 52-64 especially, regarding the protracted debates which took place during the preparatory work and the Diplomatic Conference itself, regarding recognition of partisan and resistance fighters. The ICRC, on August 17 1944, addressed a memorandum to all States involved in the Second World War, urging them to grant POW status to captured partisans, provided they complied with the basic rules of organised command; the wearing of a fixed, distinctive emblem; and the open carriage of arms. Indeed, during the Second World War, the Netherlands Forces of the Interior were granted, under the Dutch Royal Emergency Decree of 1944, the status of being part of the Dutch Army. The German occupying force did not recognise the Forces of the Interior as legitimate combatants; however, the status of the Forces was affirmed as such during the war crimes trials of the post-war period. See further the Report of the International Committee of the Red Cross on its activities during the Second World War (The Committee [ICRC], Geneva, 1948); and generally Mallison and Mallison, “The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict”, 9 Case W Res J Int’l L 39 (1977) at 52-54.

30 See Bugnion, The ICRC and the Protection of War Victims at 192-194.


32 See The United States of America v Wilhelm List et al, also known as the Hostages Trial, was the seventh of twelve war crimes trials held by the US. In that judgment, it was held that partisan fighters operating in southeastern Europe could not be considered legitimate combatants under the Hague Regulations of 1907, as
the 1949 Geneva Diplomatic Conference, States that had been subject to occupation by the Nazis argued that partisans and resistance fighters deserved equivalent treatment to other combatants, including full POW recognition and protection if captured. They also argued that less restrictive conditions for fulfilment of combatant status for partisans should be introduced.33

Debate at the conference was “most lively”34 and protracted, but eventually, all parties came to agree that partisans and resistance fighters could enjoy international protections and rights, provided they fulfilled the criteria outlined in Article 1 of the 1907 Hague Regulations. Thus, the Geneva Conventions recognise partisan and organised resistance movements, under Article 4(A)(2) of Convention III, providing for treatment as POWs for organised groups, even if they operate in already occupied territory. Resistance fighters are obliged to comply with the Hague Regulation requirements in that they must be under responsible command,35 wear a fixed distinctive sign recognisable at a distance,36 carry their arms openly,37 and conduct their operations in accordance with the laws and customs of war.38

The Post World War II Era

Following the adoption of the Geneva Conventions, a number of significant changes were experienced, both in the international community and in the conduct of armed conflict.

“captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs.” United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Volume VIII, 1949, at 57.
33 See GCIII Commentary at 52-55.
34 GCIII Commentary at 53.
It is not possible in an article of this scope to detail the events of the period with any degree of fullness; however, certain key elements bear acknowledgment. Firstly, the post World War II era saw a significant rise in the frequency of non-international armed conflicts. Where once international armed conflicts were the norm, they now became a rarity, eclipsed by internal conflicts. A 2002 study conducted by the Department of Peace and Conflict Research at Uppsala University\(^{39}\) categorized and analyzed all armed conflicts that had occurred following World War II. Of the 225 armed conflicts which had taken place between 1946 and 2001, 163 were internal armed conflicts. Only 42 were qualified as inter-state or international armed conflicts. The remaining 21 were categorized as ‘extra-state’, defined as a conflict involving a State and a non-state group, the non-state group acting from the territory of a third State.\(^{40}\)

Secondly, during the 1960s and 1970s, the United Nations General Assembly adopted a number of resolutions regarding the increasingly frequent colonial wars taking place in Africa and South East Asia. Wars of national liberation, as these conflicts were being termed, were becoming so pervasive that UN General Assembly adopted a number of declarations regarding self-determination and national liberation wars.\(^{41}\) The upshot of these

---

\(^{39}\) The Study was conducted in conjunction with the Conditions of War and Peace Program at the International Peace Research Institute in Oslo.


\(^{41}\) The UN had adopted a number of declarations and resolutions regarding self-determination and national liberation movements. See:
- Resolution on the Inclusion in the International Covenant or Covenants on Human Rights of an Article Relating to the Right of Peoples to Self-Determination, UNGAR 545 (VI), UN GAOR Supp. (No. 20), 6 UN Doc. A/219, 5 February 1952.
- Resolution on the Right of Peoples and Nations to Self-Determination, UNGAR 637 (VII); 7 UN GAOR Supp. (No. 20), UN Doc. A/236, 20 December 1952.
- Resolution on the Granting of Independence to Colonial Countries and Peoples; UNGAR 1514 (XV); 15 UN GAOR Supp. (No. 16), UN Doc. A/4684, 14 December 1960.
resolutions was the elevation of ‘wars of national liberation’ from a non-international armed conflict to the stratum of an international armed conflict. As such, it was argued that the Geneva Conventions should be reaffirmed and expanded on, to incorporate this new type of international armed conflict – it was this advocacy that contributed to the adoption of the Additional Protocols.

The Additional Protocols of 1977

In adopting the Additional Protocols in 1977, the international community extended the categories of legitimate combatant, to include irregular and guerrilla fighters. Additional Protocol I provides for its application in situations that are deemed to be:

Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes 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.  

Resolution on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGAR 2326 (XXII); 22 UN GAOR Supp. (No. 16), UN Doc. A/6716, 16 December 1967.

Resolution on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGAR 2465 (XXIII); 23 UN GAOR Supp. (No. 18), UN Doc. A/7218, 20 December 1968.


Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGAR 2625 (XXV); 25 UN GAOR, Supp. (No. 28), Doc. A/8028, 24 October 1970; hereinafter the Friendly Relations Declaration.

Resolution on the Important of the Universal Realisation of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee of Human Rights, UNGAR 2787 (XXVI); 26 UN GAOR, Supp. (No. 29), UN Doc. A/8429, 6 December 1971.

Resolution on Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes, UNGAR 3103 (XXVIII); 28 UN GAOR Supp. (No. 30), UN Doc. A/9030, 12 December 1973.

These are in addition to numerous specific resolutions and declarations regarding specific examples of national liberation wars. See further Schwebel, “Wars of Liberation – as Fought in UN Organs”, in Norton Moore (ed), Law and Civil War in the Modern World (Johns Hopkins Press, Baltimore, 1974).

Cullen, “Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law”, 183 Mil L R 66 (2005) at 89.

Art. 1(4) of Additional Protocol I.
Under Article 43, a person may be considered a member of the armed forces of a party to a conflict provided they belong to an organised force, group, or unit under responsible command, even if such command is represented by a government or authority which is not recognised by the adverse party to the conflict. Furthermore, all such forces must be subject to an internal disciplinary system providing for the enforcement of and adherence to the rules of international humanitarian law.

Protocol I also recognised the methods by which such wars were usually waged, that is, through guerrilla tactics. Guerrilla fighters are granted combatant status in much the same way as partisans and resistance fighters had been in the Conventions. These guerrilla fighters are now afforded ‘full’ Geneva protection, rather than simply being covered under Common Article 3. Guerrillas are to be considered combatants, rather than “marauders or bandits,” and are to be granted full combatants rights and responsibilities, and concomitant POW rights, if captured. Article 44(3) also recognises that “there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself” and provides that such a combatant will not lose his combatant status so long as he “carries his arms openly (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”

In granting recognition to fighters in national liberation wars, Protocol I significantly extended the ambit of international armed conflicts, to include what would have previously

44 As they would be, if wars of national liberation had not been considered fundamentally international in character, even if they were internal in reality.
46 However, this article does not extend to regular armies the right to engage in guerrilla tactics. Article 44(7) specifies that the article is “not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.” See further AP Commentary at 542, para 1723.
been considered internal armed conflicts. Thus, more ‘civilians’ were being authorised, under international law, to take part in armed conflict; civilian participation in armed conflict was being further standardised. However, the Diplomatic Conferences who debated and adopted the Protocols declined to extend the category of legitimate combatant to persons taking part in non-international armed conflicts under Protocol II. These persons would remain officially ‘civilians who take direct part in hostilities’, liable for targeting when they took direct part, but regaining their civilian immunity once they ceased taking direct part.\(^\text{47}\)

Indeed, this concept was included in Protocol I as well. In Part IV, Section I, on “General Protection Against the Effects of Hostilities”. Specifically, Article 51(3) stated that: “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”. The Diplomatic Conferences did not explain in any great detail what was meant by the phrase ‘direct part in hostilities’.\(^\text{48}\) However, the term is quite complex, with a number of distinct elements. For instance, what constitutes ‘hostilities’? Is there a specific threshold? Equally, how would one define ‘direct part’ or ‘unless and for such time’?

Given the definitional ambiguities, it is unsurprising that, in the ICRC Study on the Customary Status of International Humanitarian Law, it was stated that “a precise definition of the term ‘direct participation in hostilities’ does not exist.”\(^\text{49}\) It was with this fact in mind that the ICRC instigated a study into the concept of ‘direct participation in hostilities’. In cooperation with the TMC Asser Institute, and conducted over the period of five years, the project included questionnaires, reports, background papers, and five expert meetings. The

\(^{47}\) Under Article 13(3) of Additional Protocol II, civilians are immune from direct attack “unless and for such time as they take a direct part in hostilities”.

\(^{48}\) See the Additional Protocols Official Records XV at 330, CDDH/III/224; see also AP Commentary at 618-619, paras 1942-1945; and M Bothe, KJ Partsch and W Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, 1982) at 301-304, paras 2.4 – 2.4.2.2 (hereinafter *New Rules*).

final result of this study was the production of the Interpretive Guidance on Direct Participation in Hostilities in 2009, and marks the latest stage of attempting to define the role of civilians in armed conflict.\(^{50}\)

*Direct Participation in Hostilities – the ICRC’s Interpretive Guidance*

The Interpretive Guidance\(^{51}\) issued by the ICRC focused on three questions: (1) who is a civilian for the purposes of the principle of distinction? (2) what conduct amounts to direct participation in hostilities? and (3) what modalities govern the loss of protection against direct attack?\(^{52}\) The Guidance defines civilians as “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*”. Such persons are “entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”\(^{53}\) This definition is essentially straightforward in relation to civilians in international armed conflicts.

It becomes more complicated when one looks at how to define a civilian in a non-international armed conflict. The instruments that deal with non-international armed conflict – Common Article 3 and Protocol II – acknowledge but do not authorise participation in armed conflict. Thus, there is no clear combatant/civilian divide amongst non-State persons engaged in a non-international armed conflict. The Interpretive Guidance on participation in non-international armed conflict is accordingly more complex than that for international armed conflict:

\(^{50}\) However, this process, and the final document, was controversial; the process failed to achieve consensus, a number of experts requested their names be removed from final document, and the ICRC ended up releasing the document on its own recognisance as its ‘own work’, rather than as a result of the expert meetings. This will be discussed at a later stage in this article.


\(^{52}\) DPHIG at 994.

\(^{53}\) DPHIG at 997.
All persons who are not members of State armed forces or organised armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities (‘continuous combat function’).\textsuperscript{54}

Thus, another term requiring definition emerges – ‘continuous combat function’. This was adopted to exclude support personnel from being included in the definition of persons taking direct part in hostilities – unless they actually take direct part in hostilities in addition to their support roles. So the question becomes what exactly constitutes direct participation in hostilities. The Interpretive Guidance states that, in order to qualify as direct participation:

A specific act must meet the following cumulative criteria: (1) the act must be likely to adversely affect the military operations of military capacity of a party to an armed conflict or alternatively to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).\textsuperscript{55}

Again, these constitutive elements are designed to ensure that persons who might supply subsidiary or tangential support – such as essentially administrative or support function – are excluded from being targeted, reserving targeting for the more serious levels of involvement.

Finally, the remaining part of the overall test is that of ‘modalities governing loss of protection’. The Guidance states that civilians directing participating will lose their protected status for the duration of each act of direct participation. However, higher-level members of organised groups do not have this ‘revolving door’ of protection/loss of protection. As long

\textsuperscript{54} DPHIG at 1002.
\textsuperscript{55} DPHIG at 1016.
as such persons are deemed to be assuming a continuous combat function, they will remain
targets.56 This loss of protection for individual acts includes a temporal element – “measures
preparatory to the execution of a specific act of direct participation in hostilities, as well as
the deployment to and the return from the location of its execution, constitute an integral part
of that act.”57 Thus, travel to, and return from, an act of direct participation, is included in
the window for loss of protection.

Examining these cumulative criteria and definitions, what is striking is the
incongruity of the aims of the study into direct participation, and the outcomes. That is to
say, the intention behind the study into direct participation was to clarify when a civilian
could be considered as taking direct part in hostilities, *for the purposes of whether they could
be targeted.*58 Thus, a party to the conflict, or an individual participant, in making targeting
decisions, would have to assess whether the person or persons in question were legitimate
targets due to their direct participation.

However, the outcome – a long, detailed and quite complex cumulative test – presents
as a series of questions that can only be successfully answered *ex post facto* the targeting
decision. It may well be that such a complex test would prove useful when a targeting
decision is being made prior to any active engagement, against a target that is offering no
immediate threat – the targeted killing of Osama Bin Laden is an obvious example.
However, one must question the utility of this Guidance in active hostilities. It seems
exceptionally unlikely that an individual soldier could make such an assessment in a combat
situation, under fire, with little time to weigh up whether the person or persons they are

56 DPHIG at 1034-1035.
57 DPHIG at 1031.
58 As noted in the DPHIG “the Interpretive Guidance examines the concept of direct participation in hostilities...
for the purposes of the conduct of hostilities.” (at 993)
confronted with in battle are meeting the requisite threshold of harm, causation criteria and belligerent nexus.

**From Levee en Masse to Direct Participation – What Does this Mean for The Future of Geneva Law**

The process that produced the Interpretive Guidance was noteworthy for the controversies and disagreements that marked the experience. Consensus was hard to achieve, dispute arose over the inclusion of Section IX in the final document, and the definition of membership in armed groups. 60 A considerable number of participating experts requested their names be removed from the final document. 61 The ICRC, in response, ‘took back’ the Interpretive Guidance, and issued it under its own auspices. The problematic process that marked the drafting and publication of the Interpretive Guidance is indicative of some of the problems facing the future of Geneva law – the difficulties of achieving consensus. The complexity of the Guidance also demonstrates additional hurdles for any future revision of Geneva law; namely, that modern armed conflict has become a considerably more complex and chaotic endeavour in the sixty years since the adoption of the Geneva Conventions. It is these two distinct facets that will be explored in this final section.

59 Section IX related to “General Restraints on the Use of Force in Attack” – a section added towards the end of the process and apparently to the surprise of the participant, who had not expected nor debated such an inclusion. In a scathing article, one of the experts involved W Hays Parks, a law professor and former Senior Associate Deputy General Counsel for the US Department of Defence (among considerable other posts and achievements) dubbed Section IX as having “no mandate, no expertise and legally incorrect.” He was one of nearly a third of the experts who requested removal of his name from the documents – see Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”. 42 Int’l L and Pol 769 (2010).


61 See comments by Michael Schmitt, in
**Difficulties of Consensus**

Generally (and crudely) speaking, achieving consensus among a number of disparate parties is often difficult, even when these parties share similar goals. This is just the mechanics of the international legal system in the 21st century. The increasing difficulty in adopting new treaties is partially due to the increasing number of players on the international stage. To illustrate, one needs only to look at the statistics with regards to the Geneva Conventions and their Additional Protocols. The Geneva Conventions of 1949 were debated and drafted by 59 delegations, comprising almost 300 plenipotentiaries and delegates, mainly drawn from Europe and the Americas. The average delegation comprised five members. Over the period of four months, these States debated and adopted four conventions, comprising nearly 400 articles. Asia, Africa and the Middle East were virtually unrepresented at the Geneva conference – only two African States were at Geneva, along with only six Middle Eastern States, and four States from Asia. Less than thirty years later, at the Geneva Conferences that debated and adopted the Additional Protocols, 134 delegations and over 1400 delegates met over a period of three years, with average delegations comprising eleven plenipotentiaries and delegates. Together they debated and eventually adopted two conventions, comprising 130 articles. This time, Africa, Asia and the Middle-East were far better represented, frequently outnumbering the European and American delegations.

Though a somewhat rudimentary statistical analysis, it is clear that as the number of delegates and delegations rose, the number of adopted provisions fell considerably. This was

---

64 Egypt and Ethiopia.
65 Afghanistan, Iran, Israel Lebanon, Pakistan and Syria.
66 Burma, China, India and Thailand.
evident during the debate surrounding Additional Protocol II with regards to non-international armed conflict. The original, more expansive draft Protocol, comprising forty-nine articles, was considered unacceptable by a number of delegates. It was only when the head of the Pakistani delegation negotiated a much reduced twenty-four article Protocol II that the instrument was adopted at all.⁶⁸

The number of States in the world currently stands at 192.⁶⁹ One can only surmise the difficulty in achieving consensus amongst that many States. This is especially unlikely when one casts an even cursory look at the history of the law of armed conflict with regards to irregular participants. Advances have been made, and the category of lawful combatant expanded; however, even these expansions met with varying degrees of resistance.⁷⁰ Furthermore, the one area where there has been an almost unwavering refusal to accept expansion of the law has been with regards to irregular civilian participant in non-international armed conflict.⁷¹ It seems unlikely that a collective ‘change of heart’ could be reasonably expected anytime soon.

Complexity and Confusion in Modern Warfare – The Increasing Difficulty in Observing the Principle of Distinction

The difficulties of achieving consensus is not the only, nor perhaps the most insuperable, obstruction in the way of further development of the laws of armed conflict regarding participants. International humanitarian law is based on certain fundamental

---

⁶⁸ Additional Protocols Official Records, CDDH/427; see also AP Commentary at 1331-1336.
⁶⁹ Though this figure is sometimes disputed - the number of sovereign states who are UN members is 192; two States have observer status (Vatican City and Kosovo); nine other states have disputed status, having claimed statehood (or independence) without widespread acceptance, including Somaliland, South Ossetia, Taiwan, Abkhazia, Nagorno-Karabakh, Northern Cyprus, Palestine, Transnistria, Sahrawi Arab Democratic Republic. See http://www.un.org/en/members/index.shtml; https://www.cia.gov/library/publications/the-world-factbook/index.html.
⁷⁰ Supra, Introduction. See also New Rules at 244-246, 248.
⁷¹ Geneva Conventions Official Records, Vol II B at 10-16, 325-339 on what was then draft common Article 2.
dichotomies – the principle of distinction being one of the most significant.\textsuperscript{72} The principle of distinction provides that all persons involved in an armed conflict must distinguish between persons who take direct part in hostilities – that is, combatants, and persons who may not be attacked or do not take direct part in hostilities – civilians.\textsuperscript{73} Distinction comprises two elements. Combatants must distinguish themselves from the civilian population, and civilians are not to be made the object of attack.

The principle of distinction, as applied in the modern laws of armed conflict, is based on a certain basic belief, outlined in one of the earliest modern laws regulating armed conflict – the 1868 St Petersburg Declaration:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war; [t]hat the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy (emphasis added)

The principle of distinction is reaffirmed in numerous IHL documents.\textsuperscript{74} Its philosophical underpinning can be traced to the writings of writers like Rousseau, who theorised that wars must be considered as conflicts between States, and not a conflict between the men who fight for the State:

Men, from the mere fact that, while they are living in their primitive independence, they have no mutual relations stable enough to constitute either the state of peace or the state of war, cannot be naturally enemies. War is constituted by a relation between things, and not between persons; and, as the state of war cannot arise out of simple personal relations, but only out of real relations, private war, or war of man with man, can exist neither in the state of nature, where there is no constant property, nor in the social state, where everything is under the authority of the laws.

...War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not

\textsuperscript{72} Sassòli and Bouvier, How Does Law Protect in War? Ed 3, at 143.
\textsuperscript{73} See E Rosenblad, International Humanitarian Law of Armed Conflict: Some Aspect of the Principle of Distinction and Related Problems (Henry Dunant, Geneva, 1979) at 63-68. See also ICRC CIHL Study, Rules 1-2, 5-6, and 7-10.

\textsuperscript{74}
as members of their country, but as its defenders. Finally, each State can have for enemies only other States, and not men; for between things disparate in nature there can be no real relation.

... The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take. Sometimes it is possible to kill the State without killing a single one of its members; and war gives no right which is not necessary to the gaining of its object. These principles are not those of Grotius: they are not based on the authority of poets, but derived from the nature of reality and based on reason.75

Thus, persons who took no direct part in hostilities – civilians – were not the enemies of the State against which their own state fought; they were to thusly be spared, as far as possible, from the deleterious effects of the conflict.76

Civilian participation in armed conflict fundamentally disrupts the ability to clearly apply the principle of distinction. Civilians do not wear uniforms, do not carry their arms openly, and can transform from ‘fighter’ to ‘civilian’ unlike their counterparts in the regular armed forces. Thus, identifying when a civilian becomes a participant (or cease to become one) is quite difficult.

In contrast, the laws of armed conflict are premised on essentially clear divisions - combatants wear uniforms and carry weapons, civilians do neither. Combatants may be intentionally targeted; civilians may not be intentionally targeted. Irregular and civilian participants intentionally subvert these distinctions to their own advantage, but to the detriment of those who must make targeting decisions that follow the law. Thus, as the new

76 See Article 22 of the Lieber Code: “Nevertheless, as civilisation has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property and honour as much as the exigencies of war will admit.”
The ‘original’ definitional criterion for participant in armed conflict was essentially quite straightforward – a combatant is a member of a State’s armed forces. However, as demonstrated above, as that definition was expanded to address practical changes in conflict participation, the definition became increasingly layered and complex: compare the simplicity of “members of the armed forces of a Party to the conflict” (the definition of combatant in Article 4A of Convention III) with the multi-stage ‘test’ in Protocol I – a person is considered a combatant if they:

1. are fighting in “... armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes 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 Cooperation among States in accordance with the Charter of the United Nations” (Article 4, API);

2. are part of “... organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party if represented by a government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict” (art 43, API); and

3. “distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed conflict cannot so distinguish himself, he shall retain his status as a combatant provided that,
in such situations, he carries his arms openly (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.” (Article 44, API).

This increasing complexity in treaty IHL suggests that the issue of civilian participation in armed conflict is getting beyond the scope of current international humanitarian law. Nowhere is this more obvious that in the attempts to define the contours of direct participation in hostilities, an endeavour which has produced guidelines that are too unwieldy to be operationally functional.  When one looks at the complex multi-stage cumulative test outlined in the Interpretive Guidance on Direct Participation in Hostilities, it becomes difficult to imagine how such a test could be applied ‘on the go’ by a soldier in the field, lacking comprehensive military law expertise, having to make an immediate decision whether the person they are confronted with is reaching for a weapon, or something less sinister – perhaps identity papers to prove their civilian status.

**Conclusions**

This paper began with reference to the 60th anniversary of the Geneva Conventions in 2009, and the media reaffirmation of their relevance that accompanied the event. To bring this paper full circle, another notable event, one less affirming of the Conventions, also occurred in 2009 – the US case *Al-Bihani v Obama*, the first habeas challenge in relation to Guantanamo Bay detentions heard in US courts since *Boumediene v Bush*. In this case, Justice Brown commented on the changing nature of modern armed conflict, and the need for the law to keep pace with developments: “war is a challenge to law, and the law must adjust.

---

77 590 F 3d 866; 389 US App DC 26; Brown J concurring.
It must recognise that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare.”

It is indeed incumbent on all law to adapt and evolve in line with the situations it seeks to regulate. However, it may also be that, for the time being, Geneva law has come to a proverbial crossroads. The 1949 Conventions and the 1977 Protocols were adopted at times when profound shifts in the international community were taking place – the aftermath of a cataclysmic world war in 1949, and the tail-end of numerous devastating colonial wars in 1977. The wars of the post-9/11 era have been protracted, intense engagements. However, unlike the post World War II and post-colonial period, what we have witnessed has been an attempt by the more powerful States to attempt to downplay, even outright avoid their international law obligations, rather than reaffirm and develop those laws. Following the Second World War, and the flagrant violations of IHL that occurred during that conflict, the international community was spurred to join together as the United Nations, and to adopt treaties and declarations prohibiting genocide, affirming fundamental human rights, and developing and expanding the laws of armed conflict. Following the 9/11 attacks, and the wars in Iraq and Afghanistan, the governments in power during these conflagrations have repeatedly attempted to avoid or downplay their international obligations, resulting in the dehumanising environments of Abu Ghraib and Guantanamo, and the spurious legality and contrivance behind the US definition of the ‘unlawful combatant’.

In some respect, the difficulties facing Geneva Law are those which confront all international law – that of the difficulty in bringing so many disparate opinions in line in order to adopt a document of utility and significance. Given the current political environment, where the word ‘terrorist’ still lacks an accepted legal definition and yet is thrown around with regularity at any group or organisation that threatens the status quo, it

79 Al Bihani at 882, 42.
may well be that the international community has taken Geneva law as far as they feel it can go in this area. Indeed, the success of ‘after the fact’ mechanisms – enforcement and accountability mechanisms such as the International Criminal Court, the ICTY, ICTR, and the various other post-conflict tribunals and courts - is perhaps demonstrative of a way forward for the laws of armed conflict, of balancing both prevention and cure.